

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

**BEFORE SHRI G. S. PANNU, VICE PRESIDENT  
AND  
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 5716/DEL/2010 ( A.Y. 2006-07)**

**AND**

**ITA No. 5715/DEL/2010 ( A.Y. 2007-08)**

ACIT, Central Circle-11, Room No.364, ARA Centre, Jhandewalan Extn., New Delhi.  <b>(APPELLANT)</b>	Vs	Manish Buildwell Pvt. Ltd., IInd Floor, Usha Chambers, 37-38, Central Market, Ashok Vihar, Phase – I, New Delhi (PAN: ABFPG 1603 F)  <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Ms. Pramita M. Biswas, CIT-D.R.</b>
<b>Respondent by</b>	<b>Ms. Swaty Kothari, C.A.</b>

<b>Date of Hearing</b>	<b>16.12.2019</b>
<b>Date of Pronouncement</b>	<b>31.12.2019</b>

**ORDER**

**PER SUCHITRA KAMBLE, JM**

These two appeals are filed by the Revenue against the orders dated 15.09.2010 passed by CIT(A)-1, New Delhi for Assessment Year 2006-07 & 2007-08.

2. The Grounds of appeal are as under:-

**ITA No. 5716/Del/2010**

1. *“The order of the Ld. CIT(Appeals) is not correct in law and facts.*
2. *Whether on the facts and in law Ld. CIT(A) was legally justified in deleting the additions made on account of Unexplained cash credit in the account of Sh. Varun Wadhwa, Rs. 11,85,500/- relying merely on the arguments in the absence of further enquiry.*

3. *Whether on facts and in law Ld. CIT(A) was justified in relief on account of addition made for commission Payment Rs. 5,94,880/- without supporting evidence.*
4. *Whether on facts and in law Ld. CIT(A) was legally justified ignoring the contents seized documents while allowing relief on account of cancellation charges Rs 1,43,26,750/-.*
5. *Whether on facts and in law Ld. CIT(A) was legally justified in deleting the addition made on the basis of percentage completion method against project cost method and allowing relief to the assessee on account of postponement of profitability chargeable to tax.*
6. *Whether on facts and in law, Ld. CIT(A) was justified in deleting the addition made on account of transfer charges Rs.15,85,095/- as the assessee failed to substantiate the genuineness of such charges.”*
7. *Whether on facts and in law Ld. CIT(A) was legally justified in deleting addition of Rs. 1,68,28,900/- without conforming the identity and obtaining evidence in respect of depositors in violation of provision of Section 68.*
8. *The appellant craves leave to add, alter or amend any/ all of the grounds of appeal before or during the course of the hearing of the appeal.”*

**ITA No. 5715/Del/2010**

1. *“The order of the Ld. CIT(Appeals) is not correct in law and facts.*
2. *Whether on the facts and in law Ld. CIT(A) was legally justified in deleting the additions made on account of Unexplained cash credit in the account of Sh. Varun Wadhwa, Rs. 48,80,092/- and Ms. Shimpika Gupta Rs.16,56,239/-, relying merely on the arguments in the absence of further enquiry.*
3. *Whether on facts and in law Ld. CIT(A) was legally justified ignoring the contents seized documents while allowing relief on account of cancellation charges Rs 1,43,26,750/-.*
4. *Whether on facts and in law Ld. CIT(A) was legally justified in deleting the addition made on the basis of percentage completion method against project cost method and allowing relief to the assessee on account of postponement of profitability chargeable to tax.*

5. *Whether on facts and in law, Ld. CIT(A) was justified in deleting the addition made on account of transfer charges Rs.18,85,095/- as the assessee failed to substantiate the genuineness of such charges.”*
6. *Whether on facts and in law Ld. CIT(A) was legally justified in deleting addition of Rs. 1,68,28,900/- without conforming the identity and obtaining evidence in respect of depositors in violation of provision of Section 68.*
7. *The appellant craves leave to add, alter or amend any/ all of the grounds of appeal before or during the course of the hearing of the appeal.”*

3. Firstly we are taking up the facts of A.Y. 2006-07 being ITA No. 5716/DEL/2010.

4. The assessee is in the business of development and commercial real estate and during the relevant period it was developing a mall and commercial complex at Dwarka, New Delhi. The assessee agreed to sell several spaces of the said commercial complex to various prospective buyers and received advances in installments from them during the construction period itself as per well known and accepted trade practice. At the time of booking, a form is signed by the buyer specifying the terms therein. The said form was produced before the Assessing Officer. From perusal of these forms it can be seen that these prospective buyers are free to transfer their bookings to others as and when the desire as provision of this exit rout because in absence of the same a prospective investor does not invest money to make gains and in fact in any upcoming project, that too if a not well known big developer, there investors are the back bone. Search and seizer operation in this case was conducted on 16.03.2007 and notice u/s 153A was issued to the assessee on 21.08.2008 in response to which the assessee filed his return of income on 08.10.2008 declaring loss at Rs.54,961/-. Subsequently, notice u/s 143(2), 142(1) were issued along with questionnaire on 21.10.2008. In response to these notices, CA/AR of the assessee appeared along with the director of the company from time to time and filed information along with evidences. During the course of survey

carried out in the business premises/site offices of Manish Royal Plaza and examination of the seized materials, the Assessing Officer observed that there is an account in the name of Shri Varun Wadhwa namely S/B Account No.6087 in Oriental Bank of Commerce. During the course of survey various deposits slips of SB Account No.6087 held with Oriental Bank of Commerce, showing deposits of Rs.4,00,000/- in the SB Account No.6087 were found and impounded as per pages 38 to 45 of Annexure – A-6. Regarding this account, statement of Shri Varun Wadhwa was recorded in which he stated that he was working as a sole in-charge of Manish Global Mall and is engaged in the work of supervising and to provide necessary assistance to streamline the day to day work of the contractors on behalf of assessee's group. He was drawn salary of Rs.6500/- per annum as stated by him in his statement. The Assessing Officer held that accounts of Shri Varun Wadhwa are benami accounts of the assessee company and the credits in the same were added back to the income of the assessee-company. The Assessing Officer also made an addition of Rs.5,94,880/- towards Commission payment to Ms. Shimpika Gupta was also added. The Assessing Officer further made addition of Rs.1,43,26,750/- towards seized documents on account of cancellation charges, addition of Rs.36,97,200/- towards consideration of the value at the percentage of the profit in respect of one project, addition of Rs.15,85,095/- was made @ 3.6% of 4,40,30,403/- in respect of value of flats/spaces which was transferred during the year and also made addition of Rs.1,68,28,900/- towards unexplained cash credits. Thus, the total addition of Rs.3,81,63,364/- was made by the Assessing Officer.

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

6. As regards Ground No.1, the Ld DR submitted that the same is general in nature, hence Ground No. 1 is dismissed.

7. As regards Ground No.2 relating to deletion of the additions made on account of unexplained cash credit in the account of Shri Varun Wadhwa

amounting to Rs.11,85,500/-, the Ld. DR submitted that the CIT(A) was not justified as there is no enquiry or an attempt to verify these claims of the assessee was made by the CIT(A). The Ld. DR relied upon the Assessment Order.

8. The Ld. AR submitted that the CIT(A) has given a detailed finding and pointed out that Shri Varun Wadhwa reiterated his statement and the same was never confronted to the assessee. The Ld. AR further pointed out that the assessee has submitted all the relevant evidences towards the said amount, which was totally ignored by the Assessing Officer.

9. We have heard both the parties and perused all the relevant materials available on record. It is pertinent to note that the Assessing Officer has only relied upon the statement of Mr. Varun Wadhwa but has totally ignored the evidences put up by the assessee. In fact, the Assessing Officer did not allow the assessee to cross examine the statement of Mr. Varun Wadhwa. In fact, the parties which were mentioned by Mr. Varun Wadhwa was not brought on record as to support Mr. Varun Wadhwa's contentions. Thus, the Assessing Officer has not taken cognizance of the details of statement, though said statement was heavily relied by the Assessing Officer. The said statement at later stage was reiterated by Mr. Varun Wadhwa and since Mr. Wadhwa has owned up the said Bank account and has duly declared the income arising on the said transactions in its return of income, no adverse cognizance of the transactions in the said Bank account can be taken against the assessee in the absence of any adverse material on record. Thus, the CIT(A) has rightly deleted this addition. Ground No.2 of Revenue's appeal is dismissed.

10. As regards Ground No.3 relating to addition made for commission payment of Rs.5,94,880/- without supporting evidence, the Ld. DR submitted that the Assessing Officer has rightly made the said addition on account of unexplained expenditure as the assessee has not brought on record any documents showing that the amount was the payment of commission to the brokers. The Ld. DR submitted that the CIT(A) was not

justified in deleting the addition.

11. The Ld. AR submitted that the CIT(A) has given a categorical finding that the expenses were made in this particular year and, therefore, it was duly recorded in the books by the assessee. The CIT(A) has also given this findings, which was not contradicted by the Revenue.

12. We have heard both the parties and perused all the relevant materials available on record. It is pertinent to note that the addition for expense can be made only if any bogus expenditure is claimed in the books of accounts or any expenditure is paid outside the books. In present assessee's case, no evidence was found during the course of search which suggested that the commission was paid outside the books of accounts. The Assessing Officer has not rejected the books of accounts or has not given any contrary finding that commission was not incurred by the assessee. In this case, the commission was duly recorded in the books by the assessee and the same can be seen from the bills which were submitted by the broker and the evidence to that extent for payments made to broker was also submitted by the Assessee before the Assessing Officer. The Assessing Officer has ignored the evidence filed by the assessee. Therefore, the CIT(A) was right in deleting this addition. Ground No.3 of the Revenue's appeal is dismissed.

13. As regards Ground No.4, 5, 6 & 7, the Ld. DR relied upon the order of the Assessing Officer.

14. The Ld. AR submitted that for A.Y. 2005-06 these issues were decided by the Tribunal in assessee's own case, and the said decision of the Tribunal is confirmed by the Hon'ble High Court. Thus, the Ld. AR relied upon the decisions of the Tribunal and the High Court along with the order of the CIT(A).

15. We have heard both the parties and perused all the relevant materials available on record. As regards to Ground No. 4 relating to cancellation charges of Rs. 1,43,26,750/-, the Tribunal in A.Y. 2005-06 (ITA No. 3062/Del/2010 dated 22.12.2010 held as under:

*“17. Apropos the first issue about notional addition of cancellation charges, we find no infirmity in the order of CIT(A), in as much as the addition has been made by AO on the ground that assessee should have charged the cancellation charges from customers who cancelled their booking. In our view the AO cannot step into the shoes of businessman and review the business expediency of the assessee’s decision of not charging cancellation charges. Assessee contends it to be in the interest of market reputation and customer’s relations. It has not been alleged that assessee have received cancellation charges and did not disclose in the books. Assessee having not received any such charges CIT(A) has rightly deleted this addition.”*

This finding of the Tribunal was also confirmed by the Hon’ble Delhi High Court vide order dated 15.11.2011 (ITA No. 928/2011). In the present assessment year i.e. 2006-07, the assessee submitted a reply wherein it is stated that the assessee has already furnished the evidence to establish that in respect of booking cancelled, the entire money so received was refunded through account payee cheques. The details of all the allottees of space, whose booking have been cancelled was placed before the Assessing Officer vide letter dated 11.11.2008. This was placed along with the confirmations from each of the allottees and request letters which gives income tax particulars of such allottees and receipts of payment made to them. It is observed by us that this aspect was not at all taken into account by the Assessing Officer in the Assessment Order despite reproducing the reply of the assessee in para 5 of the Assessment Order. Thus, the assessee has given all the details and the issue is identical which was decided by the Tribunal in Assessment Year 2005-06 and confirmed by the Hon’ble Delhi High Court, therefore, there is no need to interfere in the same as CIT(A) heavily relied upon the order for A.Y. 2005-06. Ground No. 4 of the Revenue’s appeal is dismissed.

16. As regards to Ground No. 5 relating to addition made on the basis of percentage completion method against project cost method wherein the CIT(A) allowed relief to the assessee on account of postponement of

profitability chargeable to tax, this issue is also decided by the Tribunal in A.Y. 2005-06 (supra) and held as under:

*“20. Apropos ground no. 4 we see no infirmity in the order of CIT(A) as department has accepted assessee’s method of accounting on project completion method. There is no justification in adopting percentage completion method for one year on selective basis. We uphold the order of CIT(A) deleting the addition of Rs. 28,21,000/- in this behalf.”*

This finding of the Tribunal was also confirmed by the Hon’ble Delhi High Court vide order dated 15.11.2011 (ITA No. 928/2011) by following the decision of the Hon’ble Supreme Court in case of CIT vs. Bilahari Investment P. Ltd. (2008) 299 ITR 1 (SC). Before the Assessing Officer the Assessee submitted that percentage completion method cannot be applied in assessee’s case as the assessee after construction and development of space is selling such spaces to various customers and assessee recognizes such income on the sale of these spaces. Thus, the assessee demonstrated before the Assessing Officer that it is not a case of construction and development of project or transfer of project as a whole, but it is a case where shops and spaces have been allotted to the various customers of the assessee company and once the sales have been made by the assessee of such spaces to the customers of the assessee company, then only income was recognized. This method is identically applied in the earlier assessment year wherein the same is upheld by the Tribunal as well as the Hon’ble High Court in assessee’s case. Thus, the issue is identical which was decided by the Tribunal in Assessment Year 2005-06 and confirmed by the Hon’ble Delhi High Court, therefore, there is no need to interfere in the same as CIT(A) heavily relied upon the order for A.Y. 2005-06. Ground No. 5 of the Revenue’s appeal is dismissed.

17. As regards Ground No.6 relating to addition made on account of transfer charges of Rs. 18,85,095/-, the Revenue challenged this issue in A.Y. 2005-06 before the Tribunal but raised the said ground before the Hon’ble High Court. The Hon’ble High Court held as under:

*“10. So far as the question No. 4 is concerned, it is seen that before the Assessing Officer, in response to a query raised by him, the assessee submitted that merely on the basis of the seized material showing one transaction in respect of which the assessee had received transfer charges at 3.6% of the cost of the shop it should not be assumed that similar transfer charges had been received from all customers in whose cases such transfers were effected. The assessing officer did not accept the contention and proceeded to make an addition of Rs.2,19,701/- at 3.6% of Rs. 61,02,800/- which was the value of flats/space transferred during the relevant accounting year. The CIT(A) held on a perusal of the seized receipt that it mentioned the names of only the seller and the purchaser and the name of the assessee was not mentioned therein either as recipient or payer. He also found that the receipt did not mention any transfer charges being received by the assessee. It was found to mention that allied charges were “to be paid” by the buyers from which the CIT(A) concluded that the receipt cannot be taken as evidence for actual payment of any transfer charges to the assessee. In this view of the matter and for lack of any evidence he deleted the addition. In the appeal filed by the Revenue to the Tribunal we do not find any ground taken to challenge the decision of the CIT(A) to delete the addition of Rs.2,19,701/-. The order of the Tribunal also does not show that any additional ground was filed by the Revenue which was admitted and adjudicated upon. In this view of the matter, question No. 4 does not arise from the order of the Tribunal and we, therefore, decline to admit the same.”*

Thus, the CIT(A) has heavily relied upon the order of CIT(A) for A.Y. 2005-06. The Revenue did not challenge the same before the Tribunal and hence the same was not admitted before the Hon'ble High Court. Thus, the order of the CIT(A) for A.Y. 2005-06 remains final. The issue in the present year as well is that of addition on account of transfer charges, for which we perused the reply of the assessee filed before the Assessing Officer. From the said reply it emerges that the assessee denied that the receipts which were found, belongs to assessee. Further the assessee also filed

confirmation from those parties from whom allegedly received the said amount. This factual aspect as well as documentary evidence were not at all taken into account by the Assessing Officer. The issue is identical to that of A.Y. 2005-06, hence there is no need to interfere with the findings of the CIT(A). Ground No. 5 of the Revenue's appeal is dismissed.

18. As regards Ground No.7 relating to addition of Rs. 1,68,28,900/- under Section 68, the Tribunal in A.Y. 2005-06 deleted the similar addition, but the same was remanded back to the CIT(A) by the Hon'ble High Court. The Hon'ble High Court held as under:

*"25. For the above reasons, we answer the substantial questions of law framed in paragraph 21 above, in favour of the Revenue and against the assessee. The issue relating to the addition of Rs. 1,61,67,600/- made under Section 68 of the Act is restored to the CIT(A) who shall comply with the requirements of Rule 46A and take a fresh decision on the merits of the addition in accordance with law."*

It is pertinent to note that the Hon'ble High Court has remanded back this issue towards non filing of confirmation from the respective parties. In the present Assessment order also the Assessing Officer observed that the confirmations were not filed by the assessee before him. The CIT(A) simply relied upon the earlier Assessment Year 2005-06 order in appeal no. 94/08-09. Therefore, it will be appropriate to remand back this issue to the file of the CIT(A) after taking cognizance of the party wise confirmation filed by the assessee and after considering the genuineness, creditworthiness and identity of the parties decide the issue on merit. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Thus Ground No. 7 is partly allowed for statistical purpose.

19. In result, appeal of the Revenue being ITA No. 5716/DEL/2010 for A.Y. 2006-07 is partly allowed for statistical purpose.

20. As regards ITA No.5715/Del/2010 for A.Y. 2007-08 filed by the Revenue, the facts of the case are as under:

21. Search and seizer operation in this case was conducted on 16.03.2007 and notice u/s 153A was issued to the assessee on 21.08.2008 in response to which the assessee filed his return of income on 20.09.2007 declaring income at Rs.11,28,690/-. Subsequently, notice u/s 143(2) was served on the assessee on 29.09.2008. Fresh notice under Section 142(1) were issued along with questionnaire on 21.10.2008. In response to these notices, CA/AR of the assessee appeared along with the director of the company from time to time and filed information along with evidences. The Assessment was completed on 31.12.2008 thereby making addition of Rs. 48,80,092/- and Rs. 16,56,239/- on account of unexplained cash credit in the account of Sh. Varun Wadhwa and Ms. Shimpika Gupta, additions at Rs. 4,13,250/- made on the total cancellations of bookings amounting to Rs. 16,53,000/-, addition at Rs. 5,33,81,000/- on basis of percentage completion method against cost method, addition at Rs. 6,52,424/- on account of cash credit and also addition of Rs. 2,29,90,400/- under Section 68.

22. Being aggrieved by the Assessment Order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

23. As regards to Ground No. 1, the same is general in nature, hence dismissed.

24. As regards to Ground No. 2, the Ld. DR relied upon the Assessment Order and also submitted that the contentions taken in A.Y. 2006-07 will be applicable in present year as well in respect of statement of Mr. Varun Wadhwa. As regards to addition in respect to Ms. Shimpika Gupta, the Ld. DR submitted that the account of Ms. Shimpika Gupta is a benami account of the company as she is the daughter in law of the cousin of close relative of the assessee and all credits in the same was rightly added by the Assessing Officer.

25. The Ld. AR relied upon the order of the CIT(A) and submitted that the contentions taken in A.Y. 2006-07 be considered herein as well. As regard to Ms. Shimpika Gupta, the Ld. AR submitted that the assessee filed the

relevant evidence before the Assessing Officer but has totally ignored the said evidence.

26. We have heard both the parties and perused all the relevant material available on record. It is noted that the addition made on account of statement of Mr. Varun Wadhwa is identical to that of addition made in A.Y. 2006-07, therefore, the same reasoning and findings given by us hereinabove will be applicable in the present Assessment Year 2007-08 as well. As regards to addition on account of Ms. Shimpika Gupta, it is clearly mentioned in the order of the CIT(A) that Ms. Shimpika Gupta was the account holder of the Account No. 8449 with Oriental Bank of Commerce. The credit in the said account was acknowledged by her as her own income. The same was also offered to tax and due tax has been paid. The affidavit of Ms. Shimpika Gupta was also filed. All these facts were on record before the Assessing Officer as well, but the Assessing Officer has merely doubted these records without going into details of the same. In fact, the assessee has discharged its onus by producing the said evidences and set out that the said income belonged to Ms. Shimpika Gupta. Therefore, there is no need to interfere with the findings of the CIT(A). Ground No. 2 of the Revenue's appeal is dismissed.

27. As regards to Ground No. 3 relating to addition on account of cancellation charges, the said ground is identical to that of Ground No. 4 of A.Y. 2006-07 which is decided by us hereinabove. The same reasoning and findings will be applicable in the present Assessment Year 2007-08 as well. Hence, Ground No. 3 of the Revenue's appeal is dismissed.

28. As regards to Ground No. 4 relating to addition on the basis of percentage completion method, the said ground is identical to that of Ground No. 5 of A.Y. 2006-07 which is decided by us hereinabove. The same reasoning and findings will be applicable in the present Assessment Year 2007-08 as well. Hence, Ground No. 4 of the Revenue's appeal is dismissed.

29. As regards to Ground No. 5 relating to addition on account of transfer

charges wrongly mentioned as cash credits, the said ground is identical to that of Ground No. 6 of A.Y. 2006-07 which is decided by us hereinabove. The same reasoning and findings will be applicable in the present Assessment Year 2007-08 as well. Hence, Ground No. 5 of the Revenue's appeal is dismissed.

30. As regards to Ground No. 6 relating to addition under Section 68 of the Act, the said ground is identical to that of Ground No. 7 of A.Y. 2006-07 which is decided by us hereinabove. The same reasoning and findings will be applicable in the present Assessment Year 2007-08 as well. In the present Assessment order also the Assessing Officer observed that the confirmations were not filed by the assessee before him. The CIT(A) simply relied upon the earlier Assessment Year 2005-06 order in appeal no. 94/08-09. Therefore, it will be appropriate to remand back this issue to the file of the CIT(A) after taking cognizance of the party wise confirmation filed by the assessee and after considering the genuineness, creditworthiness and identity of the parties decide the issue on merit. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Thus Ground No. 6 is partly allowed for statistical purpose.

31. Thus, appeal of the Revenue being ITA No. 5715/DEL/2010 for A.Y. 2007-08 is partly allowed for statistical purpose.

32. In result, both the appeals of the Revenue are partly allowed for statistical purpose.

**Order pronounced in the Open Court on the 31<sup>st</sup> day of December, 2019.**

Sd/-

**(G. S. PANNU)  
VICE PRESIDENT**

Sd/-

**(SUCHITRA KAMBLE)  
JUDICIAL MEMBER**

Dated: 31/12/2019  
*Priti Yadav, Sr. PS \**

Copy forwarded to:

1. Appellant

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI

Date of dictation	16.12.2019
Date on which the typed draft is placed before the dictating Member	17.12.2019
Date on which the typed draft is placed before the Other Member	31.12.2019
Date on which the approved draft comes to the Sr. PS/PS	31.12.2019
Date on which the fair order is placed before the Dictating Member for pronouncement	31.12.2019
Date on which the fair order comes back to the Sr. PS/PS	31.12.2019
Date on which the final order is uploaded on the website of ITAT	31.12.2019
Date on which the file goes to the Bench Clerk	31.12.2019
Date on which the file goes to the Head Clerk	