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IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR
BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA no.343/Nag./2015
(Assessment Year : 2011-12)

M/s. Pyramid Developers
Ward no.125, Shree Ganesh Snehal
Apartment, Shradhanandpeth
S.A. Road, Nagpur 440 010
PAN - AAFCP2753D

..... Appellant

v/s

Jt. Commissioner of Income Tax
Range-1, Nagpur

..... Respondent



ITA no.291/Nag./2015
(Assessment Year : 2011-12)

M/s. Pyramid Arcade Pvt. Ltd.
Plot no.78, Each A Classic
Opp. Indian Oil Petrol Pump
Abhyankar Nagar, Nagpur 440 010
PAN - AAFCP2753D

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle-1, Nagpur

..... Respondent

Assessee by : Shri Ajay Singh
Revenue by : Shri U.U. Kasar

Date of Hearing - 23.10.2018

Date of Order - 26.10.2018

ORDER**PER G. MANJUNATHA, A.M.**

These two appeals have been filed by the different assessees challenging separate but identical orders dated 14th July 2015 and 15th October 2015, passed by the learned Commissioner (Appeals)-I, Nagpur, for the assessment year 2011-12.

2. Since these appeals involving common issues arising out of identical set of facts and circumstances, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order.



ITA no.291/Nag./2015
Assessee's Appeal - A.Y. 2011-12

3. The assessee has raised following grounds of appeal:-

"1) That, on facts, law and circumstances of the present case, the learned CIT (A)-I, Nagpur erred in confirming the business disallowance of ₹ 43,00,000/- under section 40A(3) of the Income Tax Act, 1961, made by the learned DCIT, Circle-1, Nagpur, whereas the impugned payment (Advance) amounting to ₹ 43,00,000/- (Cash) has not been made by the appellant company during the year under consideration, the same corresponds to F.Y 2009-10 relevant to A.Y 2010-11, i.e preceding the year under appeal.

2) The learned CIT (A)-I, Nagpur has also erred in not Considering the evidences submitted before him, the merit and factual position of the case resulting in confirmation of arbitrary disallowance of the sum as mentioned in Ground No.- 1 Supra, the action and view taken by the learned CIT (A)-I, Nagpur as well as learned A.O is palpably bad and not tenable in law hence the Order passed by the learned A.O and confirmed by the learned CIT(A)-I, Nagpur, must be quashed."

2. Brief facts of the case are that the assessee is engaged in the business of land development & construction and sale of flats. A survey action under section 133A of the Income Tax Act, 1961 (for short "the Act") was carried out at the premises of the assessee on 19th January 2011. A survey action resulted into detection of incriminating documents impounded as per Annex. B-1 and B-2. Shri Gunwant Sudamrao Deopare, Director of M/s. Pyramid Arcades Pvt. Ltd., in the course of his statement recorded on oath under section 131 of the Act on 19th January 2011, in response to Questions no.12 to 16, had admitted the additional unaccounted income of ₹ 2,09,37,500.

The additional unaccounted income was declared on account of on-money received from sale of flats which has not been accounted for in the books of account. The assessee has filed its return of income for assessment year 2011-12 on 29th September 2011, declaring total income at ₹ 1,70,13,782, as against the declared income of ₹ 2,09,37,500.

3. During the course of assessment proceedings, the Assessing Officer noticed that although the assessee had admitted additional income of ₹ 2,09,37,500, only declared an income of ₹ 1,70,13,782, therefore, issued a show cause notice asking the assessee as to why the sum of ₹ 39,23,718, should not be added to his total income. In



response to the show cause notice, the learned Authorised Representative for the assessee has filed his submissions and contended that in survey what has been agreed is the total receipt during the previous year and whole of the receipts are not income. The Assessing Officer, after considering the relevant submissions of the assessee and also taking into account the declaration given during the course of survey observed that the assessee has offered additional income made on account of on-money towards sale of flats, therefore, the plea of the assessee is not tenable. Accordingly, he made addition of ₹ 39,23,718.



The Assessing Officer further noticed that the assessee has debited an amount of ₹ 2,58,86,000, to purchase account. In order to ascertain the correctness of purchases, the Assessing Officer called upon the assessee to file necessary evidences. In response, the assessee has filed copy of sale deeds of land. The Assessing Officer, on analysis of sale deeds, noticed that the assessee has made cash payment exceeding ₹ 20,000 on various dates for purchase of land in contravention of provisions of section 40A(3) of the Act. The total of such payments comes to ₹ 43 lakh. Therefore, the Assessing Officer issued show cause notice and asked the assessee as to why cash payment of ₹ 43 lakh shall not be disallowed as per the provisions of section 40A(3) of the Act. In response, the assessee has submitted

that there is a business exigencies in making cash payment and also the identity and genuineness of transportation are beyond doubt. The assessee dealt with the seller for the first time and the seller insisted for cash payment, therefore, its case falls within the ambit of rule 6DD(j) and covered by Circular no.220 of 1997, issued by the CBDT, where it was explained the business exigencies. The Assessing Officer after considering the submissions of the assessee and also on analysis of provisions of section 40A(3) of the Act and rule-6DD(j), held that as per the provisions of section 40A(3) of the Act, if any payment is made otherwise by way of account payee cheque / demand draft in excess of ₹ 20,000, then the whole amount shall be disallowed under section 40A(3) of the Act. The Assessing Officer further observed that though the assessee claimed to have covered within the provisions of rule 6DD(j) and CBDT Circular no.220 of 1997, but fact remains that the provisions of rule-6DD(j) has been omitted from statue and accordingly the circular issued by CBDT explaining the provisions of rule 6DD(j) is also omitted from the statute w.e.f. 25th July 1995. Accordingly, he made addition of ₹ 43 lakh under section 40A(3) of the Act. The Assessing Officer also made addition of penalty expenses of ₹ 1,19,230, rent of ₹ 1,98,450 under section 40(a)(ia) of the Act for failure to deduct TDS under section 194I of the Act, and also disallowed the amount of ₹ 2,57,530 towards advertisement expenses



for failure to deduct tax at source under section 194C of the Act. Aggrieved by the assessment order passed by the Assessing Officer, the assessee preferred appeal before the first appellate authority.

5. Before the learned Commissioner (Appeals), the assessee reiterated the submissions made before the Assessing Officer in respect of all additions. The learned Commissioner (Appeals), for the detailed reasons recorded in his order, dismissed the appeal filed by the assessee and confirmed the additions made by the Assessing Officer towards difference in income admitted during the course of survey, disallowance of cash payment under section 40A(3) of the Act, disallowance of penalty expenses, disallowance of rent and disallowance of advertisement expenses. Aggrieved by the order passed by the learned Commissioner (Appeals) the assessee is in further appeal before us.



6. The only issue that came up for our consideration is disallowance of cash payments of ₹ 43 lakh under section 40A(3) of the Act. The learned Counsel for assessee submitted that the learned Commissioner (Appeals) erred in not appreciating the fact in right perspective even though the assessee has filed necessary evidences to prove necessity of making cash payment for purchase of lands and also the business exigencies. The learned Counsel for assessee further submitted that

the assessee has made cash payment on Sunday being holiday, therefore, there is no option for the assessee to make payment by account payee cheque or demand draft, as the said payment has been made at the instance of buyer who insisted for cash payment. The learned Counsel for assessee further submitted that there is a business exigencies and the proviso to section 40A(3) of the Act gives exception in the cases where the business exigencies required to make payment otherwise by way of account payee cheque or demand draft and such payments are outside the purview of section 40A(3) of the Act. The learned Counsel for assessee further submitted that the impugned payments are made in the financial year different than the financial year under appeal for which necessary evidences have been placed before the learned Commissioner (Appeals). The learned Commissioner (Appeals) ignored all these evidences and confirmed the additions made by the Assessing Officer merely for the reason that no evidences have been filed. Therefore, one more opportunity may be given to the assessee to file necessary evidences before the Assessing Officer and accordingly requested for restoring the issue to the file of the Assessing Officer.

7. The learned Departmental Representative, on the other hand, strongly supported the order of the learned Commissioner (Appeals). The learned Departmental Representative further submitted that the



assessee although claimed to have made payment on Sunday failed to file any evidence justifying its claim, therefore, the learned Commissioner (Appeals) was right in rejecting the claim. The learned Departmental Representative further submitted that the assessee has taken different argument before the learned Commissioner (Appeals) to contend that the impugned payments are made in the financial year different from the financial year under appeal, but failed to file any corroborative evidence, therefore th learned Commissioner (Appeals) rightly rejected the claim of the assessee and his order should be upheld.



We have heard rival contentions and perused the material available on record. It is undisputed fact that the assessee has made cash payment in excess of ₹ 20,000 in contravention of provisions of section 40A(3) of the Act. The assessee claimed that its case comes within the purview of proviso to section 40A(3) of the Act, where it was clarified that no difference shall be made and no payment shall be deemed to be the profit and gain of business or profession under sub-section (3) where a payment made to a person in a day otherwise than by account payee cheque drawn on a bank or account payee bank draft in such cases and under such circumstances as may prescribed, having regard to the nature of banking facilities available, consideration of business expediency and other relevant factors. The

assessee claimed that it has made cash payments, as the buyer are dealing with us for the first time and are insisting for cash payment. Therefore, there is a business expediency and accordingly cash payment outside the purview of provisions of section 40A(3) of the Act.

9. Having heard both sides, we find that although the assessee claims to have made the payment on the insistence of the buyer failed to file any corroborative evidences to justify its stand, therefore, we are of the considered view that the assessee failed to make out a case of business expediency. Insofar as the payment made on Sunday is concerned, although the assessee claims that the payments are made Sunday, failed to file any evidences, therefore, we are of the considered view that the assessee failed to make out even a case of non-availability of banking facility at the place of payment and on the date of payment. Hence, we are of the considered view that the Assessing Officer was right in making additions towards cash payment under section 40A(3) of the Act. Coming back to the second argument of the assessee, the learned Authorised Representative for the assessee has taken an argument for the first time before the learned Commissioner (Appeals) that the impugned payments are made in financial year different from financial year under consideration, therefore, no additions can be made under section 40A(3) of the Act,



in respect of payments made in a year different from the assessment year under consideration, in this regard, he filed necessary details including copy of sale deeds.

10. Having considered both the parties, we find that as per the provisions of section 40A(3) of the Act, where the assessee incurs any expenditure in respect of which a payment made to a person in a day otherwise than by way of account payee cheque / demand draft in excess of ₹ 20,000, no deduction shall be allowed in respect of such expenses. In this case, the assessee claims that it has made payment in previous financial year different from the year under consideration, therefore, if at all any addition is required it can be made in a year in which the payments are made. We do not find any merit in the arguments advanced by the assessee for the reason that the year of payment is irrelevant for the purpose of disallowance of section 40A(3) of the Act and what is required is the year of claim of expenditure in the books of account. In this case, the Assessing Officer has brought out clearly the facts to the effect that the assessee has debited expenditure towards purchase of land in the year under consideration and, hence, any payment made in cash including payment made in previous financial year are coming within the ambit of section 40A(3) of the Act, when such payment has been treated as expenditure in Profit & Loss account. Therefore, we are of the considered view that



the Assessing Officer was right in making addition towards cash payment under section 40A(3) of the Act . The learned Commissioner (Appeals) after considering the relevant submissions has rightly confirmed the addition made by the Assessing Officer. Consequently, we do not find any error in the order of the learned Commissioner (Appeals) and, therefore, we are inclined to uphold the findings of the learned Commissioner (Appeals) and dismissed the grounds raised by the assessee.

11. In the result, assessee's appeal stands dismissed.

ITA no.343/Nag./2015
Assessee's Appeal - A.Y. 2011-12



The first issue that came up for our consideration from ground no.1 is disallowance of cash payment of ₹ 53,50,000 under section 40A(3) of the Act.


13. We have considered similar issue in ITA no.291/Nag./2015, in preceding paragraph. The facts involved in this appeal are identical to the facts which we have already considered in appeal being ITA no.291/Nag./2015. The reasons given by us in preceding paragraph shall mutatis mutandis apply to this appeal also and, therefore, for similar reasons, we uphold the finding of the learned Commissioner (Appeals) in confirming the disallowance of cash payment under

section 40A(3) of the Act and dismiss the ground of appeal by the assessee.

14. The second ground that came up for our consideration is disallowance of bad debt written-off of ₹ 10.50 lakh.

15. The Assessing Officer has disallowed bad debt written-off on the ground that the assessee has failed to file necessary evidences to

prove that the income pertaining to bad debt written-off in the year under consideration has been considered in the previous financial year.



According to the Assessing Officer, the assessee has not fulfilled the conditions prescribed under section 36(2) of the Act, therefore, disallowed bad debt claim of ₹ 10.50 lakh. It is the contention of the assessee that once bad debt is written-off in the books of account, it is not necessary to prove that the debt has really become bad and what is required is the debt must be written-off in its books of account and the income has been offered in previous financial year. The assessee further contended that even otherwise also, it is a business loss incurred wholly and exclusively in connection of the business which needs to be allowed under section 37 of the Act, once the assessee proved that these are normal business advances given in the course of business.

16. We have heard rival contentions and perused the material available on record. There is no dispute with regard to the fact that the assessee has claimed bad debt written-off in books of account by passing necessary journal entries by writing-off debts in the books of account. Once the debts are written-off in the books of account, it is sufficient compliance of provisions of section 36(1)(viiia) of the Act and the assessee is not required to prove that the debt become real bad during the year under consideration. This legal position has been reiterated by the Hon'ble Supreme Court in TRF Ltd. v/s CIT, 190 taxman 391 (SC), wherein the Hon'ble Supreme Court held that after 1st April 1989, it is not necessary for the assessee to establish that the debt has become irrecoverable and it is only if the bad debt is written-off as irrecoverable in the accounts of the assessee. In this case, there is no doubt with regard to the fact that the assessee has written-off the debt in the books of account. Therefore, we are of the considered view that the Assessing Officer was erred in disallowing bad debt under section 36(1)(viiia) of the Act. The learned Commissioner (Appeals) without appreciating the facts simply confirmed the addition made by the Assessing Officer. Therefore, we reverse the finding of the learned Commissioner (Appeals) on this issue and direct the Assessing Officer to delete the addition made on account of bad and doubtful debt.



17. The next issue that came up for our consideration is disallowance of brokerage and commission expenses of ₹ 7,25,390.

18. The Assessing Officer disallowed brokerage expenses of ₹ 7,25,390 on the ground that the brokerage and commission expenses claimed by the assessee is excess and unreasonable when compared to the gross receipt from the business. The Assessing Officer further observed that the assessee has claimed brokerage and commission expenses of ₹ 76,47,410, which is 7.9% of gross receipts. Accordingly,



has allowed brokerage and commission to the extent of 5% of gross receipts and balance amount has been disallowed. It is the contention of the assessee that brokerage and commission expenses is supported by valid evidences and also necessary TDS has been deducted, therefore, there is no reason for the Assessing Officer to disallow part of the brokerage expenses on the ground that it is excessive and unreasonable without bringing on record any comparable cases where the brokerage expenses is less than or equal to 5%. The assessee further contended that in the absence of any incorrectness in bills and vouchers in respect of a particular expenditure, the books of account cannot be rejected only for estimating a single expenditure.

19. Having heard both the parties and considering the material on record, we find that the Assessing Officer disallowed brokerage and commission expenses by allowing ad-hoc 5% on gross receipts without bringing on record any contrary finding in respect of books of account and bills and vouchers maintained for such expenses. On the other hand, the assessee has filed necessary evidences to prove that the brokerage has been paid by cheque and necessary TDS has been deducted on such brokerage payments. Therefore, we are of the considered view that the Assessing Officer was erred in making ad-hoc disallowance without bringing on record any contrary finding in respect of books of account and bills and vouchers. The learned Commissioner (Appeals) has accepted the fact that brokerage expenses is supported valid evidence, yet confirmed partial amount of ₹ 7,25,390 on the ground that ₹ 7,25,290, pertains to advances reflected in the Balance Sheet as liability which is pertaining to other financial years other than the year under appeal which cannot be allowed as deduction for the year under consideration. We also find that the finding of the fact recorded has not been controverted by the assessee by filing any evidence to prove that the said amount pertains to the assessment year in question. Therefore, we are of the considered view that there is no error in the finding of the learned Commissioner (Appeals), hence,



we are inclined to uphold the findings of the learned Commissioner (Appeals) and reject the ground taken by the assessee.

20. The next issue that came up for our consideration is disallowance of murum expenses, poal expenses, sand and boulder expenses of ₹ 38,07,335.

21. The Assessing Officer made addition towards expenditure incurred by rejecting the books of account on the ground that the assessee has failed to file any documentary evidence in support of such expenses and also a single entry has been passed on 31st March 2011, without any description. The Assessing Officer further observed that the said expenditure was claimed to have been incurred in cash. The Assessing Officer further stated that the assessee could not produce any bills and vouchers in support of expenditure. It is the contention of the assessee that it has furnished necessary evidence in support of murum expenses, poal expenses, sand and boulder expenses, but the Assessing Officer ignored all the evidences filed merely for the reason that the said evidences are Xerox copies of bills and vouchers. The assessee further contended that it has filed complete details of ledger account along with bills and vouchers in support of expenses, therefore, there is no reason for the Assessing



Officer to make disallowance of expenditure merely for the reason that one single entry has been passed in the books of account.

22. We have heard rival contentions and perused the material available on record. The assessee has filed a paper book containing ledger account of expenditure along with bills and vouchers in support of murum expenses, pool expenses, sand and boulder expenses. The assessee claimed that though a single entry has been passed in the books of account as on 31st March 2011, the said expenditure is supported by proper bills and vouchers, but the authorities below ignored all evidences only on the reason that a single entry has been passed at the end of the year. There is a divergent facts emerged from the orders of the lower authorities and the arguments of the assessee.

The Assessing Officer claimed that the assessee has not filed any evidence in support of expenditure. Though, the learned Commissioner (Appeals) accepted the fact that the assessee has filed xerox copy of vouchers, but went on to confirm the additions on the ground that those vouchers were not furnished before the Assessing Officer during the assessment proceedings. The assessee might not have furnished evidences before the Assessing Officer, but when said evidences were produced before the learned Commissioner (Appeals), the learned Commissioner (Appeals) ought to have commented on the evidences filed by the assessee himself or get them verified from the Assessing



Officer by calling for remand report before arriving at a conclusion that the assessee has failed to give any justification for such expenditure. Therefore, we are of the considered view that the issue needs to be re-examined by the Assessing Officer in the light of the evidences by the assessee, hence, we restore the issue to file of the Assessing Officer and direct him to cause necessary verification of bills and vouchers filed by the assessee afresh after giving a reasonable opportunity of hearing to the assessee. Accordingly, the ground raised by the assessee is allowed for statistical purposes.



23. In the result, appeal by the assessee is allowed for statistical purposes.

24. To sum up, appeal in ITA no.291/Nag./2015 is dismissed and appeal in ITA no.343/Nag./2015, is partly allowed for statistical purposes.

Order pronounced in the open Court on 26.10.2018

Sd/-
SANDEEP GOSAIN
JUDICIAL MEMBER

Sd/-
G. MANJUNATHA
ACCOUNTANT MEMBER

NAGPUR, DATED: 26.10.2018