

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI D. KARUNAKARA RAO, AM AND
SHRI S. S. VISWANETHRA RAVI, JM

आयकर अपील सं. / ITA No.2349/PUN/2017
निर्धारण वर्ष / Assessment Year : 2012-13

ACIT, Circle-11,
Pune.

.....अपीलार्थी / Appellant

बनाम / V/s.

Indo Global Erectors Pvt. Ltd.,
704, Sohrab Hall, Sasoon Road,
Pune Station, Pune-411001.

PAN : AABCI5167N

.....प्रत्यर्थी / Respondent

Revenue by : Shri Pankaj Garg

Assessee by : Shri Kishor Phadke

सुनवाई की तारीख / Date of Hearing : 07.11.2019

घोषणा की तारीख / Date of Pronouncement : 20.11.2019

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

This appeal is filed by the Revenue against the order of CIT(A)-1, Pune dated 24.07.2017 for the Assessment Year 2012-13.

2. The grounds raised by the Revenue are as under :-

"1. The order of the Ld. CIT(A) is contrary to law and to the facts and circumstances of the case.

2. The Ld. CIT(A) erred on the facts and circumstances of the case in directing the Assessing Officer to delete the **addition of Rs. 18,75,000/-** made on account of unconsidered amount of consideration from Geberit India Manufacturing Ltd. as per MOU even though the assessee company is following mercantile system of accounting.

3. The Ld. CIT(A) erred on the facts and circumstances of the case in directing the Assessing Officer to delete the **addition of Rs. 98,20,000/-** made on account of disallowance of commission paid to various brokers for introduction of customers to the assessee company even though the assessee company failed to discharge its onus to prove that the expenditure was incurred

wholly and exclusively for the purpose of business. The assessee company also failed to prove how and why and at what rate/percentage the commission is given and the manner in which amount of commission was calculated, the kind of services rendered by those parties, their involvement and responsibilities in the concerned transactions.

4. *The Ld. CIT(A) erred on the facts and circumstances of the case in directing the Assessing Officer to delete the **addition of Rs. 2,31,42,000/-** made on account of disallowance of development expenses even though the assessee company failed to discharge its onus by filing of possession letter / receipts from MIDC that MIDC had given possession of the land to the assessee company.*

5. *For these and such other grounds as may be urged at the time of hearing, the order of the Ld. CIT(A) may be vacated and that of the AO restored.*

6. *The appellant craves to add, amend, alter or delete any of the above ground of appeal during the course of appellate proceedings before the Hon'ble Tribunal."*

3. Briefly stated the relevant facts include that the assessee is a registered company under the Companies Act, 1956 and is engaged in the business of buying, selling, holding, owning acquiring & constructing, leasing and developing immovable properties and industrial sheets. The assessee also carried on the business as developers, promoters and builders. The assessee filed the return of income declaring total income of Rs.8,42,94,309/-. In the assessment u/s 143(3) of the Act, the Assessing Officer determined the total assessed income of Rs.12,01,17,640/- as per para 9 of the assessment order and the said para 9 is extracted hereunder :-

"9. *Subject to above remarks, the total income of the assessee is computed as under :*

| | | |
|---|-------------------------|---------------------------------|
| <i>Returned Income</i> | | <i>Rs.8,42,94,309/-</i> |
| <i>Add:</i> | | |
| <i>Disallowance u/s 14A rw Rule 8D</i> | <i>Rs.56,730/-</i> | |
| <i>Commission of expenses of</i> | <i>Rs.98,20,000/-</i> | |
| <i>Development expenses of</i> | <i>Rs.2,31,42,400/-</i> | |
| <i>Disall. of salary, travelling etc</i> | <i>Rs.28,04,197/-</i> | <i>Rs.3,58,23,327/-</i> |
| <i>Total Income</i> | | <i>Rs.12,01,17,636/-</i> |
| <i>Total Income Rounded off to</i> | | <i>Rs.12,01,17,640/-</i> |

4. During the proceedings before the CIT(A), assessee made various submissions. At the end of the proceedings, the CIT(A) granted relief to the assessee on items relating to (i) addition of Rs.18,75,000/- on account

unconsidered amount of consideration from Geberit India Manufacturing Ltd.; (ii) addition of Rs.98,20,000/- on account of disallowance of commission paid to various brokers; and, (iii) addition of Rs.2,31,42,000/- on account of disallowance of development expenses.

5. Aggrieved with the said relief granted to the assessee by the CIT(A), the Revenue is in appeal before us with the above extracted grounds.

6. In ground no.1 raised by the Revenue, the Assessing Officer made an addition of Rs.18,75,000/- on account of unconsidered amount of consideration from Geberit India Manufacturing Ltd.. The CIT(A) deleted the same as per discussion given in para 6 of his order. For the sake of completeness, the relevant part of para 6 of the order of CIT(A) is extracted hereunder :

“6.

*After carefully considering the facts of the case as well as submissions of the appellant, it is seen that differential amount of Rs.18.75 Lacs has not been offered for taxation as the same was not received by the appellant. From the perusal of the assessment order, it is seen that the A.O. has passed the assessment order without providing opportunity to the appellant to properly explain the case and adduce necessary evidence. Therefore, additional evidence filed by the appellant is admitted. From the perusal of the additional evidence, it is quite clear that the **appellant has raised bills for the said amount of Rs. 18.75 Lacs and has also issued legal notice in this matter.** The appellant is of course following mercantile system of accounting, however due to dispute regarding the said amount, **it cannot be said that the amount has really accrued to the appellant company.** Further, the tax is required to be levied on the basis of **real income and not on the income which has not accrued** to the appellant in the real sense. The appellant in **its affidavit has also submitted** that the amount of **Rs. 18.75 Lacs will be offered to tax** as and when the same is received. This being so, there is no loss to revenue in accepting the plea of the appellant company. Accordingly, the A.O. is directed to delete the addition of Rs. 18.75 Lacs and the ground is allowed. In the computation of income, this amount has not been considered, probably due to oversight, In that case, there will not be any requirement of deleting the amount from computation of income unless the same has been considered in Section 154 of the Income Tax Act subsequently. The A.O. may verify this aspect while giving effect to this order.”*

7. On hearing both the sides and considering the above para 6 of the order of the CIT(A), we do not find any infirmity in the order of the CIT(A). In

support of non-accrual of Rs.18.75 lakhs there are sustainable reasons i.e. issue of legal notice, filing an affidavit, commitment to offer the same to tax on the end of litigation etc. Thus, the order of the CIT(A) on this issue is fair and reasonable and does not call for any interference. Therefore, the ground no.1 raised by the Revenue is dismissed.

8. In ground no.2 raised by the Revenue, the Assessing Officer made addition of Rs.98,20,000/- on account of disallowance of commission paid to various brokers for introduction of customers to the assessee company even though the assessee failed to discharge its onus to prove that the expenditure incurred wholly and exclusively for the purpose of business. The CIT(A), as per discussion given in para 7 of his order, deleted the said addition of Rs.98,20,000/-. For the sake of completeness, the relevant portion of para 7 of the order of the CIT(A) is extracted hereunder :-

“7.

In this case, it is seen that the appellant has claimed commission of Rs.98.20 Lacs in respect of introduction of various clients, which are basically in respect of transaction of MIDC land. The appellant company has filed confirmation from the respective parties and has also filed copy of invoices which refers the work done by the respective parties. It is also seen that all the parties have shown PAN in the respective bills as well as confirmations which shows that these parties are assessed to tax. All these parties are based in Pune and if the A.O. had any doubt, he could have asked the appellant to produce the respective parties for verification or the A.O. could have issued summons/ notices u/s. 13(6) as the case may be, in case, the appellant showed its inability to produce any of the parties. Without doing this exercise disallowance of entire commission amount cannot be justified. It may be appreciated that in all the cases, TDS has been deducted at appropriate rates and TDS information is available on the website of the Department in 26AS statement and in case of income mismatch, trigger is automatically raised for scrutiny of the respective returns. This being so, with advancement of technology, incidence of bogus commission has been effectively checked.

The A.O. has disallowed the commission basically on the ground that third party evidence was not filed. The appellant claims that most of the clients being MNCs, getting third party confirmation is quite difficult task. This claim of the appellant has some point as MNCs are generally hesitant to give confirmations in respect of such transactions due to various reasons. In such a situation, only course left to the A.O. is to verify the parties to arrive at the truth, Without doing such verification, the stand of the A.O. in disallowing the entire amount of commission cannot be held to be justified. Accordingly, the A.O. is directed to delete the addition of Rs.98,20,000/- and the ground is allowed.”

9. On hearing both the sides and considering the above para 7 of the order of the CIT(A), we do not find any infirmity in the order of the CIT(A). The brokers received the payments in cheques; they are assessed tax containing the PAN, requisite TDS is done by the deductor-assessee etc. Thus, the order of the CIT(A) on this issue is fair and reasonable and does not call for any interference. Therefore, the ground no.2 raised by the Revenue is dismissed.

10. In ground no.3 of the Revenue, the Assessing Officer made addition of Rs.2,31,42,000/- on account of disallowance of development expenses even though the assessee company failed to discharge its onus by filing of possession letter/receipts from MIDC. The CIT(A), as per discussion given in para 8 of his order, deleted the same. For the sake of completeness, the relevant portion of para 8 of the order of the CIT(A) is extracted hereunder :-

“8.

I have carefully considered the facts of the case as well as reply of the appellant. As discussed in the earlier ground, there was no sufficient time to the appellant for filing the documents required by the A.O. The appellant has also submitted that these papers could not be envisaged by the appellant during the course of the assessment proceedings as the objections raised by the A.O. regarding possession etc. was not known to the appellant. Since the issue of possession of MIDC land has been made central to the allowability of expenses claimed, additional evidences filed by the appellant is admitted.

Coming to the merit of the issue, the A.O. has first raised the objection regarding less amount received from Schindler compared to other parties, when land was situated in the same area of MIDC, I find sufficient force in the argument of the appellant that consideration were shown by the appellant based upon independent negotiations and therefore, Solatium received from all the parties cannot be the same report. This should be also appreciated that there are third party transactions, and the same cannot be looked with suspicion without any evidence.

As regards the objection of the A.O. in respect of incurring the expenses without possession of land by MIDC, it is seen that Schindler has written following letter to the appellant on 01.07.2011, which is the date of offer letter of MIDC land in favour of Schindler. The same reads as under:-

"With respect to the agreement dated 22nd March, 2011, between Schinder India Pvt.Ltd. and Indo Global Erectors Pvt. Ltd. the latter agreed to relinquish its right on the Land situated at Chakan, MIDC Phase-II for a compensation of Rs.8,80,00,000/- (Rupees Eight Crores Eighty Lakhs). Out of which, an amount of Rs.4,40,00,000/- (Rupees Four Crores Forty Lakhs) will be paid shortly.

As inspected by out surveyors and engineers, the land in question has some contours. Also, there are quarries at certain places which need to be filled so as to call it an industrial land.

As you are aware that the land should be suitable for setting up our factory to manufacture elevators and escalators, we would request you to carry out the leveling, filling arid development of the land so as to make it fit for further construction.

The above request is in line with clause 1.1.4 of our agreement which clearly defines Land as "Suitable and acceptable for the purpose of setting up an elevators and escalators manufacturing unit".

The compensation amount (as per agreement) will remain the same for relinquishment as well as the above development Work."

The appellant has carried out the work of development of land after offer of allotment of land on 01.07.2011 to Schindler. This land was subsequently allotted vide letter dated 30.08.2011 to M/s. Schindler India Pvt. Ltd after completion of certain formalities. The obligation of the appellant to provide suitable land for the purpose of setting up an elevator and escalator manufacturing unit arose from clause 1.1.4 of the agreement dated 22.03.2011 as insisted vide letter dated 01.07.2011 issued by Schindler to the appellant reproduced above. It must be appreciated that the A.O. has not doubted the expenditure incurred in this regard as such but has questioned the occurrence of the same on the ground of absence of possession of MIDC land either in favour of the appellant or in favour of Schindler India Ltd. This issue has been addressed by the appellant after filing of copy of offer of the allotment letter dated 01.07.2011 and the allotment letter dated 30.08.2011 in favour of Schindler India Ltd. Therefore, considering the totality of facts, it is held that the A.O. was not justified in disallowing the development expenses of Rs.2,31,42,000/-. Accordingly, he is directed to delete the same and ground is allowed."

11. Allowability of the expenditure claim of Rs.2,31,42,000/- is the issue for adjudication. On perusal of the agreement between assessee and M/s Schindler India Pvt. Ltd. dated 22.03.2011, we find (Ref cl. 1.1.4) the 'land' is defined. Assessee is under obligation to see the land transferred in such suitable/acceptable land fit for setting up the unit. Having found the land to be transferred is not such suitable land, transferee demanded for further land development. In our view, the claim is in order. The contents of pages 94, 98 and 113 of the Paper Book are found helpful to the assessee. Vide page 113, there is demand for land leveling from the buyer. Further, we find that the assessee incurred the expenditure substantially involving banking channels. The details given in the table inserted in para 8 (Rs.1,91,28,800/- was spent in cheque on purchase of murrum/material; Rs.30 lakhs spent in cheque on labour charges etc) are examined. Small expenditure of Rs.9,93,600/- was

spent in cash. Supporting vouchers were examined. We do not find any suspicious features in the claim of the assessee. Thus, there exists (i) enabling provisions in the said agreement and (ii) expenditure is genuine.

12. On hearing both the sides and considering the above para 8 of the order of the CIT(A), we do not find any infirmity in the order of the CIT(A). Thus, the order of the CIT(A) on this issue is fair and reasonable and does not call for any interference. Therefore, the ground no.3 raised by the Revenue is dismissed.

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

Order pronounced on 20th day of November, 2019.

Sd/-

(S. S. VISWANETHRA RAVI)
न्यायिक सदस्य/**JUDICIAL MEMBER**

Sd/-

(D. KARUNAKARA RAO)
लेखा सदस्य/**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 20th November, 2019.
Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-1, Pune.
4. The Pr.CCIT, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.