

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND  
SHRI PAWAN SINGH, JUDICIAL MEMBER**

**ITA NO. 1003/MUM/2019 : A.Y : 2013-14**

M/s. Asiatic Trading & Construction Co., vs. ITO – 17(1)(2), Mumbai.  
146, Mittal Tower, Nariman Point, (Respondent)  
Mumbai 400 021.

**PAN : AAKFA1190K (Appellant)**

**Appellant by : Shri Sanjay R. Parikh**

**Respondent by : Shri Michael Jerald**

**Date of Hearing : 06/02/2020**

**Date of Pronouncement : 16/07/2020**

**ORDER**

**PER SHAMIM YAHYA, ACCOUNTANT MEMBER**

This appeal by the assessee is directed against order of learned CIT(A) dated 19.07.2016 and pertains to assessment year 2013-14.

2. The issue raised is that the learned CIT(A) erred in confirming the order of the Assessing Officer holding that the opening work-in-progress of Rs.5,71,59,128/- was to be considered as the business loss of the assessee. Brief facts of the case are that assessee is a partnership firm engaged in the business of development and construction of residential/commercial projects.

The Assessing Officer, on perusing the Profit & Loss Account, noted that assessee firm has debited various expenses to work-in-progress during the year amounting to Rs. 90,98,858/-. The Assessing Officer was of the opinion that the opening work-in-progress of Rs. 5,71,59,128/- was a capital loss as the assessee has demolished the constructed property. This as per the Assessing Officer was coming out of the assessee's notes on business activity. Hence, Assessing Officer held that such demolished project cannot be part and parcel of work-in-progress. Holding that the assessee has demolished the project, the Assessing Officer gave notice. In response to the show cause notice, assessee gave elaborate submissions.

3. The submissions noted by the Assessing Officer in his order reads as under :-

*"The assessee firm has started construction project at Borivali (W) for which IOD was granted by BMC on 11.11.2003 and CC was granted in part by BMC at various times. Plan for the construction of the building consisting of Ground Floor plus 5 upper floors was submitted but approval for CC was received by the assessee firm from BMC in part from time to time. Mean time, a stay was issued by the Bombay High Court in PIL in 2004 in which the assessee firm was also one of the parties. Copy of the same has already been submitted to you. Bombay High Court has lifted stay around late 2006/early 2007. The assessee firm has amended plan incorporating slum first floor on 21.07.2008. On the basis of which, the assessee firm has purchased TDR and paid FSI Premium charges applicable to TDR purchase to BMC in the year 2008-09. (The relevant copy of Bombay High Court has also been submitted to you vide our Architect's report).*

*In the meanwhile, under gazette notification dated 13<sup>th</sup> November, 2008, the BMC revised the parkings norms drastically. Under the said norms the number of parking required were more than double as against the earlier rules. It may be mentioned that under the revised norms for parking, it was*

*required to have 101 Nos. of parkings as against approximately 40 required to be provided as per the earlier regulations. These 40 parkings as per earlier plan were proposed to be accommodated in part stilt and open spaces around the building, considering the size of the plot.*

*Again in 2012, the D.C. regulations were also drastically revised by BMC under Notification No. CMS4311/452/CR-58/2011/UD-11 dated 6<sup>th</sup> January, 2012. The copy of which has already been submitted to your good selves. Under the Revised DC Rules, if the plan for Construction project has been approved for partial development and c.c. issued for part work, then developer has to follow new Regulations under Revised DC Rules for balance construction work. Revised DC Rules has also made Revised parking Rule which were notified on 13.11.2008 compulsory and plan as per revised rules were mandatory to get c.c. for balance work.*

*It was therefore necessary for the assessee firm to replan/redesign the construction project as per Revised DC Rules including Revised parking norms. As advised & suggested by the Architect, full basement having an area of 14000 sq. ft. was necessary to be constructed so as to take care of additional stipulated parking given to buyer of the flats be constructed.*

*The assessee firm hereby submits to you that the project was not abandoned by the firm as stated in the notice issued to us, but it was replanned/redesigned the project to comply with the revised D.C. regulation including to accommodate parking. It was necessary to construct basement and also to follow revised rules unless the existing construction was demolished the planning was not possible. It was also pointed out by Architect that the revised rules also allows higher F.S.I. which would compensate for the expenses incurred till now. Our Architect has submitted calculation in this regard, in the report already submitted to you.*

*The assessee firm has incurred various expenses which includes TDR purchases, FSI Premium charges, LUC Property taxes to BMC, Legal & Professional Fees, Architect Fees, Interest on loans from starting of the project till dates. Detailed year wise expenses list has already been submitted to you for your kind perusal. All the expenses are revenue expenditure for carrying out construction of building and the same be a part of work in progress of 6,62,57,986/- as on 31<sup>st</sup> March, 2013. Hence, opening WIP of*

*Rs.5,71,59,128/- be allowed as revenue expenditure along with current year revenue expenses.”*

From reading of the above, it is clear that assessee has duly submitted that there are some modification in the plan, that the matter had even-travelled to Hon'ble Bombay High Court, that there was revision in plans and that as a result, various revisions amendments were carried out. The Assessing Officer did not examine the veracity of the claims and submissions of the assessee.

4. The Assessing Officer only inferred from the above that various expenditures incurred on commercial property which were subsequently demolished. Since the constructed property is not in existence, hence he held that the entire sum was business loss. Upon assessee's appeal, learned CIT(A) confirmed the treatment of opening work-in-progress as business loss. In this order, the learned CIT(A) distinguished the decision of Hon'ble Delhi High Court relied upon by the assessee for the proposition that in project completion method all the expenditure incurred till the completion of the project are to be taken into account. The decision was in the case of *Lunar Electrical vs ACIT, 210 taxmann 69*.

5. Against this order, assessee is in appeal before us. We have heard both the Counsel and perused the records. We find that it is settled law that substance prevails over form. In our considered opinion, the detailed note of the assessee to the Assessing Officer has not been properly appreciated by the authorities below. The entire detailed note has been summarily rejected by the Assessing Officer by inferring that the project is demolished. The learned CIT(A) also erred in as much as he has distinguished the Hon'ble Delhi High Court decision referred without proper reasoning.

6. We find that assessee has shown the expenditure as work-in-progress. Assessee's case is that there has been court cases and amendments in the rules and plans which have led to the change in plan and consequent amendment and demolition of certain aspects of the project. But the assessee's contention is that assessee is still continuing with the project and the expenditure in this regard has to be treated as work-in-progress in as much as assessee is following project completion method. In our considered opinion, on the facts and circumstances of the case, the matter needs to be remitted to the file of Assessing Officer. The Assessing Officer is directed to consider the veracity of assessee's submission with reference to the relevant evidences. If the assessee's submissions regarding the change in rules and other aspects are found to be cogent, then the assessee's claim of work-in-progress and the assessee's following of project completion method have to be examined on the touchstone of Hon'ble Delhi High Court decision in the case of *Lunar Electrical* (supra) as above. Accordingly, we remit the issue to the file of Assessing Officer. Assessing officer is directed to consider the issue afresh in light of our observations as above. Needless to add, the assessee should be granted adequate opportunity of being heard.

7. Before parting, we note that this appeal was heard on 06.02.2020. The pronouncement is delayed due to lockdown in view of Covid-19 pandemic. The pronouncement is as per Rule 34(5) of Appellate Tribunal Rules and Hon'ble Bombay High Court decision vide order dated 15.04.2020 extending the time bound periods specified by Hon'ble High Court by removing the period under lockdown. This aspect is also dealt with in detail in ITAT Mumbai order in case of *DCIT vs JSW Steel* vide order dated 15.05.2020.

8. In the result, appeal by the assessee stands allowed for statistical purposes.

Order pronounced in the court on 16<sup>th</sup> July, 2020 as per Rule 34(4) by placing the pronouncement list on notice board.

Sd/-  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

Sd/-  
**(SHAMIM YAHYA)**  
**ACCOUNTANT MEMBER**

Mumbai, Date : 16<sup>th</sup> July, 2020

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "A" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar  
I.T.A.T, Mumbai