

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

**ITA No. 3065/MUM/2019
Assessment Year: 2010-11**

M/s Bhoomi Construction Projects, Plot No. 8, Sector 11, Opp. Juinagar Rly. Station, Sanpada, Navi Mumbai - 400709 PAN: AAHFB9734D	Vs.	Income Tax Officer, Ward 22 (3) (1), 3 rd Floor, Tower No. 6, Vashi Railway Station Complex, Vashi, Navi Mumbai - 400703
(Appellant)		(Respondent)

**ITA No. 3091/MUM/2019
Assessment Year: 2010-11**

ITO - 28 (1) (2), Room No. 325, 3 rd Floor, Tower No. 6, Vashi Railway Station Complex, Vashi, Navi Mumbai - 400703	Vs.	M/s Bhoomi Construction Projects, Plot No. 8, Sector 11, Opp. Juinagar Rly. Station, Sanpada, Navi Mumbai - 400709 PAN: AAHFB9734D
(Appellant)		(Respondent)

Assessee by : Ms. Ritika Agarwal (AR)
Revenue by : Shri Tharian Oommen (DR)

Date of Hearing: 06/05/2021
Date of Pronouncement: 02/06/2021

ORDER

PER SAKTIJIT DEY, JM

The aforesaid cross appeals arise out of order dated 06.02.2019 of learned Commissioner of Income Tax (Appeals)-26, for the assessment year 2010-11.

2. There is a delay of 32 days in assessee's appeal. Learned counsel for the assessee, drawing our attention to delay condonation petition and the accompanying affidavit, submitted that the delay in filing the appeal was bona fide and due to reasonable cause. Hence, she prayed for condonation of delay. The learned Departmental Representative did not have any serious objection towards condoning the delay. Having considered rival submissions and perused the contents of the affidavit and delay condonation petition, we are satisfied that the delay in filing the appeal was due to reasonable cause. Accordingly, we condone the delay and admit the appeal for adjudication on merits.

ITA No. 3065/Mum/2019 (Assessee's appeal)

3. The only dispute in the present appeal is with regard to disallowance of interest expenditure amounting to Rs. 3,33,722/-.

4. Briefly the facts are, the assessee is a partnership firm and is engaged in the business of builder and developer. For the assessment year under dispute the assessee filed its return of income on 13.09.2011 declaring nil income. In course of assessment proceedings, the Assessing Officer (AO) notice that the assessee has debited interest on unsecured loan amounting to Rs. 56,69,148/- to the work in progress account. After calling upon the assessee to furnish details regarding loans taken and its utilization, the AO found that the assessee has given interest free advances to various parties amounting to Rs. 1,79,65,000/-. Whereas, the assessee is paying interest @ 12% on the borrowed. Holding that borrowed funds were not utilized for the purpose of business, the AO disallowed an amount of Rs. 37,73,700/- out of the interest expenditure by invoking the provisions of section 36(1)(iii) of the Act. The assessee contested the aforesaid disallowance before the first appellate authority. After considering the submissions of the assessee in the context of facts and material on record, learned Commissioner (Appeals) granted partial relief to the assessee by restricting the disallowing to Rs. 3,33,722/-.

Admittedly, against the aforesaid decision of the first appellate authority revenue has not preferred any appeal.

5. Before us, the learned Authorized Representative of the assessee submitted, no disallowance out of the interest expenditure can be made as the assessee has provided the interest free loans and advances out of the interest free funds available with it. To demonstrate that the interest free loans and advances were given out of interest free funds available with the assessee, learned Authorised Representative drew our attention to the ledger account, copy of bank statement and other details placed in the paper book. Thus, she submitted, the disallowance made has to be deleted. Further, she submitted, under identical facts and circumstances, the Tribunal in assessee's case in assessment years 2008-09 and 2009-10 has deleted disallowance made under section 36 (1) (iii) of the Act. In this context, she drew our attention to the observations of the Tribunal in ITA No. 1267/Mum/2013 and others dated 15.05.2015.

6. The learned Departmental Representative relied upon the observations of the AO and learned Commissioner (Appeals).

7. We have considered rival submissions and perused the material on record. As could be seen, the AO has made disallowance under section 36(1)(iii) of the Act alleging that interest free loans and advances were given to 8 parties. However, in course of appellate proceedings, learned Commissioner (Appeals) has deleted the interest disallowance made in respect of alleged interest free loans and advances to all the parties, except, Ellora Realities Pvt. Ltd. and Sarjak, considering the fact that in the remand report the AO has stated that only in respect of aforesaid two parties the assessee could not establish that these advances were for business purposes. Thus, the disallowance to the extent of Rs. 3, 33,722/- was sustained. However, from various documents placed before us including copy of ledger account, bank statements etc., we find that the interest free loans and advances given to Ellora Realities Pvt. Ltd. and Sarjak were out of interest free funds available with the assessee. No contrary evidence has been brought on record by the revenue to demonstrate

that any of part of the borrowed funds was utilized for providing interest free loans and advances to the aforesaid two parties. Therefore, when interest free loans and advances were provided out of interest free funds available with the assessee, no disallowance out of interest expenditure can be made under section 36(1)(iii) of the Act. Accordingly, we delete the disallowance of Rs. 3,33,722/-. Grounds are allowed.

In the result, appeal filed by the assessee is allowed.

ITA No. 3091/Mum/2019 (Department's appeal)

8. The only issue in dispute is concerning partial relief granted by learned Commissioner (Appeals) in the matter of addition made on account of non genuine purchases.

9. Briefly the facts are, in course of assessment proceedings, from the information received from Sales Tax Department, Govt. of Maharashtra through DGIT (Inv.), Mumbai, the AO found that purchase worth Rs. 3,53,572/- claimed to have been made from two parties are non genuine. Accordingly, treating them as bogus purchases, the AO added back to the income of the assessee. The assessee contested the aforesaid addition before learned Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and material on record, learned Commissioner (Appeals) restricted the disallowance to 12.5% of the alleged non genuine purchases.

10. We have heard the parties and perused materials on record. After considering rival submissions, we do not find any infirmity with the aforesaid decision of learned Commissioner (Appeals) due to the following reasons. As could be seen, simply relying upon certain information received from the Sales tax department the AO has treated certain purchases as non genuine and added back the entire amount. It is evident, the AO has not made proper enquiry on his own to find out the source of such purchases. It is also a fact that the AO has not disputed either the utilization of the goods purchased or the turnover of the assessee. Thus, the aforesaid facts would clearly indicate

that the doubt, if any, is only with regard to the source of purchases and not the purchase itself. In the aforesaid scenario, only the profit element embedded in the purchases alleged to be non-genuine, can be considered for addition. That being the case, the decision of learned Commissioner (Appeals) in restricting the disallowance to 12.5%, being the profit element embedded in the alleged non genuine purchases, is fair and reasonable. As regards the decision of the Hon'ble Supreme Court referred to in the grounds of appeal, on careful reading, it is found to be factually distinguishable, hence, would not apply to the facts of the present appeal. Grounds are dismissed.

11. In the result, appeal is dismissed.

12. To sum up, assessee's appeal is allowed and revenue's appeal is dismissed.

Order pronounced in the open court on 2nd June, 2021.

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 02/06/2021

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai