

आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

आयकरअपील सं./ I.T.A. No.3440/Mum/2009
(निर्धारण वर्ष / Assessment Year: 2005-06)

M/s Peninsula Land Limited (previously known as Morarjee Realities Ltd.) Peninsula Spenta, 2 nd floor Mathuradas Mills Compound, Senapati Bapat Marg, Lower Parel, Mumbai-400 013	बनाम / Vs.	DCIT – 7(1), 622, Aaykar Bhavan M. K. Marg Mumbai – 400 020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AACT-5173-A		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

&

आयकरअपील सं./ I.T.A. No. 3696/Mum/2009
(निर्धारण वर्ष / Assessment Year: 2005-06)

DCIT – 7(1), 622, Aaykar Bhavan M. K. Marg Mumbai – 400 020	बनाम/ Vs.	M/s Peninsula Land Limited (previously known as Morarjee Realities Ltd.) Peninsula Spenta, 2 nd floor Mathuradas Mills Compound, Senapati Bapat Marg, Lower Parel, Mumbai-400 013
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AACT-5173-A		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Vijay Mehta - Ld. AR
Revenue by	:	Shri H. N. Singh – Ld. CIT-DR

सुनवाई की तारीख / Date of Hearing	:	05/08/2021
घोषणा की तारीख / Date of Pronouncement	:	27/10/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1.1 Aforesaid cross-appeals for Assessment Year (AY) 2005-06 arises out of the order of learned Commissioner of Income-Tax (Appeals)-VII, Mumbai [CIT(A)], dated 12/03/2009 in the matter of assessment framed by Ld. Assessing Officer (AO) u/s 143(3) on 31/12/2007.

1.2 Though the assessee has raised multiple grounds of appeal along with Form No.36, however, Ld. AR submitted that the assessee is not pressing ground nos.1,3 and also a part of ground no.2. Accordingly, these grounds stand dismissed as being *not pressed*. The remaining grounds as urged before us are as follows: -

GROUND II: DISALLOWANCE OF VARIOUS EXPENSES

1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the disallowance of various expenses, viz. Power and Fuel, Deferred Revenue Expenses, Rent, rates and taxes, Miscellaneous Expenses, to the extent of 25% as against ad-hoc disallowance made by the AO of 75%.

1.3 The grounds urged by the revenue read as under: -

1. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the profit estimated by the AO at Rs.28,01,64,768/- by observing that the percentage completion method followed consistently by the appellant cannot be rejected without appreciating the contention of the AO discussed in detail at para No. 4 of the assessment order.

2. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in directing the AO to adopt the cost of acquisition as the fair market value as on 01/04/1981 in respect of the land converted from investment in stock-in-trade at Rs.240/- per sq.ft. as against Rs.16.32 which was adopted by the assessee himself while converting the land to stock-in-trade in AY 2004-05 for a similar project.

3. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in directing the AO to adopt fair market value for the sale of land converted into stock-in-trade at Rs.1,750/- per sq.ft. as against Rs.3,000/- adopted by the AO for computation of long term capital gain disregarding the contention of the AO at para 6 of the assessment order while rejecting the valuation of the assessee.

4. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs.97.89 lakhs towards professional fees by relying on the presentation of the assessee without considering the contention of the AO at para 7.4 of the assessment order which clearly establishes that the expenditure claimed by the assessee remained unverifiable and was claimed in addition to Rs.3.34 cr. separately claimed under this head by the assessee.

5. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs.24,24,98,793/- on account of deferred revenue expenditure by holding that sec.35DDA does not prevent the assessee from claiming deduction in the case of slump sale and by relying on the decision of the Supreme Court in the case of Madras Indl. Corpn. Ltd. (225 ITR 802) without appreciating the fact that the decision of the Supreme Court is distinguishable from the facts of the assessee in as much as in the said decision there was no slump sale and the issue was regarding the discounting of debentures amortised over a number of years but claimed as a deduction whereas in the present case the assessee sold its business as slump sale alongwith assets and liabilities of its business and the addition made by the AO is as per law.

6.(a). On the facts and in the circumstances of the case and in law, the CIT(A) has erred in directing the AO to allow Long Term Capital Loss of Rs.3,66,24,370/- and also in deleting the recomputation of Long Term Capital Gain of Rs.87,07,94,630/- without appreciating the observations and analysis made by the AO clearly establishing the fact that the transactions giving rise to the losses have been concocted with a colorable intention to evade taxes.

b) On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to allow Short term capital loss of Rs.1,11,69,404/- and also deleting the recomputation of short term capital gain at Rs.3,88,75,330/- without appreciating the observations and analysis made by the AO clearly establishing the fact that the transactions giving rise to the losses have been concocted with a colorable intention to evade taxes.

C) On the facts and in the circumstances of the case and in law, the CIT(A) has erred in not appreciating the fact that the intra group series of transaction and shares and application of money suffered from want of transparency and it had obtained the blemish of colorable device and tax avoidance.

7. The appellant prays that the order of CIT(A) on the grounds be set aside and that of the AO restored. The appellant craves leave to amend or alter any ground or add a new ground that may be necessary.

2. The Ld. CIT-DR, drawing attention to the factual matrix of the case, pleaded for restoration of assessment as framed by Ld.AO. The Ld. AR, on the other hand, drawing attention to various documents as placed in the paper book, supported the impugned order. The Ld. AR also contested the disallowance of various expenses. Reliance has been placed on various judicial pronouncements, the copies of which have been placed on record. The decision of Tribunal in assessee's own case for AY 2004-05, ITA Nos.2135,2343/Mum/2009 dated 30/08/2019 has also been referred to.

3. We have carefully heard the rival submissions and perused relevant material on record including the documents placed in the paper book. We have also deliberated on various judicial pronouncements as cited during the course of hearing. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

For ease of reference, the grounds urged by the revenue could be tabulated in the following manner: -

G.Nos.	Grounds / Issue
1.	Estimation of business Profit
2. & 3.	LTCG on conversion of Land in to stock-in-trade
4.	Disallowance of professional fees
5.	Deferred revenue expenditure u/s 35DDA
6.	Computation of Capital Losses on sale of shares
7.	General in nature

The assessee being resident corporate assessee is stated to be engaged in realty business. An assessment was framed for the year u/s 143(3) on 31/12/2007 wherein the assessee was saddled with certain adjustments / additions / disallowances which is the subject matter of appeal before us. The facts as well as adjudication of the same would be as given in succeeding paragraphs.

Estimation of Business Profits

4.1 It transpired that during Assessment Year 2004-05, the assessee converted 950000 square feet of factory land into stock-in-trade. Out of this converted land, 91628 square feet of land was sold during this year and accordingly, as per the provisions of Section 45(2), the assessee computed Long-Term Capital Gains (LTCG) at Rs.585.31 Lacs and offered the same to tax. For the purpose of computation, the fair market value (FMV) of the land on the date of conversion i.e. 24/12/2003 was taken at Rs.1750/- per square feet whereas FMV as on 01/04/1981 was

taken at Rs.240/- per square feet. The proportionate indexed cost of 91628 square feet worked out to be 1018.17 Lacs as against proportionate sale consideration of Rs.1603.49 Lacs and the difference of the two i.e. Rs.585.31 Lacs was offered to tax as LTCG.

4.2 So far as the business profit on sale of premises is concerned, the assessee projected sale of Rs.579.69 Crores on super built-up area of 10,63,986 square feet. Therefore, following percentage of completion method of accounting, the assessee recognized revenue of 11% during the year as certified by the Architect. The revenue thus recognized by the assessee amounted to Rs.56.42 Crores and the same was credited to Profit & Loss Account. The aforesaid accounting methodology was stated to be in accordance with Generally Accepted Accounting principles and accounting standards issued by The Institute of Chartered Accountants of India (ICAI).

4.3 However, rejecting the aforesaid accounting methodology, Ld. AO opined that there would be three components of profits viz. (i) Long-term capital gains on sale of land upto the date of conversion; (ii) profit / loss on sale of land subsequent to conversion; (iii) profit / loss on construction of the premises.

4.4 In the above background, Ld. AO proceeded to work out profit / loss on sale of land. It was noted that average sale price of the constructed premises was Rs.5558/- per square feet and estimated average cost of construction including profit on construction activities would be Rs.750/- per square feet. The differential of the two i.e. Rs.4808/- per square feet would be the sale value of 91628 square feet of land sold during the year. The total sale value of the land would thus be Rs.4405.13 Lacs. Since the assessee reflected sale of Rs.1603.49

Lacs under the head capital gains, the remaining amount i.e. Rs.2801.64 Lacs would be the business profit on sale of land held as stock-in-trade. It was further noted the assessee recognized revenue of 11% which was Rs.56.42 Lacs against which expenses relating to construction activity and other expenses not related to business activity was debited to the Income & Expenditure Account. Therefore, Ld. AO estimated net profit rate of 15% on total sales from construction activity which would be reduced by the amount of profit determined on sale of land. The 15% of booking advances received by the assessee came to Rs.1129.98 Lacs. Since the profit on land was determined at higher figures of Rs.2801.64 Lacs, no further addition was made on this account. Aggrieved, the assessee challenged the methodology of Ld. AO in further appeal.

Appellate Proceedings

4.5 During appellate proceedings, the assessee, inter-alia, submitted that the consistent method of accounting being followed by the assessee to recognize the revenue was rejected by Ld. AO without any basis. The assessee also assailed the estimations made by Ld.AO while determining the profits.

4.6 The Ld. CIT(A) concurred with assessee's submission that it was not correct on the part of Ld. AO to estimate the profit based on agreement to sell while the actual sale had not materialized during the year and only 11% of the project was completed during the year. The assessee followed duly recognized method of accounting for revenue recognition based on percentage completion method for computing the profit of the construction project. This method was accepted by Ld. AO in the earlier assessment years. Mere agreement to sale could not be

construed as sale. Therefore, the estimation as made by Ld. AO was rejected with following observations: -

3.16. It is further noted by the undersigned that the above percentage completion method has been accepted by the AO / department in the appellants' own case in the earlier years in respect of other construction projects and also in similar other cases. During the year no sudden event has occurred to change the AO's stand. It is a fact that merely an agreement to sell cannot be construed as a sale. The AO has neither disputed the projected revenue nor the projected cost. He has not appreciated that the method followed by the appellant will get automatically substituted by the actual realization of the revenue and the cost incurred would be inclusive of land cost in the year of completion of the project. Moreover, this is a company in which the public are substantially interested and its final accounts are subject to scrutiny and approval by the shareholders in the annual general meeting: calling for full transparency before the public. Therefore ultimately there will be no revenue loss. The undersigned gives due weightage to the appellant's submission that there are only two methods for construction accounting, firstly the 'Project Completion Method' and secondly the 'Percentage Completion method'. The appellant has adopted a recognised method of accounting for offering the revenue for taxation based on the percentage completion method. The AO has not pointed out any defect therein which may warrant the rejection of the method followed. The AO has computed the profit on sale of land separately and the profit on sale of construction separately. Both of these profits are components of the same project as a whole which cannot be isolated as done by the AO. In the present case the AO has bifurcated the entire profit on this Ashok Tower project between capital gains and business income as in this case the project was taken up by converting its land held as capital assets into stock-in-trade. This has been done in conformity with the provisions of the Act which lays down that in the year of transfer the profits on sale of project to the extent of the converted value of land into stock in trade on the date of conversion would be treated as long term capital gains and the balance is to be treated as business income. The undersigned finds that there is a deemed transfer in view of the provisions of section 45(2) of the Act for the revenue recognition based on the percentage completion method. Moreover it was not fair on the part of the AO to adopt the construction cost of project at Panvel (Mansarovar Kamothe Builders & Developers Welfare Association) for estimating the construction cost of the appellant's project situated in the heart of the city, i.e. Parel and thus the comparable project was at least 50 kms away from each other and therefore the likes should be compared only with likes.

3.17. Therefore, in view of the above-mentioned observations, the undersigned is of the considered opinion that the percentage completion method followed consistently by the appellant in respect of the above Construction Project and accepted by the deptt. in earlier years, cannot be rejected and therefore the profit re-estimated by the AO at Rs 28,01,64,768/- is deleted and the same is to be substituted by the profit in accordance with the method followed by the appellant, which in this case is Rs.13.17 Crores, subject to verification of the figures by the AO.

The alternative submissions of the assessee that the FMV on the date of conversion should be uniform for computing capital gains as well as for computing business income, Ld.CIT(A) directed Ld. AO to adopt the FMV as determined by Ld.DVO. Consequently, the objection of the assessee as to estimation of profit by Ld.AO @15% was held to be non-surviving ground and accordingly, dismissed. Aggrieved as aforesaid, the revenue is in further appeal before us.

Our findings & Adjudication

5. Upon careful consideration of factual matrix, it could be gathered that the assessee converted its land into stock-in-trade and thus computed the capital gains as provided in Sec. 45(2) of the Act. The land stood converted into stock-in-trade and the assessee constructed premises / buildings on this land. During the year, the assessee entered into agreement for sale of these premises. For the purpose of revenue recognition, the assessee followed percentage completion of method of accounting. Since project was completed to the extent of 11% during the year as certified by the Architect, the assessee recognized projected revenues to that extent in its books of accounts. The said method was recognized method of accounting as per Accounting Standards issued by ICAI and this method was consistently followed in subsequent years to recognize the revenue. This method was accepted in earlier years also. Therefore, Ld. AO, in our considered opinion, was not justified in rejecting the methodology adopted by the assessee and estimating the business profits on sale of land as well as profits from construction activities separately since the land merged into the stock-in-trade and the premises including the undivided share in the land was sold to various buyers during the year. The perusal of chart placed before us

would show that finally, the project has been completed in AY 2010-11 and revenue has been recognized from AYs 2005-06 to 2010-11 based on percentage of completion method of accounting. Therefore, finding no infirmity in the impugned order on this issue, we dismiss ground no.1 of revenue's appeal.

LTCG on conversion of land into stock-in-trade

6.1 Ground nos. 2 & 3 of revenue's appeal pertain to computation of LTCG on conversion of land into stock-in-trade. As stated in para-4.1, the assessee converted 950000 square feet of factory land into stock-in-trade on 24/12/2003. Out of this converted land, 91628 square feet of land was sold during this year and accordingly, as per the provisions of Section 45(2), the gains were worked out at Rs.585.31 Lacs and offered as Long-Term Capital Gains (LTCG). For the said purpose, the fair market value (FMV) of the land on the date of conversion (24/12/2003) was taken at Rs.1750/- per square feet whereas fair market value as on 01/04/1981 was taken at Rs.240/- per square feet. The proportionate indexed cost of 91628 square feet worked out to be Rs.1018.17 Lacs as against proportionate sale consideration of Rs.1603.49 Lacs and the difference of the two i.e. Rs.585.31 Lacs was offered to tax as LTCG. The rate of Rs.1750/- per square feet was stated to be taken on the basis of valuation report dated 24/12/2003 issued by government valuer namely M/s U.D. Chande.

6.2 However, Ld. AO doubting the valuation submitted by the assessee, formed an opinion that rate of Rs.1750/- per square feet was too low considering the fact that the land was situated in Parel area where luxurious apartments and commercial malls were being constructed. Similarly, FMV of Rs.240/- as on 01/04/1981 was on higher

side. Accordingly, a reference u/s 55A was made to DVO to value the land as on 01/04/1981 as well as on the date of conversion. Till the time of receipt of report, the gains were computed by taking FMV as on 01/04/1981 at Rs.16.32 per square feet and FMV of Rs.3000/- per square feet on the date of conversion. Accordingly, Ld. AO enhanced the amount of LTCG to Rs.2679.60 Lacs.

6.3 During appellate proceedings, the assessee claimed that Ld.AO erred in disregarding the value adopted by the assessee on the basis of valuer's report and making a reference u/s 55A. No show-cause notice was issued to the assessee before rejecting the valuation report and therefore, reference was not as per law. The rate of Rs.3000/- as adopted by Ld.AO was without any basis and Ld. AO ought to have accepted the valuation report submitted by the assessee. The FMV rate of Rs.16.32 per square feet as on 01/04/1981 as taken by Ld.AO was the cost of land in the year 1934-35 and not in the year 1981 and therefore, disturbing the same, was not justified at all.

6.4 However, Ld. CIT(A) justified reference to DVO and directed Ld. AO to adopt the FMV on the date of conversion as declared by the assessee subject to revision of the same on the receipt of DVO report. Regarding valuation as on 01/04/1981, Ld. AO did not form any opinion that the FMV declared by the assessee was less than actual FMV and therefore, the same was to be taken at Rs.240/- per square feet as directed in first appellate order for AY 2004-05. Aggrieved, the revenue is in further appeal before us.

Our findings & Adjudication

7. Upon perusal of factual matrix, we find that there are two facets of the dispute i.e. FMV as on 01/04/1981 as well as FMV on 24/12/2003 i.e.

the date of conversion. The FMV, on both the dates, as adopted by the assessee is duly supported by the valuation report of registered valuers, the copies of which are on record (page nos.54 to 61 of Paper-Book). So far as the valuation as on 24/12/2003 is concerned, we find that Ld. CIT(A) has already directed Ld. AO to accept the valuation of Rs.1750/- per square feet subject to the revision of the same upon receipt of DVO's report. It was submitted by Ld. AR that the valuation report has already been received on the basis of which FMV as on 24/12/2003 may be recomputed by Ld. AO and for the same, the assessee do not have any grievance. This being so, the directions given by Ld. CIT(A), to that extent, could not be faulted with since the valuation of DVO is binding on Ld.AO. The Ld. AO is directed to re-compute the gains by taking FMV as on 24/12/2003 as valued by Ld. DVO. No further directions would be required from our side with respect to Ground No.3 of revenue's appeal and this ground becomes infructuous.

So far as valuation as on 01/04/1981 is concerned, we find that the FMV adopted by the assessee is Rs.240/- per square feet which is as per valuation made by the registered valuer. The Ld. AO has adopted the rate of Rs.16.32 per square feet on the basis that in respect of one of the land on which assessee constructs Peninsula Chamber Units II, the assessee took cost of land at Rs.16.32 per square feet as per assessment order of AY 2004-05. However, upon perusal of Assessment order of AY 2004-05 as placed on record, it could be noted that the aforesaid observation is factually incorrect. The rate of Rs.16.32 per square feet is the actual cost of acquisition and not FMV as on 01/04/1981. In fact, during assessment proceedings, the assessee sought substitution of actual cost of acquisition with FMV as on

01/04/1981 at Rs.260/- per square feet. Though Ld. AO had denied the same, however, the same was allowed in first appellate proceedings which were confirmed by the Tribunal by way of dismissal of revenue's grounds. Therefore, the rate of Rs.16.32 per square feet as taken by Ld. AO is without any basis. On the other hand, the valuation adopted by the assessee is supported by registered valuer's report.

The second aspect of the matter is that prior to 01/07/2012, no reference to DVO could be made u/s 55A where Ld. AO was of the view that FMV was less than value declared by the assessee as held by Hon'ble High Court of Bombay in **CIT V/s Puja Prints (43 Taxmann.com 247; 15/01/2014)**. It was held as under: -

7. We find that Section 55A(a) of the Act very clearly at the relevant time provided that a reference could be made to the Departmental Valuation Officer only when the value adopted by the assessee was less than the fair market value. In the present case, it is an undisputed position that the value adopted by the respondent-assessee of the property at Rs.35.99 lakhs was much more than the fair market value of Rs.6.68 lakhs even as determined by the Departmental Valuation Officer. In fact, the Assessing Officer referred the issue of valuation to the Departmental Valuation Officer only because in his view the valuation of the property as on 1981 as made by the respondent-assessee was higher than the fair market value. In the aforesaid circumstances, the invocation of Section 55A(a) of the Act is not justified.

8. The contention of the revenue that in view of the amendment to Section 55A(a) of the Act in 2012 by which the words "is less than the fair market value" is substituted by the words "is at variance with its fair market value" is clarifactory and should be given retrospective effect. This submission is in face of the fact that the 2012 amendment was made effective only from 1 July 2012. The Parliament has not given retrospective effect to the amendment. Therefore, the law to be applied in the present case is Section 55A(a) of the Act as existing during the period relevant to the Assessment Year 2006-07. At the relevant time, very clearly reference could be made to Departmental Valuation Officer only if the value declared by the assessee is in the opinion of Assessing Officer less than its fair market value.

9. The contention of the revenue that the reference to the Departmental Valuation Officer by the Assessing Officer is sustainable in view of Section 55A(a) (ii) of the Act is not acceptable. This is for the reason that Section 55A(b) of the Act very clearly states that it would apply in any other case i.e. a case not covered by Section 55A(a) of the Act. In this case, it is an undisputable position that the issue is covered by Section 55A(a) of the Act. Therefore, resort cannot be had to the residuary clause provided in Section 55A(b)(ii) of the Act. In view of the above, the CBDT Circular dated 25 November 1972 can have no application in the face of the clear position in law. This is so as the understanding of the statutory provisions by the

revenue as found in Circular issued by the CBDT is not binding upon the assessee and it is open to an assessee to contend to the contrary.

10. The contention of the revenue that the Assessing Officer is entitled to refer the issue of valuation of the property to the Departmental Valuation Officer in exercise of its power under Sections 131, 133(6) and 142(2) of the Act is entirely based upon the decision of the Guwahati High Court in *Smt. Amiya Bala Paul (supra)*. However, the Apex Court in *Smt. Amiya Bala Paul (supra)* has reversed the decision of the Guwahati High Court and held that if the power to refer any dispute with regard to the valuation of the property was already available under Sections 131(1), 136(6) and 142(2) of the Act, there was no need to specifically empower the Assessing Officer to do so in circumstances specified under Section 55A of the Act. It further held that when a specific provision under which the reference can be made to the Departmental Valuation Officer is available, there is no occasion for the Assessing Officer to invoke the general powers of enquiry.

In view of the above and particularly in view of clear provisions of law as existing during the period relevant to Assessment Year 2006-07, we are of the view that questions (a) and (b) do not raise any substantial question of law.

Viewed from any angle, the substitution of FMV as on 01/04/1981 by Ld.AO cannot be held to be in accordance with law. Therefore, finding no infirmity in the impugned order, in this respect, we dismiss ground no.2 of revenue's appeal.

Disallowance of Professional fees

8.1 The assessee claimed Rs.130.52 Lacs as professional fees which was paid to different persons / entities. Upon perusal of assessee's submissions, Ld.AO opined that the submissions do not give any picture as to the fact that the expenses were incurred wholly and exclusively for the purpose of business. Accordingly, 75% of these expenses were disallowed which came to Rs.97.89 Lacs.

8.2 During appellate proceedings, it was submitted that complete details of professional fees paid by the assessee was furnished. The fees include certification fees for representing before tax authorities, fees for limited review etc. The same being for business purposes were allowable expenditure. Concurring with the same, Ld. CIT(A) directed Ld.

AO to allow the same. Aggrieved, the revenue is in further appeal before us.

8.3 We find that the assessee has furnished name of payees, nature of expenses and the amount paid to each of them (Page no. 83 of the Paper Book). No defect has been pointed out in these details. The expenses are in the nature of certification work, management consultancy, fees for appearance before Tax Authorities, company secretarial work and these expenses are incurred for business purposes of the assessee. Therefore, no fault could be found in the impugned order deleting the estimated disallowance as made by Ld.AO. Ground No.4 stand dismissed.

Deferred revenue expenditure u/s 35DDA

9.1 In computation of income, the assessee disallowed VRS expenses amortized in books for Rs.1143.92 Lacs but claimed VRS expenses of Rs.1866.34 Lacs u/s 35DDA. The deduction was claimed @1/5th of expenditure paid in FYs 2000-01 to 2003-04. It transpired that the assessee sold its textile division under slump sale to M/s Morarjee Textiles Limited (MTL) during financial year 2003-04 and paid VRS payments to the workers of textile division. The assessee incurred deferred revenue expenditure of Rs.1702.57 Lacs (including Rs.1143.92 Lacs VRS payment). However, rejecting assessee's submission, Ld. AO denied deduction of Rs.1866.34 Lacs along with balance deferred revenue expenditure of Rs.558.65 Lacs (Rs.1702.57 Lacs less expenses already disallowed by the assessee Rs.1143.92 Lacs). The gross disallowance came to Rs.2424.98 Lacs. The detail of deferred revenue expenditure as debited by the assessee was as under: -

Particulars	Unit I	Unit II	Amount
VRS	9,17,68,906	2,26,23,774	114,392,680
GTO	6,30,117		6,30,117
Export-Quota/Trade Mark	11,90,714		11,90,714
Subscription	53,000		53,000
Professional & Legal Charges	3,82,500		3,82,500
Seagull Services	37,50,514		37,50,514
Wages	17,68,000	41,98,434	59,66,434
Ex-Gratia Wages	20,20,973	80,29,722	1,00,50,695
Ex-Gratia Salaries	2,11,849	75,000	2,86,849
PL Encashment	1,83,413	3,95,363	5,78,776
Gratuity	2,30,53,990	65,84,815	2,96,38,805
DCML-VRS			33,35,916
	12,50,13,976	4,19,07,108	17,02,57,000

9.2 During appellate proceedings, the assessee submitted that the claim was in accordance with the provisions of Sec.35DDA and the same was certified by the Tax Auditor. Concurring with the same, Ld. CIT(A) observed that Sec.35DDA does not debar the assessee to claim deduction in case of slump sale and therefore, the disallowance was to be deleted. Aggrieved, the revenue is in further appeal before us.

9.3 We find that the provisions of Sec.35DDA entitle the assessee to amortize the expenses incurred on voluntary retirement scheme and allow 1/5th of such expenditure starting from the year in which the expenditure has been incurred by the assessee. The perusal of computation of income would show that VRS expenditure has been incurred by the assessee during FYs 2000-01 to 2003-04 and the same are claimed as per the mandate of Sec.35DDA. The same has been claimed to the extent of 1/5th of expenditure incurred in earlier years. The deduction of the same has been allowed to the assessee in past assessments. Therefore, there could be no occasion to disallow the same in this year. Hence, the disallowance of Rs.1866.34 Lacs has rightly been deleted in the impugned order.

So far as the balance expenditure of Rs.558.65 Lacs is concerned, the perusal of above table would show that majority of these payments are in the nature of wages, ex-gratia payment, leave encashment, gratuity, VRS expenses etc. paid by the assessee. Upon perusal of the same, it could be seen that these are normal business liability of the assessee paid during normal conduct of the business. Therefore, these are incurred wholly and exclusively for the purpose of business and thus qualify for deduction u/s 37(1). This being so, we confirm the stand of Ld. CIT(A) in deleting the same. Ground No.5 stand dismissed.

Computation of Capital Losses

10.1 The assessee claimed short-term capital loss (STCL) on sale of equity shares of M/s Morarjee Brembana Limited (now Morarjee Textile Limited' in short 'MTL'). These shares numbering to 725286 were purchased on 29/06/2004 at Rs.15.50 per share and sold on 27/10/2004 at Re.0.10 per share which led Ld.AO to doubt the transaction.

10.2 It was explained that MTL was a 50:50 joint venture entity of The Morarjee Goculdas Spg. & Wvg.Co Ltd (now known as Peninsula Land Limited hereinafter referred to as PLL) and Manifattura Di Valle Brembana SPA, ITALY (MVB). The joint venture was funded by both the partners from time to time by way of subscription to the equity share capital / loans against equity. Later on, MVB wanted to quit from this Venture and their stake was acquired by PLL in October 2003. As per Share Purchase Agreement (SPA) dated 23/08/2003 between PLL and MVB, MVB agreed to sell the shares to PLL for an aggregate consideration of US One million Dollars. Thus, MTL turned out to be subsidiary of PLL with 99% holding thereof and one percent was with ESOP Trust. This transaction happened during financial year 2003-04.

The assessee also enclosed of valuation of shares determined by M/s Shah & Co, Chartered Accountants.

10.3 Subsequently, in FY 2003-04 only, PLL sold part of equity holding and entire preference share holding in MTL to MGM Shareholder Benefit Trust. Due to recession in the textile industry, there was huge accumulated debit balance in Profit & Loss Account of MTL as on 31/03/2003 for Rs.38.02 Crores and the value of assets of MTL diminished. Therefore, MTL formulated a proposal to rationalize the financial structure of the company and to get shares of the company listed on Stock Exchanges. Infusion of funds of Rs.15.50 Crores by issue of further 100 Lac shares at premium of Rs.5.50 per share was contemplated. The fund was to be utilized as per the scheme of arrangement u/s 391 of the Companies Act, 1956 as approved by Hon'ble Bombay High Court. Pursuant to the scheme, PLL was allotted 100 Lac shares on 20/07/2004 at Rs.15.50 per share. Thus, the holding of PLL was as under: -

- 131.51 Lacs Equity Shares of MTL were acquired from MVB at Rs.2.78 per share in October 2003.
- 100 Lacs Equity shares were acquired on 20/07/2004 pursuant to the scheme formulated by MTL at Rs.15.50 per Share

On 27/10/2004, PLL surrendered 138.76 Lacs Equity Shares @Re.0.10 per share as per the scheme approved by Hon'ble Bombay High Court. The remaining 92.75 Lacs shares were given free of cost to share holders of PLL. Accordingly, Long-Term Capital Loss (LTCL) of Rs.366.24 Lacs arose on surrender of 131.51 Lacs shares whereas there was short-term capital loss (STCL) on sale of remaining 7.25 Lacs

shares for Rs.111.69 Lacs. The same was claimed in the computation of income.

10.4 However, after considering assessee's submissions, Ld. AO alleged that fresh shares were purchased by the assessee on 29/06/2004 with full knowledge and intention of booking loss on this account. Therefore, STCL claimed by the assessee was to be disallowed. This was in the background of the fact that the assessee group adopted various practices in artificially creating a series of transactions with related parties with an intention to evade taxes and siphon away public funds. M/s Morarjee Realities Ltd. (assessee; in short MRL) booked losses of Rs.17.38 Crores by selling shares of MTL in AY 2004-05 to MGM Shareholder Benefit Trust and used the same to set-off capital gains on land. MGM Shareholder Benefit Trust booked losses of Rs.5 Crores approx. in AY 2005-06 by surrendering the shareholding in MTL which was also used to set off other capital gains. MTL issued fresh shares at Rs.15.50 per share to sole applicant i.e. MRL which were surrendered within short span of time @Re.0.10 per share. The entire transaction was structured in a way so that the assessee was benefitted by booking losses to set-off other gains. Therefore, Ld. AO proceeded to determine the fair market value of shares as surrendered by the assessee during the year. The same was computed at Rs.69.10 per share and STCL & LTCL were, accordingly, recomputed. The rate of Rs.69.10 per share was nothing but the average of 5 different prices picked by Ld. AO. Finally, as against Short-term Capital Loss (STCL) of Rs.111.69 Lacs, Ld. AO computed Short-term Capital Gain (STCG) of Rs.388.75 Lacs whereas as against Long-term Capital Loss (LTCL) of Rs.366.24 Lacs, Ld. AO computed Long-term Capital Gain (LTCG) of

Rs.8707.94 Lacs. The working of the same has been given on page-27 of the assessment order. Aggrieved, the assessee challenged the aforesaid action of Ld. AO by way of further appeal.

10.5 During appellate proceedings the assessee, inter-alia, submitted that the provisions of Sce.28 or 48 does not empower Ld. AO to substitute actual considerations received by the assessee with sale consideration computed. The consideration which never accrued or which was never received by the assessee could not be brought to tax as capital gains or business income as held by Hon'ble Apex Court in **K.P.Varghese & Co. (131 ITR 597)** and in various other decisions. The reliance of Ld. AO on the decision of **McDowells and Co.(154 ITR 148)** was out of context since the transactions, in the present case, were entered into within the framework of law and by no stretch of imagination, these could be considered as colorable device. As against this, the decision in **UOI V/s Azadi Bachao Andolan (263 ITR 703)** held that an act which was otherwise valid in law could not be treated as non-est merely on the basis of some underlying motive supposedly resulting into some economic detriment or prejudice to revenue.

10.6 Concurring with assessee's submissions, Ld.CIT(A) reversed the action of Ld. AO with following observations: -

7.13. The undersigned has carefully perused through the rival contentions. It is noted that merely on the basis of intention, a valid claim made within the four corner of the Act, cannot be disallowed unless established to the contrary. In this case the AO has not conducted any independent enquiry to prove that the above mentioned claims of capital losses were not bonafide. In the above mentioned observations, it is also noticed that the appellant has furnished pointwise replies to all the adverse comments made by the AO.

7.14. Therefore, it is held that the AO did not have sufficient reasons to conclude that the claimed capital losses were not allowable. Hence the AO is directed to allow the claim of the short term capital loss at Rs.3,66,24,370/- and the long term capital loss at Rs.1,11,69,404/- and further to delete the re-computation the long term capital gains of Rs.87,07,94,630/- and the short term capital gains of Rs.3,88,75,330/-

Aggrieved as aforesaid the revenue is in further appeal before us.

Our findings & Adjudication

11. The undisputed facts that emerges are that the assessee was holding shareholding in the joint venture entity namely MTL. The other partner expressed intention to quit from the joint venture and accordingly, his shareholding was acquired by the assessee during financial year 2003-04. A part of the holding was sold by the assessee to MGM Shareholder benefit Trust in that year.

Since MTL had accumulated losses, a restructuring plan was proposed and the assessee subscribed to additional shares @Rs.15.50 per share. The shares were subsequently listed. The Ld.AO missed the fact that the application for purchase of shares was made in June, 2004 and the scheme of arrangement was filed subsequently. Another pertinent fact to be noted is that the funds were already lying with MTL by way of advances and the same were converted into share capital since MTL was a loss making entity and could not have returned the money. The action of the assessee facilitated financial restructuring and listing of shares of MTL. The entire purpose was to infuse the funds, make the business viable, get the share listed and derive value of investment. Further, the funds were to be utilized as per the scheme of arrangement u/s 391 of the Companies Act, 1956 as approved by Hon'ble Bombay High Court. As per the approved scheme, the assessee surrendered the shares and computed capital gains thereon, as applicable. It could be seen that Ld.AO has computed average price per share at Rs.69.10 per share. The three prices of Rs.93.81, Rs.81 & Rs.146 are the rates that were prevailing after the capital restructuring involving reduction of share

capital was over which would lend support to assessee's submissions. As rightly observed by Ld. CIT(A), merely on the basis of intention, a valid claim made within the four corner of the Act, could not be disallowed unless established to the contrary. The Ld. AO has not conducted any independent enquiry to prove that the above mentioned claims of capital losses were not bona-fide or lacked credentials. Concurring with the same, we would hold that the allegations of Ld. AO and conclusion drawn there-from has no legs to stand.

We also concur that the statutory provisions do not empower Ld. AO to substitute actual consideration received by the assessee with hypothetical sale consideration. The consideration which never accrued or which was never received by the assessee could not be brought to tax as capital gains or business income.

It could further be seen that similar allegations were leveled by Ld. AO in assessment order for AY 2004-05 and few of these allegations have merely been reproduced in the assessment of this year. However, all such allegations as well as disallowances as made in AY 2004-05 stood settled in assessee's favor by the cited decision of Tribunal for AY 2004-05. We find no reason to deviate from the same.

Therefore, considering the facts and circumstances of the case, no error could be found out in the order of Ld. CIT(A) reversing the stand of Ld.AO, in this regard. This ground as well as the revenue's appeal stand dismissed.

Assessee's Appeal

12.1 The only ground urged in assessee's appeal is disallowance of following expenses: -

No.	Expenditure	Amount (Rs.)
1.	Power & Fuel	Rs.37.09 Lacs
2.	Rates, Taxes & Water Charges	Rs.31.05 Lacs
3.	Miscellaneous Expenses	Rs.64.48 Lacs

The power & fuel expenses have been disallowed by Ld. AO with the observation that the assessee claimed electricity expenses for Ashoka Towers for Rs.27.13 Lacs. The office situated at Parel was being used by other sister concerns also but the assessee did not bifurcate the expenditure amongst sister concerns. Accordingly, 75% of the expenditure was disallowed which came to Rs.27.82 Lacs.

The assessee claimed rent, rates & taxes for Rs.49.25 Lacs and suo-moto disallowed Rs.8.59 Lacs being property tax paid for Piramal chamber. It also disallowed water charges of Rs.3.16 Lacs. However, Ld. AO estimated disallowance of 75% which came to Rs.36.94 Lacs. After adjusting suo-moto disallowance of Rs.8.59 Lacs, net disallowance worked out to be Rs.28.35 Lacs.

The assessee claimed misc. expenses for Rs.64.48 Lacs and suo-moto disallowed Rs.10.40 Lacs being expenses on building /shops /others. In the absence of any evidence that the expenses were incurred for business purposes, 75% of gross expenditure was disallowed which was computed at Rs.48.37 Lacs.

12.2 During appellate proceedings, the assessee submitted that most of the sister concerns which were using the premises were the subsidiaries of the assessee and therefore, any indirect expenditure incurred by assessee related to such entities would be allowable business expenditure. These subsidiaries were dormant companies and had no substantial business activity. The assessee being the flagship company of the group had its corporate office and therefore, the expenses were

allowable. Partly concurring with the same, Ld. CIT(A) directed Id. AO to estimate the disallowance @25%. Similar estimation was made for Rent, rates & taxes as well as for miscellaneous expenses. Aggrieved, the assessee is in further appeal before us.

13. So far as the disallowance of power & fuel expenses is concerned, it is undisputed fact that the assessee is flagship company of the group and the premises was being used by various other group entities which were subsidiary of the assessee company. However, these entities were dormant entities and had no substantial business activity. Therefore, the disallowance of 25% as confirmed by Ld. CIT(A) is without any sound basis. We direct Ld. AO to delete the same.

So far as the rent, rates and taxes are concerned, the assessee has incurred expenditure of Rs.49.25 Lacs and already disallowed Rs.11.77 Lacs in the computation of income. Out of balance, Ld. CIT(A) has confirmed disallowance of 25%. Similar estimation has been made for miscellaneous expenses. Considering the nature of expenses as placed on record, the disallowance, under both the heads, is on the higher side and therefore, we reduce the same to 10%. The ground raised by the assessee stand partly allowed.

Conclusion

14. The assessee's appeal stand partly allowed. The revenue's appeal stand dismissed.

Order pronounced on 27th October, 2021.

Sd/-

(Mahavir Singh)

उपाध्यक्ष / Vice President

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 27/10/2021
Sr.PS, Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**