

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

**BEFORE,
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No.4252/Del/2016
(ASSESSMENT YEAR: 2011-12)**

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| Dy. CIT, Circle-27(1), New Delhi. | Vs. | M/s Unitech Property Management Pvt. Ltd., 6, Community Centre, Saket, New Delhi-110017. PAN – AAACU 1291Q |
| (Appellant) | | (Respondent) |

**ITA No.4034/Del/2016
(ASSESSMENT YEAR: 2011-12)**

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| M/s Unitech Property Management Pvt. Ltd., (Presently known as M/s Qns Facility Management Pvt. Ltd.) 6, Community Centre, Saket, New Delhi-110017. PAN –AAACU 1291Q | Vs. | Dy. CIT, Circle-18(1), Now Circle-27(1), New Delhi. |
| (Appellant) | | (Respondent) |

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| Appellant By | Sh. Saras Kumar, SR. DR |
| Respondent by | Ms Kanika Jain, Adv. Sh. Mohit Jain, CA |
| Date of Hearing | 23.06.2020 |
| Date of Pronouncement | 31.08.2020 |

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

ITA 4034/Del/2016 is the assessee's appeal against order dated 23.05.2016 passed by the Learned Commissioner of Income Tax (Appeals)-22, New Delhi {CIT(A)} for Assessment Year 2011-12 whereas ITA No.4252/Del/2016 is the Department's Cross appeal for the same year.

2.0 The brief facts of the case are that during the year under consideration, the assessee was engaged in the business of maintenance of immovable property which were mainly developed by M/s Unitech Ltd. The return of income was filed declaring total income at Rs.23,74,36,630/-. The return was initially processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter called 'the Act') and the case was later selected for scrutiny. During the course of assessment proceedings, the Assessing Officer (AO) noticed that an amount of Rs.4,03,23,314/- was transferred by the assessee to the Asset Replacement Reserve Account and debited to the profit and loss account. The assessee was required by the Assessing Officer to justify the allowability of

the same and also to provide details of the Asset Replacement Reserve Account. The Assessing Officer also noted that a disallowance had been made on an identical issue in Assessment Years 2009-10 and 2010-11. It was the assessee's contention before the Assessing Officer that the amount represented contribution received by the assessee company towards sinking fund and the same was received by the assessee company under an agreement with the owners for meeting the cost of replacement, refurbishing, major repairs and other capital expenses. It was also submitted before the Assessing Officer that the contribution/s were kept in a separate account and in no manner represented the income of the assessee company particularly since the assets did not belong to the assessee company. It was highlighted that the various assets belonged to the owners/Resident Welfare Association and were not part of either the current assets or the fixed assets of the assessee company. It was the assessee's contention that it was a case where there was a diversion of income by overriding title and it was not a case of application of income. However, the Assessing Officer was of the view that similar disallowance had been made in Assessment

Years 2009-10 and 2010-11 and though in both the years, the Ld. First Appellate Authority had given a finding in favour of the assessee, the Department's appeal was pending before the Tribunal and, therefore, on identical facts, the disallowance had to be made. The Assessing Officer proceeded to make addition of Rs.4,03,23,314/- on this account and the assessment was completed at an income of Rs.27,77,59,940/-.

2.1 Aggrieved, the assessee preferred an appeal before the Ld. First Appellate Authority. The Ld. CIT (A) partly allowed the appeal by observing that the actual amount spent on replacement etc. was considerably less than amount transferred to the Assets Replacement Account. The Ld. CIT (A) also observed that the ratio of the amount transferred to Assets Replacement Account and Management Fee received was fluctuating and not fixed from year to year. The Ld. CIT (A) held that the total maintenance charges received by the assessee company, irrespective of its nomenclature, constituted revenue receipts and the appropriation out of the same towards sinking fund could not be allowed as deduction, but deduction of actual expenditure incurred is to be allowed.

2.2 Aggrieved with the findings of the Ld. CIT (A), now both the assessee as well as Department are before this Tribunal and had raised the following grounds of appeal:

Grounds of appeal in ITA No.4252/Del/2016

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the total addition of Rs.4,03,23,314/- and allowing expenditure actually incurred for asset replacement.

2. On the facts and in the circumstances of the case and law, the Ld. CIT(A) has erred in accepting additional evidences without giving opportunity to the AO in contravention of the Rule 46A of the Income Tax Rules, 1962.

3. The appellant craves, leave or reserving the right to amend modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

Grounds of appeal in ITA No.4034/Del/2016

1) That order made u/s 250 of the Income Tax Act dated 23/05/2016 by the Learned CIT(Appeals)-22 is erroneous in nature as he has more or less confirmed the order of Ld. AO who made additions on arbitrary basis on account of amount transferred to Asset Replacement A/c.

2) That the order passed by the Ld. CIT(A) -22 is bad in law particularly when the issue stands already covered in the appeals for the AY 2009-10 and AY 2010-11 and has been decided in favour of the assessee company by his worthy predecessor.”

3.0 At the outset, the Ld. Authorized Representative submitted that the issue stood covered by the order of the ITAT in

assessee's own case for Assessment Years 2009-10 and 2010-11 in ITA Nos.1316 & 2615/Del/2014 vide order dated 19.09.2016. The Ld. Authorized Representative further submitted that the order of the Tribunal had reached finality in view of the fact that the Department's appeal against the said order was dismissed by the Hon'ble Delhi High Court in ITA No.440/2018 and C.M. No.14353 & 14354/2018 vide order dated 13.08.2018, wherein the Hon'ble Delhi High Court had held that no question of law arose in this appeal as the maintenance/service fees charged did not entirely vest with the assessee. The Ld. Authorized Representative further submitted that the Department's SLP against the order of the Hon'ble Delhi High Court stood dismissed as withdrawn by the Hon'ble Apex Court vide order dated 22.11.2019. It was submitted that, therefore, the issue has attained finality and, accordingly, the Department's appeal deserved to be dismissed and the assessee's appeal deserved to be allowed.

4.0 Per contra, the Ld. Sr. Departmental Representative (DR) placed reliance on the findings of the Lower Authorities. However, the Ld. Sr. DR fairly accepted that the issue stood covered by the

order of the ITAT in assessee's own case in Assessment Years 2009-10 and 2010-11.

5.0 We have heard the rival submissions and have also perused the material on record. We have also perused the order of the Co-ordinate Bench of this Tribunal in assessee's own case for Assessment Years 2009-10 and 2010-11 in ITA Nos.1316 and 2615/Del/2014 wherein vide order dated 19.09.2016, the Co-ordinate Bench has decided the issue in favour of the assessee. The relevant observations of the Bench are contained in Para -9 of the said order and the same is being reproduced herein under for a ready reference:

“9. In view of the above cited decisions, when we apply the ratio of the decision of the Hon'ble High Court of Delhi in the case of DTTDC [supra], then in the light of article 10.2, we observe that in consequence of termination of contract, the maintenance agency shall reconcile all the accounts and transfer the IFSD, sinking fund and other advances, if any, to the buyers association, subject to adjustment of any all amounts due to it from the occupant(s) under the said contract. Thus, in view o the dicta laid down by the co-ordinate bench of the Tribunal in the case of Alpha Services [supra] impugned receipts out of fees and serving clause received and transferred to sinking funds towards assets replacement fund for purchase or maintenance assets of flats, which is returnable in the event of termination of contract to the payer flat owner cannot be held as income

taxable in the hands of the assessee. This agreement was confronted to the AO by the CIT(A) and remand report was also filed. Thus, we decline to accept the contentions of the Id. DR that the said agreement was not confronted to the AO therefore, we are unable to agree with the contention of the Id. DR that the mater should be restored to the AO for a fresh adjudication. We are, therefore, of the opinion that the conclusion recorded by the CIT(A) in para 2.3 of the order is sustainable and thus we are unable to see any valid reason to interfere with the same and thus we uphold the order of the CIT(A) on this count. Consequently, grounds raised by the Revenue in both the appeals being devoid of merits, are dismissed.”

5.1 We also note that the Department’s appeal before the Hon’ble Delhi High Court has been dismissed by approving the order of the ITAT with the observation that no substantial question of law arose in this case. We also note that the SLP of the Department against the order of the Hon’ble Delhi High Court was dismissed as withdrawn by the Hon’ble Apex Court vide order dated 22.11.2019. Thus, for all practical purposes, the order of the Tribunal in assessee’s own case as aforesaid has attained finality and respectfully following the same, we dismiss the grounds raised by the Department and allow the grounds raised by the assessee. Thus, the impugned amount transferred to the Assets Replacement

Account for the year under consideration will not form part of the taxable income of the assessee's company.

6.0 In the final result, the appeal of the assessee stands allowed whereas the appeal of the Department's stands dismissed.

Order pronounced on 31/08/2020.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 31/08/2020

PK/Ps

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI