

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

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND  
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

ITA No.693/Bang/2016
Assessment Year :2011-12

M/s. Divyasree Holdings Pvt. Ltd., Divyasree Chambers, 'O' Shaugnessy Road, Bengaluru – 560 025. <b>PAN : AAACD 6970 H</b>	Vs.	1. The Principal Commissioner of Income Tax, Central, Bengaluru. 2. The Deputy Commissioner of Income Tax, Central Circle – 2[3], Bengaluru.
--	-----	--

Assessee by	:	Shri. Narendra Sharma, Advocate
Revenue by	:	Shri. Pradeep Kumar, CIT(DR)(ITAT), Bangalore

Date of hearing	:	12.1.2021
Date of Pronouncement	:	18.1.2021

**ORDER**

***Per N. V. Vasudevan, Vice President***

This an appeal by the assessee against the order dated 27.1.2016 of the Principal CIT, Bengaluru, passed under section 263 of the Act, in relation to Assessment Year 2011-12.

2. The assessee is engaged in the business of property development. For Assessment Year 2011-12, the assessee filed return of income on 28.9.2011 declaring Nil income. The assessment was completed under section 143(3) of the Act by order dated 28.3.2014, accepting the return of income filed by the assessee. The CIT, in exercise of the powers under section 263 of the Act was of the view that the aforesaid order of the AO was erroneous and prejudicial to the interest of the Revenue for the following 2 reasons:

- 1) As per 3CD report, TDS has not been deducted on Rs.2,24,000/- and the same has not been disallowed.
- 2) A sum of Rs.50,00,000/- has been debited towards advances written off in P & L (Schedule 13, Operating and Other Expenses).

The same has not been considered in the assessment order.

3. According to the CIT, the action of the AO in not disallowing the aforesaid 2 items of expenses for the reason that the first item of the expenditure ought to have been disallowed under section 40(a)(ia) of the Act and the second item of expenditure ought to have been disallowed as one not incurred for the purpose of business of the Assessee. The CIT accordingly issued a show cause notice under section 263 of the Act dated 12.08.2015.

4. The assessee in its letter dated 25.1.2016 in reply to the show cause notice, submitted that ,as regards the first item of non-deduction of tax at source on a sum of Rs.2,24,000/- was the sum total of payments made to various parties and payment to each of the party did not exceed the threshold limit for deduction of tax at source. As far as the second item of expenses which was set out in the show cause notice under section 263 of the Act, the assessee submitted that the assessee had entered into an MoU dated 1.5.2007 with one Mr. Rakesh Rastogi of Delhi. The assessee wanted to acquire properties in and around National Capital Region, Greater Noida (UP) and Gurugram (Haryana) for setting up of a Special Economic Zone (SEZ) and in this regard, paid a sum of Rs. 50 lakhs to Mr. Rakesh Rastogi for procuring land. The assessee submitted that there were certain bickering and misunderstanding with Mr. Rakesh Rastogi and in terms of clause 7 of the MoU dated 1.5.2007, he forfeited the sum of Rs.50 lakhs. The assessee produced a letter dated 6.7.2009 from Mr. Rakesh Rastogi wherein he had mentioned that he has not incurred any expenses or paid any advance for acquiring lands pursuant to the MoU dated 1.5.2007. Another letter dated 23.4.11 of Mr. Rakesh Rastogi stating and confirming that the advance paid by

the assessee was being forfeited as the assessee did not make further payments as required by Mr. Rakesh Rastogi. The assessee claimed that the aforesaid expenses were in connection with the business of the assessee and ought to be allowed as deduction while computing income from the business and was rightly allowed as a deduction by the AO. In support of the claim of the assessee, the assessee also placed reliance on the judgment of the Hon'ble Bombay High Court in the case of Harshad J. Choksi Vs. CIT 80 DTR 20 (Bom). In the aforesaid decision, the assessee was a stock broker and he wrote off a sum of Rs.47.58 lakhs as Bad Debt due to the breach committed by 3 members of the Bombay Stock Exchange. The claim was disallowed by the AO for the reason that under section 36(2) of the Act, a debt which is claimed as a Bad Debt ought to have been offered to tax as income in an earlier previous year since the sum written off as Bad Debt was not so offered to tax. The AO denied the claim of the assessee for deduction on account of Bad Debt. The Tribunal confirmed the action of the AO. On further appeal, the Hon'ble Bombay High Court, following the decision of Hon'ble Supreme Court in the case of Badridas Daga Vs. CIT (1958) 34 ITR 10 (SC) held that the deduction if not allowable as Bad Debt should be allowed as a business loss as the loss was incidental to carrying out of business of the assessee.

5. The CIT, however, held that the sum of Rs.2,24,000/- was admitted by the assessee in the tax audit report under section 44AB of the Act, as a sum on which TDS has not been and therefore the said sum ought to have been disallowed. The CIT directed the AO to disallow the said sum.

6. As far as the sum of Rs.50 lakhs which was advances written off in the Profit and Loss Account which is a sum forfeited by Mr. Rakesh Rastogi is concerned, the CIT was of the view that that Mr. Rakesh Rastogi had not paid any advance or incurred any expense pursuant to the MoU dated 1.5.2007. Further, under clause 7 of the MoU, there is no right for Mr. Rakesh Rastogi to forfeit the amount received

from the assessee. CIT also referred to clause 20 of the agreement which provided that Mr. Rakesh Rastogi has to refund unutilized amount out of the advance received from the assessee. The CIT referred to clause 23 of the MoU under which assessee was obliged to give further advance of Rs.50 lakh on utilization of the first instalment of the advance. Since Mr. Rakesh Rastogi has not spent any sum or paid any advance out of the first instalment of Rs.50 lakhs, there was no question of his demanding the second instalment of Rs.50 lakhs as per clause 23 of the MoU. According to the CIT, the assessee ought to have taken legal recourse and ought not to have allowed the sum to be forfeited. CIT in this regard referred to clause 24 of the MoU which provided for settlement of disputes by arbitration. For all the above reasons, the CIT came to the conclusion that the loss was not a genuine business loss. The CIT referred to the decision of the Hon'ble Karnataka High Court in the case of United Breveries Ltd., 231 ITR 456 (Karn) wherein it was held that when there was no business necessity or legal compulsion on the part of the assessee to pay certain amount, the expenditure is not admissible as deduction in terms of section 37. The CIT was also of the view that the sum cannot be claimed as a Bad Debt because the sum which was claimed as Bad Debt was not shown as income of the assessee in any previous year. For all the above reasons, the CIT directed the AO to add a sum of Rs.50 lakhs to the income of the assessee. Aggrieved by the order of the CIT, the assessee is in appeal before the Tribunal.

7. We have heard the submissions of the learned Counsel for the assessee who reiterated the stand of the assessee as put forth before the CIT. The learned DR relied on the order of the CIT.

8. We have given a very careful consideration to the rival submissions. As far as the first item of disallowance of Rs.2,24,000/- is concerned, the learned Counsel for the assessee could not point out as to why the aforesaid sum cannot be disallowed under section 40(a)(ia) of the Act. Form 3CD report clearly mentioned a sum of

Rs.2,24,000/- as the sum on which TDS was not made. The plea of the Assessee that the aforesaid sum is the sum total of all small payments made to different persons and that each of the payment was below the threshold limit of sum on which TDS has to be made as per law, has not been substantiated by the Assessee. In these circumstances, we confirm the order of CIT regarding this addition.

9. As far as the addition of Rs.50 lakhs made by the CIT in the impugned order is concerned, the conclusion of the CIT is based on the reading of the different clauses of the MoU. We are of the view that the parties are at liberty to agree on terms even contrary to the MoU dated 1.5.2007. Shri. Rakesh Rastogi forfeited a sum in question and the same was accepted by the assessee. The fact that the assessee could have disputed and challenged the action of Shri. Rakesh Rastogi in forfeiting the sum of Rs.50 lakhs and the failure of the assessee to do so cannot be the basis to conclude that there was no business necessity or legal compulsion on the part of the assessee to have allowed a sum of Rs.50 lakhs to be forfeited by Mr. Rakesh Rastogi. It cannot also be said that the advances given by the assessee to Mr. Rakesh Rastogi as not for genuine business purposes. There is no material on record to come to such conclusion. The expenditure in question has been incurred for the purpose of business as the same was paid to Mr. Rakesh Rastogi for acquiring properties in Delhi for construction of a SEZ. The assessee is in the business of property development and it cannot be said that the advance given to Mr. Rakesh Rastogi is not for the purposes of business of the assessee. The assessee is the best judge as to whether he should accept forfeiture by Mr. Rakesh Rastogi or take a legal stand for recovery of advance paid to Mr. Rakesh Rastogi. The circumstances pointed out by the CIT cannot be a ground to come to a conclusion that the advances given is not for genuine business purposes. In our view, the loss on account of forfeiture of advance paid to Mr. Rakesh Rastogi is incidental to the business of the assessee and is allowable as a deduction under section 37(1) or under section 28 of the Act as held by the Hon'ble Bombay High Court in the case of Harshad J. Choksi (supra). For the

reasons stated above, we are of the view that the CIT was in error in adding a sum of Rs.50 lakhs by the impugned order. The said addition is directed to be deleted.

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

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

Sd/-

**(CHANDRA POOJARI)**  
**Accountant Member**

Sd/-

**( N. V. VASUDEVAN)**  
**Vice President**

Bangalore.

Dated: 18.1.2021.

/NS/\*

Copy to:

- |               |               |
|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT        | 4. CIT        |
| 5. DR         | 6. Guard file |

By order

Assistant Registrar,  
ITAT, Bangalore.