

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A', NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No.3564/Del/2016
Assessment Year: 2012-13

DCIT Central Circle-28, Room No. 317, ARA Centre, Jhandewalan Extn. New Delhi	Vs.	Omni Farms Pvt. Ltd. 201-212, 2 nd Floor, Sponsor Forum, Jasola New Delhi PAN : AAACO5916C
PAN :		
(Appellant)		(Respondent)

Appellant by	Sh. Sanjay Kumar, CA
Respondent by	Shri P.S. Thuingaleng, Sr. DR

Date of hearing	11.09.2019
Date of pronouncement	30.10.2019

ORDER

PER SUCHITRA KAMBLE, JM:

This appeal is filed by the revenue against the order dated 23.03.2016 passed by CIT(A)-29, New Delhi for Assessment Year 2012-13.

2. The grounds of appeal are as under:

1. *“That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.1,64,90,841/-, shown as pending refunds to customer and treated as unaccounted income by the AO, without appreciating the fact that as per the agreement with the buyers whenever the request for the cancellation is received the earnest money is forfeited thus the above amount has accrued to the assessee the moment the request for cancellation is received.*

2. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in holding that the above addition was made by the AO without any cogent reason and on surmise and conjectures.

3. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.2,60,45,450/- made on account of advertisement and brokerage commission by holding that the above expenditure is indirect expenditure without appreciating the fact that the above expenses were correctly capitalized by the AO as the assessee had disclosed NIL turnover.

4. That the order of the CIT(A) is perverse, erroneous and is not tenable on facts and in law.

5. That the grounds of appeal are without prejudice to each other.

6. That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time of hearing of the appeal.”

3. The assessee is a Private Limited Company and is engaged in the business of real estate developer. The return of income was filed by the assessee on 25.09.2012 declaring loss of Rs. 1,57,39,641/-. The case was selected and notice u/s 143(2) was issued to the assessee company on 08.08.2013 and served by post. In response to which assessee filed a reply on 30.08.2013. Notices u/s 143(2) and 142(1) alongwith questionnaire were issued on 13.10.2014. In response to the statutory notices, Chartered Accountant and Authorized Representative of the assessee attended the proceedings and filed the details. The Assessing Officer assessed the income at Rs. 2,67,96,650/- by making following additions :-

S. No.	Particulars	Amount
1.	On account of refund on cancellation of the allotment, treated as unaccounted income	Rs. 1,64,90,841/-
2.	On account of Advertisement and Brokerage & Commission	Rs. 2,60,45,450/-

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. As regards to Ground No. 1 and 2, the Ld. DR submitted that the CIT(A) erred in deleting the addition of Rs. 1,64,90,841/- shown as pending refunds to customer and treated as unaccounted income by the Assessing Officer without appreciating the fact that as per the agreement with the buyers whenever the request for the cancellation is received, the earnest money is forfeited. Thus the said amount has accrued to the assessee the moment the request for cancellation is received. Therefore, the Ld. DR submitted that the CIT(A) was not right in deleting this addition.

6. The Ld. AR as regards to Ground No. 1 and 2 submitted that all the details of current liabilities, project receipts relating to payment in respect of plan and in respect of flat as well as the agreements were furnished before the Assessing Officer and therefore the CIT(A) rightly allowed the issue in favour of the assessee.

7. We have heard both the parties and perused all the relevant material available on record. While deciding the issue in respect of Ground Nos. 1 and 2 herein, the CIT(A) held as under:

“7. I have gone through the above submissions of the appellant and have considered the facts and evidences on record. I have also perused the observations made by the AO in the assessment order and the details provided during the assessment and appellate proceedings.

8. It has been submitted by the appellant during assessment

proceedings as well as appellate proceedings that though as per the terms of the "allotment certificate and agreement", appellant is entitled to forfeit the earnest money received from the customers however, whole of the earnest money is not forfeited in all the cases, in order to avoid unnecessary litigation or to continue with a fair business practice as per policy decision. In fact it is found that the appellant has also given interest on some deposits while cancelling the allotment. As and when the request for cancellation of allotment is accepted by the appellant and in the event of forfeiture of any deposit, it is shown as income when such request is accepted and accounts are cleared. The appellant submitted the details of other operating income, wherein such income towards amount forfeited on cancellation was stated to have been shown and credited. The appellant provided the details of payments made with respect to the amounts refunded to the customers subsequently with the interest, alongwith the bank statement and demonstrated that these sums have been paid to the respective customers who have cancelled their bookings. They have also claimed that tax has been deducted at source on such payment wherever applicable.

8.1 The AO made addition on account of refund due by treating it as unaccounted income of the appellant. However, the AO failed to substantiate that how such income is not accounted in the books of accounts of the appellant. The AO himself has recognized that these amounts are the refund due to the customers for which the details have been provided by the appellant. Further, it is a matter of record that upto the year ending 31.03.2012, a total of Rs.75,23,20,847/- has been received by the appellant from various customers as booking advance, however no receipt has been shown on this account as income because the project was at a initial stages. The said receipts included the amount of Rs.1,64,90,841/- , which relates to the customers who have requested for cancellation of allotment and the same has been refunded later on, though recognized by the appellant as on 31.03.2012.

8.2 This clearly transpires that the said amount recognized as due for refunds towards cancellation of booking are the part of receipt included in appellant's full receipts and cannot be termed as unaccounted income of the appellant. Therefore, in terms of the agreement, the forfeited amount towards earnest money can only be subjected to tax as liability has ceased to exist in the hands of appellant and the same has been shown by the appellant as income under the head other operating income. Therefore, being duly accounted, where the source of said receipts are properly explained as

booking from various customers, this cannot be disallowed as unaccounted income of the appellant.

8.3 It is further noticed that the said cancellation charges are paid/refunded subsequently when the accounts are duly cleared. The contention of the appellant that even though it is recognized, the same has been paid later on is duly found explained, which is demonstrated to have been paid through banking channels.

8.4 Further, during assessment proceedings, the appellant provided detailed Dly before the AO submitting the details of booking account subject to icellation and forfeiture of earnest money received, which has not been considered by the AO during the assessment proceedings and concluded that this is unexplained income of the appellant, even without pointing out any defect or any doubt on the audited books of accounts. The additions are made without any cogent reasoning and on surmises and conjectures. AO has not brought anything on record to substantiate that this is unaccounted income or unexplained cash credit in the hands of the appellant.

8.5 In any case, on perusal of the submissions of the appellant and going through the clause of agreement and the income recognized by the appellant on cancellation of unit during the year under appeal and subsequent repayments of cancellation amount through banking channels, it cannot be said that the moment a request is made by customer for cancellation of booking, the amount paid by it towards the earnest money deposit shall stand forfeited, immediately, as the acceptance of such request by the company is also one of the condition and the forfeiture is being accounted for, when all other formalities are completed and accounts are cleared .This may take some time. It is also observed that in various cases even though there is a forfeiture clause in the agreement, the courts have held that the amounts cannot be forfeited from the customers merely on the presence of such clause in the agreement, being onerous or one sided in nature. The courts have even directed the builders to pay interest on such deposits. The proposed Real Estate Regulatory Bill has also taken care of this issue.

8.6 In the present case, request for cancellation of booking were pending acceptance by the appellant from 7 customers only as on 31.03.2012, amounting to Rs.8,60,824/- and the request was accepted in the subsequent period and refunds were issued through cheque. Similarly, regarding rest of 43 cases from whom aggregate sum of Rs.1,56,30,017/- was received upto 31.03.2012, both request for cancellation as well as refund was made in subsequent period and accordingly, this cannot be treated as income of the appellant for the year under appeal. Even if for argument sake it is considered that this

amount was recognized by appellant as refundable on 31.03.2012, the same cannot be treated as unexplained income of the appellant because the same is shown as liability, and in the event of repayment, it is to be reduced from the advance from customers .The source of such receipts are duly explained and subsequently repaid through banking channels. Whenever the amount has been forfeited, the same is recognized and disclosed as income by the appellant. Therefore, in any case, no additions can be made on this issue.

8.7 Accordingly, in view of the discussions in the foregoing paragraphs and looking to the facts and circumstances of the case and in law it is held that the addition of Rs.1,64,90,841/-, made by the AO treating the refund due to the customer as unaccounted income of the appellant deserves to be deleted. Therefore, the impugned addition is directed to be deleted and appellant gets a relief of Rs.1,64,90,841/-. This ground of appeal is allowed.”

It is pertinent to note that the fact that request for cancellation of booking were pending in respect of acceptance by the assessee from 7 customers only as on 31.03.2012 which amounted to Rs.8,60,824/- and the request was accepted in the subsequent period and refunds were issued through cheque. Regarding rest of 43 cases from whom aggregate sum of Rs.1,56,30,017/- was received upto 31.03.2012, both request for cancellation as well as refund was made in subsequent period. This facts were not disputed by the Revenue at any point of time, therefore, the CIT(A) rightly held that this cannot be treated as income of the assessee for the year under appeal. The CIT(A) has given a detailed finding, therefore, there is no need to interfere. Ground Nos. 1 and 2 are dismissed.

8. As regards Ground No. 3, the Ld. DR submitted that the CIT(A) erred in deleting the addition of Rs. 2,60,45,450/- made on account of advertisement and brokerage commission by holding that the above

expenditure is indirect expenditure without appreciating the fact that the above expenses were correctly capitalized by the Assessing Officer as the assessee had disclosed nil turnover.

9. As regards to Ground No. 3 the Ld. AR submitted that the assessee has justified the claim of selling expenses as revenue expenditure in respect of advertisement, brokerage and commission. The Ld. AR further submitted that selling expenses cannot form part of cost of inventories as mandated by Accounting Standard 2 (AS-2). Both of these expenditures are of revenue in nature and not directly related to the development of the project. Incurring of selling expenses does not result in the creation of any identifiable capital asset on the project or otherwise. Once the business is setup, all expenses of revenue nature incurred for the purposes of business are allowable in the year in which it has incurred. Advertisement expenditure as well as expenditure on brokerage & commission are of revenue in nature and cannot be disallowed merely because sales did not take place during the year. The Ld. AR relied upon the decision of the Hon'ble Delhi High Court in case of CIT vs. DLF Universal Ltd. [2015] 378 ITR 197 (Del.) and Tapari Tools Ltd. Vs. JCIT [2015] 372 ITR 605 (SC).

10. We have heard both the parties and perused all the relevant material available on record. The CIT(A) held as under:

“10. I have gone through the above submissions of the appellant and have considered the facts and evidences on record. I have also perused

the case laws relied upon by the appellant as well as accounting standards issued by the ICAI.

10.1 *The facts borne from the records are that the appellant has incurred a sum of Rs.1,18,03,591/- on account of advertisement, to sell its only project namely Eldeco Saubhagyam and also paid brokerage amounting to Rs.1,42,41,859/- to various property brokers for obtaining advance from booking of properties. During the period under consideration, approximately Rs.75 crores have been received as booking, however since the project is on a preliminary stage for the year under consideration, no sales revenue was recognized from the said project, as per the prescribed AS-9, issued by ICAI. The revenue from the said project stated to have been recognized first time during the period relevant to AY 2014- 15. The AO has not disputed the method of accounting regularly employed by the appellant however disallowance was made due to the reason that appellant has capitalized all direct expenses related to the project and there was no revenue/turnover shown by the appellant during the year. AO has not disputed the said expenditure per se.*

10.2 *While disallowing, the AO has not considered the fact that during the year, substantial amount has been received as advance for booking from customers, in which the role of brokers and advertisements cannot be denied. The sales revenue has not been shown in the profit and loss account, following the project completion method and in accordance with the accounting standards and accounting policy employed by the company which is accepted.*

10.3 *The appellant contended that these selling expenses does not add or enhance the value of project as per AS-2, and it is to be followed statutorily in view of the provisions of section 211(3C) of the companies Act, which clearly states that all selling and distribution cost should not form part of cost of inventory and to be recognized as expense for the period it has been incurred.*

10.4 *The business of the appellant has already commenced and it is a trite law that once the business is set up, the appellant is entitled for claim of such expenses, which is revenue in nature. Further, for claiming expenses, it is not necessary that income should be earned, as held in the case of CIT vs. Madan Lai Jain (1982) 136 ITR 409 (Del) wherein relying on the decision of Hon'ble Supreme Court in the case of CIT vs. Rajendera Moody 115 ITR 519, it was held as under :-*

“6.....Where an assessee has incurred expenses in

order to acquire a source of income but there is no income from that particular source then the income should be taken as nil and the assessee should be given such deduction as would be allowable to him had there been a positive income"

10.5 *Therefore, though there is no sales revenue however the business has already commenced, the expenditure claimed being revenue in nature is not liable for disallowance.*

10.6 *It is important to understand whether these expenses can be said to be directly related to the sole project undertaken by the appellant and has enhanced the value of the project. As per AS-2, the selling expenses cannot form part of the cost of inventory. Further, selling cost should not be considered as part of construction cost or development cost. Thus, selling expenses cannot be termed as direct expenses relating to project of the appellant company and as such the impugned expenditure on advertisement and commission/brokerage does not add to the value of the project. Relying upon the ratio laid down by the jurisdictional High Court in the case of CIT vs. Spice Distribution Ltd. (Supra) and CIT vs. DLF Universal Ltd. (Supra), the expenditure incurred is held to be the indirect expenses, being revenue in nature and looking to the fact that the business has already been commenced and substantial booking has been made due to such advertisements and brokerage, these expenditure are allowable for the year under appeal and accordingly the addition is directed to be deleted.*

10.7 *Here it is also to be pointed out that AO has made disallowance on the basis of no income shown in the profit and loss account towards this project, however he has not doubted the incurring of expenses. On the other hand, the appellant has provided the details of such expenditure and also demonstrated that the tax has been deducted at source on such payments. While giving effect to this appellate order, the AO is directed to verify the details of payments made vis-à-vis the tax deducted at source and in case of any violation towards TDS is noticed, the disallowance to be made as per the provisions of section 40(a)(ia) of the Act. Accordingly, the said relief allowed to the appellant will be restricted to the extent of disallowance attracted as per the provisions of section 40(a)(ia) of the Act. With these remarks the appeal of appellant is partly allowed."*

From the perusal of the records, it can be seen that the CIT(A) rightly held that the Assessing Officer did not doubt the incurring of expenses. The fact remains that the assessee provided the details of such expenditure and also demonstrated that the tax was deducted at source on such payments. Therefore, the CIT(A) rightly directed the Assessing Officer to verify the details of payments made vis-à-vis the tax deducted at source and further directed that in case of any violation towards TDS is noticed, the disallowance to be made as per the provisions of section 40(a)(ia) of the Act. Thus, the CIT(A) rightly restricted the claim to the extent of disallowance attracted as per the provisions of section 40(a)(ia) of the Act. The CIT(A) has rightly given a detailed finding and there is no need to interfere with the same. Ground No. 3 is dismissed.

11. In result, appeal of the Revenue is dismissed.

Order is pronounced in the open court on 30th October, 2019.

Sd/-

**(N.K. BILLAIYA)
ACCOUNTANT MEMBER**

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 30th October, 2019.

BR

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi

Sl. No.	Particulars	Date
1.	Date of dictation:	23/10/2019
2.	Date on which the draft of order is placed before the Dictating Member:	23/10/2019
3.	Date on which the draft of order is placed before the other Member:	
4.	Date on which the approved draft of order comes to the Sr. PS/PS:	
5.	Date of which the fair order is placed before the Dictating Member for pronouncement:	
6.	Date on which the final order received after having been signed/pronounced by the Members:	
7.	Date on which the final order is uploaded on the website of ITAT:	
8.	Date on which the file goes to the Bench Clerk	
9.	Date on which files goes to the Head Clerk:	
10.	Date on which file goes to the Assistant Registrar for signature on the order:	
11.	Date of dispatch of order:	