

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES “ A ” BENCH: BANGALORE

**BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No.2522/Bang/2018
(Assessment Year: 2013-14)

M/s. One World Ventures,
No.809, Kamadhenu,
10th Main, 5th Cross, 4th Block,
Koramangala, Bangalore-560 034

....Appellant

Vs.

Assistant Commissioner of Income Tax,
Circle 4(3)(1), Bangalore.

.....Respondent.

Assessee By:	Shri Siddesh S Gaddi, C.A.
Revenue By:	Shri Sunder Rajan, Addl. CIT (D.R)

Date of Hearing :	17.08.2020.
Date of Pronouncement :	19.08.2020.

ORDER

PER SHRI PAVAN KUMAR GADALE, JM :

The assessee-firm has filed an appeal against the order of Commissioner of Income Tax (Appeals)-4, Bangalore passed u/s.143(3) and u/s 250 of the Income Tax Act, 1961 (the Act).

2. The assessee has raised the following grounds of appeal :

1. The Assistant Commissioner of Income Tax, Circle 4(3)(1), ('Learned AO') and Commissioner of Income Tax (Appeals) - 4 ('Learned CIT(A)') have erred in passing an order which is bad in law and contrary to facts of the case;
2. The Learned CIT(A) has erred in upholding disallowance of Rs. Rs. 95,00,000/- made to the returned income of the Appellant;
3. The Learned CIT(A) and AO have erred in law and on facts in not appreciating that the claim of the Appellant towards forfeiture of advance paid for purchase of property is revenue in nature as it was done in the ordinary course of its business and therefore, squarely allowable under the provisions of the Income-tax Act, 1961 ('the Act');
4. On the facts and in the circumstances of the case and in law, the Learned AO and CIT(A) have erred in arriving at the conclusion that the property intended to be acquired is capital in nature;
5. The Learned AO and CIT(A) have erred in law in erroneously interpreting provisions of section 2(14) of the Act and applying the same to the facts in the present case as, by paying advance money, the Appellant did not get any right which could be termed as capital asset within definition of section 2(14);
6. The Learned CIT(A) has erred in perversely stating that the Appellant is primarily into construction activity and not of outright purchase / sale of property;
7. The Learned CIT(A) has erred in law and on facts in requiring series of operations or transactions of similar nature to treat the impugned transaction / activity as business in nature in accordance with provisions of section 28 read with section 2(13) of the Act;
8. The Learned AO and CIT(A) have erred in law in not appreciating that it is for the Appellant to decide future course of action and the Assessing Officer cannot step into the shoes of the assessee and suggest what should be for the best interest of the Appellant.
9. The Learned AO has erred in law and on facts in levying interest under section 234B of the Act;

10.The Learned AO has erred in law by initiating proceedings under section 271(1)(c) of the Act;

11.For these and other grounds that may be adduced at the time of hearing, the order of the Learned AO, Bangalore, to the extent upheld by the CIT(A), may be set aside and this appeal be allowed.

3. The Brief facts of the case are that, the assessee is a partnership firm engaged in the business of development of real estate, purchase and sale of land and other related activities. The assessee has filed the return of income electronically on 26.09.2013 with total income of Rs.30,45,190/-.Subsequently, the case was selected for scrutiny and Notices under Section 143(2) and 142(1) of the Act were issued. In compliance, the Id. AR of the assessee appeared from time to time and furnished the details and the case was discussed. The Assessing Officer on perusal of the Profit and Loss Account found, that the assessee has claimed an expenditure of Rs.95lakhs as advance made for purchase of property forfeited. The Assessing Officer called for the Agreement of Sale and found that the assessee has agreed to purchase a property at Rajajinagar, Bangalore along with commercial building for a consideration of Rs.3,95,00,000/-. Out of the said amount Rs.95 lakhs was paid as advance. The Assessing Officer has issued summons to seller of the property Mr. Mukesh Kumar to furnish the return of income for the Assessment Year 2013-14. Whereas, the Assessing Officer found that the seller of the property has not disclosed this advance receipt for income tax. Further, Show cause notice was

issued to the assessee to explain the details, and the assessee has filed submissions on 12.02.2016 referred at Para 4.2 of the assessment order. The observations of the assessing officer are that the transaction has to be treated as Capital Asset and forfeiture loss cannot be allowed as deduction. Whereas the submissions made before the Assessing Officer are that the assessee firm intends to resale the property in the course of business for higher rate and not to hold as fixed asset but due to the financial constrains and fall in the real estate business, the assessee was not in a position to purchase the property and accepted the fact that the advance paid could not be recovered. The Assessing Officer has emphasized that the transaction of purchase of property is a capital asset and will not fall within the provisions of Sections 30 to 37 of the Act and further observed that the main business of the assessee is in construction of flats and residential houses and not buying commercial complexes and the transaction is not in the normal course of business and hence has to be capitalized and made disallowed claim of expenditure of Rs.95 lakhs and assessed the total income of the assessee at Rs.1,25,45,190/- and passed the order under Section 143(3) of the Act dt.12.03.2016.

Aggrieved by the order, the assessee has filed an appeal with the CIT (Appeals). The CIT (Appeals) considered the grounds of appeal, statement of facts and assessee submissions dt.13.03.2018 referred at para 5.2 of the order and observed in page 10 at para 5.3 that the assessee has not made serious efforts to recover the

forfeited amount paid to the seller and the expenditure was claimed in profit and loss account as advance forfeited for purchase of property. Further, the decisions relied on by the assessee are not applicable to the case and confirmed the action of the Assessing Officer and dismissed the assessee appeal. Aggrieved by the order of CIT (Appeals), the assessee has filed an appeal with the Tribunal.

4. At the time of hearing, the learned Authorized Representative submitted that the CIT (Appeals) has erred in confirming the addition overlooking the facts which goes to the roots of the case. The learned Authorized Representative has substantiated his arguments with Paper Book and judicial decisions and emphasized that the transaction entered by the assessee firm was intend to make profit out of the sale and not to keep as a fixed asset and demonstrated with copy of partnership deed, where the objects of the assessee business are referred. The contention of the Id.AR that the assessee has submitted the details before the CIT (Appeals), whereas the CIT (Appeals) has not appreciated the facts on the nature of business of the assessee nor on the transaction lead to forfeiture of the advance amount and prayed for allowing the appeal. Contra, the Id. DR relied on the orders of lower authorities.

5. We heard the rival submissions and perused the material on record. The sole matrix of the disputed issue that the Id. CIT (Appeals) has upheld the addition

made by the Assessing Officer, where the advance paid for the purchase of property was forfeited and claimed as deduction in the profit and loss account. The learned Authorized Representative referred to page 27 of paper book were copy of the partnership deed dt.2.3.2009 was filed and at clause 3 the nature of business carried by the firm, was also in purchase and sale of land or any other real estate. Whereas in the present case, the assessee has intended to purchase property for a consideration of Rs.3,95,00,000/- out of the said amount of Rs.95 lakhs was paid by the assessee which is not disputed by the Assessing Officer and the balance of Rs.3 Crores has to be paid as per the Agreement of Sale referred at page 32 of the Paper Book on or before 20.02.2013. The learned Authorized Representative referred to the page 33 of the Paper Book, where the profit and loss account discloses the advance for purchase of property forfeited and also referred to the sequence of events, from the date of advance amount till the cancellation of sale agreement. Further The Ld. AR referred to the legal opinion and the Notice sent by the seller of the property for payment of balance consideration. The assessee firm has sought legal opinion on Agreement of Sale and also reply was submitted by the assessee to the seller referred at pages 45 to 51 of the Paper Book, further the assessee never intended to hold the property but due to adverse market conditions and financial difficulties has to cancel the agreement referred to pages 52 to 55 of the Paper Book. The learned Authorised Representative relied on the

judicial decision in the case of Prin. CIT Vs. Khyati Realtors (P) Ltd reported in 108 taxmann.com 449 (Bom). The learned Authorised Representative contentions that the Hon'ble Court has considered the efforts made by the assessee and could not get the refund and observed that it is a nature of business loss and confirmed the Tribunal decision in allowing as business loss. Similarly, the Id. AR also relied on judicial decisions which were dealt by CIT(A). The learned Authorised Representative has been emphasizing that the transactions entered by the assessee is not for retaining the asset but for the sale at higher profit. We on perusal of the facts and observations of the CIT (Appeals) and Assessing Officer found that the facts which are narrated before the Tribunal and sequence of events as referred by the assessee at pages 5 to 7 of the Paper Book, do not find a place in the assessment order and there is no clarity with respect to details. The CIT (Appeals) has also observed that no evidence was filed before the lower authorities in respect of serious efforts made by the assessee. We on perusal of the legal notices and facts narrated by the assessee are of the opinion that these facts are not discussed by the Assessing Officer or the CIT (Appeals) and the assessee firm could substantiate serious efforts made for recovery of advance amount. We considering the principle of natural justice, shall provide one more opportunity to the assessee to substantiate with the evidence before the Assessing Officer. Accordingly, we remit the disputed issues for limited purpose to the file of

assessing officer to verify and examine the evidences and consider the claim of the assessee as per law. Further the assessee should be provided adequate opportunity of hearing and shall co-operate in submitting the information and we allow the grounds of appeal of the assessee for statistical purposes.

6. In the result, the assessee's appeal is allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(G. MANJUNATHA)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Dated: 19.08.2020.

*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore