

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

ITA No. 2235/Bang/2018
Assessment year: 2008-09

Mr. Mallikarjuna Udayshankar # 148, 6 th Main, 2 nd phase, 2 nd stage, Mahalakshmpuram, Bengaluru - 560086 PAN: AACPU 0412C	Vs.	The Assistant Commissioner of Income Tax, Circle 6(2)(1), Bengaluru – 560 095.
APPELLANT		RESPONDENT

Appellant by	:	Shri Nitesh Ranjan, CA
Respondent by	:	Smt. H.L. Sowmya Achar, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	29.01.2020
Date of Pronouncement	:	19.02.2020

ORDER

Per N.V. Vasudevan, Vice President

This appeal by the assessee is against the order dated 13.4.2018 of the CIT(Appeals), Bengaluru-6, Bengaluru relating to assessment year 2008-09.

2. The assessee in this appeal is an individual deriving income from construction of flats. For AY 2008-09, the assessment was completed u/s. 143(3) of the Income-tax Act, 1961 [the Act] and in the assessment so completed, the AO disallowed the claim of assessee for deduction of a sum of Rs.88,50,000 paid to M/s. Orange Properties.

3. The aforesaid addition was challenged by the assessee before the CIT(Appeals), who confirmed the order of the AO. Against the order of CIT(Appeals) the assessee preferred appeal before the Tribunal and the Tribunal in ITA No.975/Bang/2015 by order dated 30.9.2015 remanded the issue with regard to disallowance of advertisement expenses to the AO for fresh consideration with the following observations:-

“08. We have perused the orders and heard the rival contentions. It is not disputed that assessee had made payments to M/s. Orange Properties through banking channels. Assessee no doubt had produced an invoice from M/s. Orange Properties before the CIT (A). One of the reasons cited by the CIT (A) to confirm the disallowance is that bill dt.16.01.2008 of M/s. Orange Properties could not be correlated with payments reflected in the ledger of the assessee. Assessee had produced copies of advertisement placed in newspaper by M/s. Orange Properties. In our opinion, the evidence produced by the assessee required more detailed examination at the level of the AO. Even though the concerned M/s. Orange Properties is untraceable, there are ways and means available with the AO to verify the authenticity and correctness of the claim preferred by the assessee. We are of the opinion that the issue requires a fresh look by the AO. We set aside the orders of the lower authorities on this issue and remit it back to the file of the AO for fresh consideration in accordance with law.”

4. After the order of Tribunal, the issue was again examined by the AO in such set aside proceedings and he came to the conclusion that the services rendered by Orange Properties were not proved with proper documentary evidence. The claim of assessee was that payments to Orange Properties had been made through banking channel and that because of certain criminal proceedings initiated against Orange Properties, they were not traceable and hence the Assessee was unable to produce the concerned parties, for examination by the AO nor obtain their confirmed. The Assessee submitted that in the circumstance of the case, no adverse inference can be drawn against the Assessee. The assessee

also pointed out that summons issued to Orange Properties could not be served as they were no longer carrying on business at the address known to the assessee; that the payment to Orange Properties was not only for carrying out advertisements, but for canvassing business on behalf of assessee. The AO was of the view that there was no agreement regarding terms of canvassing and also for carrying out advertisements. In the set aside proceedings, a confirmation was filed whereby Orange Properties submitted that they had received payments from the assessee and that payment was through banking channels and was in the nature of commission for sales effected by the assessee and commission received by them was Rs.82,32,467. When this confirmation was filed before the AO, the AO called for books of account and Mr. Vijay Ravipathi Tata of Orange Properties submitted before the AO that books of account and bank statements were all gutted in fire and all records stored in the office were destroyed.

5. The AO again disallowed the claim of assessee by holding as follows:-

“ In view of the above, the assessee was given one more opportunity stating that the assessee's contention that Rs.88,50,000/- is paid as advertisement charges is not acceptable for the reason that the same could not be confirmed from the M/s Orange Properties and the statements given by both the parties are contradictory with respect to the nature of expenditure. M/s Orange Properties have not furnished the complete details as called for by this Office. In view of this, the claim of the advertisement expenditure by the assessee cannot be considered. In the circumstances, I once again treat the expenditure claimed under the head advertisement charges of Rs.88,50,000/- which is disallowed as per the provision of section 69C of the IT Act, 1961 vide order dated: 28/12/2010 is correct and the assessment is completed as under:”

6. On appeal by the assessee, the CIT(Appeals) confirmed the order of AO.

7. The CIT(Appeals) proceeded on the basis that Orange Properties could not be located despite best efforts whereas the fact is that the Orange Properties filed confirmation and even appeared before the AO. Aggrieved by the order of CIT(A), the assessee has preferred the present appeal before the Tribunal. A petition for admission of additional grounds of appeal was filed in which the Assessee has raised a plea that the impugned addition was made by the AO by invoking the provisions of Sec.69C of the Act, whereas such provisions are applicable only when the expenditure is not recorded in the books of accounts of the Assessee whereas the Assessee has duly recorded the expenditure in the books of accounts and has also explained the source. The additional ground is only one facet of the argument in support of the Assessee's plea for deletion of the addition and will be taken up for consideration, if necessary.

8. We have heard the rival submissions. The Id. DR reiterated the stand of the AO contained in the order of assessment and also made reference to the observations of the CIT(Appeals) in the first round of litigation, which in our view, becomes redundant because of the subsequent order of the Tribunal setting aside that order.

9. The Id. counsel for the assessee brought to our notice the fact that the assessee has raised invoices for advertisement expenditure to Orange Properties. Our attention was drawn to the confirmation filed by Orange Properties which is at page 23 of the assessee's PB, besides copy of bank statement of assessee evidencing payments to Orange Properties. More particularly, our attention was drawn to the various advertisements issued by Orange Properties on behalf of assessee.

10. We have considered the evidence on record and we find that from the advertisements a copy of which is at page 110 of PB, it is clearly mentioned therein that the property is being developed by Akshay i.e., the Assessee, which is the business name of assessee and that the property is being marketed by Orange Properties. It is also seen that in the proceedings before the AO after set aside by the Tribunal, the assessee has clarified that Orange Properties sold flats to its customer and those flats were developed by the assessee and the payment made to Orange Properties is not just for advertisement, but also for canvassing the sale of properties on behalf of assessee. We also find that in the confirmation filed by the assessee before the CIT(Appeals), Orange properties confirmed having received the commission to the extent of Rs.82,32,467. In our view, the evidence on record shows that to the extent of Rs.82,32,467 confirmed by the Orange Properties, the expenditure should be allowed as business expenditure as nothing adverse has been brought on record. Therefore, to this extent, we direct that the addition sustained by the CIT(Appeals) should be deleted.

11. In the result, the appeal of the assessee is partly allowed.

Pronounced in the open court on this 19th day of February, 2020.

Sd/-

(B R BASKARAN)
ACCOUNTANT MEMBER

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 19th February, 2020.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
ITAT, Bangalore.