

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F', NEW DELHI**

Before Sh. Amit Shukla, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 766/Del/2015 : Asstt. Year : 2006-07

ITA No. 1745/Del/2013 : Asstt. Year : 2007-08

M/s Rainbow Promoters (P) Ltd., M-11, Middle Circle, Connaught Circus, New Delhi-110001	Vs	ACIT, Central Circle-23, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAACR5368R		

ITA No. 1678/Del/2013 : Asstt. Year : 2007-08

ACIT, Central Circle-23, New Delhi	Vs	M/s Rainbow Promoters (P) Ltd., M-11, Middle Circle, Connaught Circus, New Delhi-110001
(APPELLANT)		(RESPONDENT)
PAN No. AAACR5368R		

Assessee by : Sh. Piyush Kaushik, FCA &

Sh. Ajay Bhagwani, FCA

Revenue by : Sh. T. Kipgen, CIT DR

Date of Hearing: 25.11.2021

Date of Pronouncement: 15.02.2022

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the Revenue and the assessee against the orders of the Id. CIT(A)-XXXIII, New Delhi dated 18.12.2012 and 30.10.2014.

ITA No. 766/Del/2015 : A.Y. 2006-07 (Assessee)

2. The brief facts of the case are that the assessee is a part of the BPTP group and engaged in the business of land aggregation and consolidation. A search u/s 132 of the Income Tax Act, 1961 was conducted on the BPTP group and some other companies on 07.12.2010. Assessment in the case of the assessee is completed u/s 153A.

3. Against the order of the Id. CIT(A) in Appeal no.165/13-14/1316 dated 31.10.2016 appeals were filed by department as well as by assessee. The appeal of the revenue was dismissed due to low tax effect in ITA No.506/Del/2015 vide order dated 24.09.2019.

4. Ground nos. 1, 2, 2.1, 2.2, 2.3 and 4 are not pressed. The only effective ground remains relates to disallowance u/s 40A(3) of Rs.5,31,124/- u/s 40A(3).

5. The assessee has purchased land and paid part of amount in cash. The cash paid is recorded in books of accounts of assessee. The assessee has entered into collaboration agreement with M/s Countrywide Promoters Pvt. Ltd. Pursuant to which assigned development rights in land are assigned by assessee in favour of M/s Countrywide Promoters Pvt. Ltd. The assessee has received reimbursement of cost of land along with some fees for collaboration charges in lieu of assignment of development rights in land assigned to M/s Countrywide Promoters Pvt. Ltd.

6. In respect of cash payments made of Rs.26,55,623/- for acquiring land, the Assessing Officer invoked provision of Section 40A(3) and disallowed 20% amounting to Rs.5,31,124/.

7. Aggrieved the assessee filed appeal before the Id. CIT(A), who confirmed the disallowance. Being aggrieved, the assessee is in appeal before us.

8. During the course of assessment proceedings, the AO noticed that the assessee company has acquired various land from farmers and on perusal of the details of payment made by the assessee company for acquiring the land from farmers, it has been noted that assessee has made part payment of total sale consideration in cash of Rs.26,55,623/-. As the above sum was paid in cash, the AO noted that it is in contravention of provisions of section 40A (3) of the act. The assessee explained that entire expenditure was incurred for the purchase of land which was reimbursed by Countrywide Promoters private limited. The above expenditure on account of cost of land and other expenses is not debited in the profit and loss account and no expenditure incurred on purchase in cash was debited or claimed by the assessee as deduction through computation. The assessee has submitted that it is the reimbursement of the cost for the purchase of land as per the collaboration agreement. The learned assessing officer rejected the contention of the assessee. He held that above payment has been made in contravention of the provisions of section 40A (3) and is not covered by the exceptions referred to in rule 6DD of the income tax rules 1962. He therefore disallowed 20% of the above cash payment and the same was confirmed by CIT(A).

9. The Id. AR submitted that the issue in question is fully covered in favour of the assessee by the order of the Coordinate Bench of ITAT in case of Westland Developers Pvt. Ltd. in ITA No.1752/Del/2013 vide order dated 22.08.2014 for the AY 2006-07. He further submitted that this order of the Tribunal has been accepted by the Department and no appeal has been filed before the Hon'ble High Court. It was also submitted that on identical facts the order of the Westland Developers Pvt. Ltd. (supra) is followed in various cases of group companies wherein it has been held that if the expenditure has not been debited to the profit and loss account but is reimbursed by the another company, there is no claim made by the assessee as an expenditure as none of these expenditure has entered into the profit and loss account, therefore the provisions of section 40A (3) of the income tax act does not apply to the same. The assessee submitted compilation of such 38 orders passed by the coordinate benches on identical facts and circumstances in various group companies of BPTP group where addition made on account of disallowance made u/s 40A(3) is deleted following the decision in case of Westland supra

10. We have considered submissions made by the parties and perused the material made available on record. In Westland Developers Pvt. Ltd. (supra) on identical facts it was held in para 10.10 at page 29 of Tribunal order as under:

"10.10. Accordingly on a consideration of the peculiar facts and circumstances of the case and the judgments relied upon considering the relevant provision of the Act namely Section 40A(3), we hold for the detailed reasons given hereinabove that

Section 40A(3) of the Act has been wrongly invoked as admittedly no expenses relatable to the addition has been claimed and the assessee has successfully demonstrated that the payment were reimbursement made by CWPPPL. Accordingly Ground No.4 is allowed."

11. The Id. CIT DR heavily relied on the order of AO and CIT(A) and submitted that these may be followed.

12. Heard the arguments of both the parties and perused the material available on record.

13. Undoubtedly, the issue is decided by the coordinate benches in 38 cases of the group concerns where the identical disallowance under section 40A (3) of the income tax act has been deleted. On perusal of the most of the decisions, it is found that the coordinate benches have followed the decision passed by the coordinate bench in ITA No. 1752/Del/2013 dated 22.08.2014 in case of M/s West Land Developers Private Limited vs. Assistant Commissioner Of Income Tax. The learned departmental representative could not show us any reason or fresh material that why should we deviate from the orders of the coordinate benches. Even otherwise, judicial discipline, rule of consistency and rule of precedence requires that unless those orders are upset, same should be followed. Therefore respectfully following the decision of the coordinate benches, we direct the learned assessing officer to delete the disallowance as under section 40A (3) of the act of Rs.5,31,124/-. Accordingly, ground No.3 and 3.1 of the appeal of the assessee is allowed.

14. In the result, appeal of the assessee is allowed.

ITA No. 1745/Del/2013 : A.Y. : 2007-08 (Assessee)

15. The grounds are as under:

"2. That without prejudice, on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the action of the Assessing Officer in relying upon the material seized in the case of search on M/s BTP group of cases despite:-

i) that such material had no nexus/relevance with the case of the appellant and,

ii) that, the CIT(A) himself holding that such material did not belong to the appellant.

3. That on the facts and circumstances of the case and in law the CIT(A) erred in holding to quote, 'that seized documents definitely prove that interest is paid on PDC' despite

i. that the seized record on the basis of which above finding was given, even according to his own finding by the CIT(A), did not belong to the appellant and,

ii. that no enquiries were made from any of the alleged recipients of the interest and none was confronted with relevant document(s).

3.1 That the finding of the CIT(A) is based on mere surmises and conjectures without proof and corroboration by independent evidence.

3.2 That without prejudice the CIT(A) erred in upholding the addition of interest for the period for which PDC's were extended.

3.3 That without prejudice the CIT(A) erred in not quantifying the addition and instead giving ambiguous directions to compute the interest after six months from the date of sale."

ITA No. 1678/Del/2013 : A.Y. 2007-08 (Revenue)

16. The grounds are as under:

"1. On the facts and in the circumstances of the case, CIT(A) has erred in deleting the addition of Rs.7832133/- out of total addition of Rs.12533522/- made by the Assessing Officer on account of interest on PDCs paid out of books of account.

2. On the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition of Rs.1,40,90,457/- made by the Assessing Officer in view of the provisions of Section 37(1) of the Income Tax Act, 1961 on account of additional payment in violation of Stamp Duty Act, 1899"

3. On the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition of Rs.4,58,000/- made by the Assessing Officer in view of the provision of Section 2(22)(e) of the Income Tax Act, 1961 on account of deemed dividend."

17. Ground of Appeal No. 2 & 3 of the assessee and Ground of No. 1 of Revenue which are on the same issue on account of interest paid in cash outside the books of account on Post Dated Cheques (PDCs).

18. During the course of search on BPTP group on 15.11.2007, certain documents were found and seized. As per these seized documents, the Assessing Officer held that BPTP and its group companies were purchasing land by making some part payment at the time of execution and registration of sale deeds and balance payment was made through PDCs and for the period in between from the date of sale deed to the date of encashment of PDCs, interest in cash at the rate of 1.25% p.m. was being paid in cash to vendors of land outside the books of accounts.

19. In this case, assessment was completed u/s 143(3). No search was conducted on the assessee which is evident from the fact that assessment in this case is completed u/s 143(3). In the search on BPTP Ltd., certain documents were seized which belong to BPTP Ltd. and some of its group companies. However, out of seized documents, no document belonged to the assessee were found and seized as provisions of Section 153C are not invoked in case of assessee.

20. The Id. AR, at the outset of hearing, stated that issue of addition on account of interest paid on PDCs in cash outside books of accounts is fully covered by the decision of Hon'ble ITAT in case of M/s Green Valley Tower Pvt. Ltd in ITA No.1750/Del/2013 and in case of Countrywide Promoters Pvt. Ltd. In ITA no.6343/Del/13 & 6304/Del/13 dated 04/05/21 for

the AY 2007-08 under absolutely identical facts which are group companies of BPTP. The finding contained in para 9 of order in ITA no.1750/Del/2013 in case of M/s Green Valley Tower Pvt. Ltd. is reproduced as under:

"9.0 Coming to assessee's appeal for AY 2007-08, it is seen that in the assessment order, lots of seized documents are mentioned while making the addition in respect of interest paid on post dated cheques. However, nowhere has the AO stated that these seized documents belonged to the assessee. The Ld. CIT (A) has analysed all these seized documents and has given a categorical finding that none of the seized documents mentioned in assessment order belong to the assessee. It is clear from this that the AO has used documents which belonged to other assessee for making the addition in the hands of assessee. Further, the AO has neither called any of the vendors of land nor recorded any statement to arrive at the correct facts. Under such circumstances, question arises as to whether additions can be made in absence of any document/s or any adverse statement/s simply on the basis of suspicion and assumption that the assessee might have also paid interest on post dated cheques given towards purchase of land. This issue is settled by the co-ordinate bench in case of Westland Developers Pvt. Ltd. in ITA no. 1757/Del/2013 vide order dated 23.11.2015 wherein it was held by the Tribunal that in absence of any cogent, definite material which belonged to the assessee or any evidence demonstrating the payment of interest by the assessee on PDCs, reasons recorded for initiation of proceedings u/s 147 were not in consonance with law having been based on mere suppositions, surmises and extrapolation of material seized. The bench completely discarded the argument of AO and Ld. CIT (A) of common management and the assessee belonging to the same group and held that it cannot be equated with existence of incriminating seized material belonging to the assessee.

In this case also, there is no seized document found which belongs to the assessee and it is so confirmed by the Ld. CIT (A) also in his order. No statement of any vendors of land is recorded by the AO. Statement of Shri Chottu Ram is referred to although the assessee has denied to have purchased any land from Shri Chottu Ram. The statement of Shri Chottu Ram was not even provided to the assessee. In our view, the statement of Shri Chottu Ram cannot be made as the basis for taking adverse inference without the assessee even having been confronted with it. Reliance is placed on the judgment of the Hon'ble Supreme Court in M/s Andaman Timber Industries vs. Commissioner of Central Excise wherein it was held that order becomes null if based merely on statement of witness without allowing opportunity to cross examine them. None of the vendors of land and the alleged recipients of interest paid by the assessee were examined by AO who would have confirmed of having received any such interest. It is the basic principle of law that unless there is a corroborative evidence, no addition can be made in an assessment. Reliance is placed on the judgment of the Hon'ble Supreme Court in case of Dhakeshwari Cotton Mills Ltd. vs. CIT 26 ITR 775(SC), Omar Salay Mohd. Salay vs. CIT 37 ITR 151 (SC) and Lalchand Bhagat Ambica Ram vs. CIT 37 ITR 288 (SC) wherein it is held by the Hon'ble Supreme Court that there must be something more than mere suspicion in support of an assessment and mere suspicion cannot take the place for the purpose of passing an order of assessment.

9.0.1 The issue of the alleged payment of interest by the assessee is covered by the judgment of the Hon'ble Jurisdictional (Delhi) High Court in case of CIT vs. Lubtec India Ltd. reported in 311 ITR 175 (Delhi) (2009) wherein it was held by the Hon'ble Delhi High Court that where there was nothing to show that expenditure in question was in fact incurred by assessee and assessee had denied having

incurred expenditure and had contended that it did not have that kind of money, no addition on account of such expenditure could be made to assessee's income. The issue of alleged payment of interest by the assessee is also covered by the decision of Hon'ble Delhi High Court in the case of CIT vs. Ved Prakash Choudhary reported in 169 taxman 130(Delhi) (2008) wherein the addition was deleted as there was no corroborative evidence to show that there was in fact transfer of money. Accordingly, considering the facts of the case and judicial pronouncements as discussed above, the Ground nos.2 & 3 relating to addition confirmed by the Ld. CIT(A) in respect of interest paid on post-dated cheques outside the books is deleted."

21. Apart from decision of Co-ordinate Bench of ITAT, the issue of PDC interest as contested in assessee's appeal is also squarely covered in assessee's favour in case of another group company in ACIT vs. M/s Countrywide Promoters Pvt. Ltd. in cross appeals for AY 2007-08 in ITA No. 6343/Del/13 & 6304/Del/13 dated 04.05.2021 wherein by following the decision of Green Valley Tower (supra) similar addition on account of interest paid on PDCs in cash outside books of account was deleted.

22. The Id. CIT DR heavily relied on the order of AO and submitted that during the course of search lot of seized documents of several other assessee were found and seized which shows payment of interest on PDCs. Accordingly, as this company also belong to same group might have paid interest on PDCs. Accordingly, order of AO may be followed.

23. Heard the arguments of both the parties and perused the material available on record.

24. Undoubtedly, the issue is decided by the coordinate benches in cases of the group concerns where the identical addition made on account of PDCs Interest has been deleted on similar facts. The Id. DR was unable to bring on record any fresh evidence or material to show us any valid and justifiable reason to deviate from the earlier orders of the coordinate benches as discussed above. The judicial discipline, rule of consistency and rule of precedence requires that unless those orders on same facts in case of other group companies are upset or facts are different or any fresh material or any evidence is brought on record to deviate from earlier decisions, same should be followed. Therefore respectfully following the decision of the coordinate benches, we direct the learned assessing officer to delete the whole addition on account of PDC Interest of Rs.1,25,33,522/-.

25. Accordingly, Ground of Appeal No.2 and 3 in respect of appeal of the assessee is allowed and Ground of Appeal No.1 of the Revenue is dismissed.

26. Ground of Appeal No.2 of Revenue in respect of addition on account of disallowance of Additional Payment made by the Assessing Officer of Rs.1,40,90,457/- in view of the provisions of Section 37(1) of the Income Tax Act, 1961 on the basis of violation of Stamp Duty Act, 1899.

27. Additional payment is payment made to the seller of land or any of his relative or any other party post registration of sale deed to avoid litigation and to take peaceful possession etc. The Assessing Officer made disallowance of Additional payment

made by the assessee of Rs.1,40,90,457/- that it is hit by Explanation to Section 37 of IT Act as there is violation of provision of Stamp Duty Act. The assessee challenged this before the Id. CIT(A) that the deduction in respect of Additional payment having not been claimed by the appellant, no disallowance could be made. The Id. CIT(A) did not accept this contention viz., that the assessee having not claimed the deduction, no disallowance could be made. The assessee also took plea that there is no violation of provisions of stamp duty Act as payment of Additional Payment is subsequent to registration of sale deed. Thus, provisions of Section 37(1) or its explanation are not applicable to instant case. The Id. CIT(A) gave his finding in para 6.3.7 and held that there is no violation of provisions of Stamp Duty Act and provisions of Explanation to Section 37(1) of Income Tax Act, 1961 are not applicable in instant case. He however, gave certain directions to quantify the disallowance to be made. As per these directions while giving appeal effect the whole disallowance of Rs.1,40,90,457/- was deleted.

28. The Id. AR submitted that the issue in question is fully covered in favour of the assessee by the order of the Coordinate Bench of ITAT in case of Westland Developers Pvt. Ltd in ITA No.1752/Del/2013 vide order dated 22.08.2014 for the AY 2006-07. He further submitted that this order of the Tribunal has been accepted by the Department and no appeal has been filed before the Hon'ble High Court. It was also submitted that on identical facts the order of the Westland Developers Pvt. Ltd. (supra) is followed in more than 30 cases of group companies wherein it has been held that there can be no disallowance in

respect of additional payment if no deduction was claimed either by debiting to Profit and Loss account or through computation. The assessee submitted compilation of 30 orders passed by various Co-ordinate Benches on identical facts and circumstances in various group companies of BPTP group where addition made on account of disallowance of additional payment made by the assessing officer was deleted following the decision in case of Westland Developers Pvt. Ltd (supra).

29. The Id. AR submitted that similar issue is also decided by Hon'ble jurisdictional Delhi High Court in case of another group company viz. Vasundara Promoters Pvt. Ltd in ITA No.211/2018 vide order dated 14.05.2018. The Hon'ble High Court held as under which is reproduced as:

"The second question of law urged is with respect to the payment of Rs.1,05,86,958/- made by the assessee to the farmer/owners of the agricultural land from whom the land was purchased. It is contended by the Revenue that the ITAT ought not to have gone by the fact that the amount was routed from the books of account and included in the principle loss or that separate amount was used for that purpose. It was submitted that the amounts in fact constituted flagrant violation of law in as much as the provisions of the Stamp Act and other connected laws were sought to be evaded by the sale deed. This Court is of the opinion that the broad interpretation of the Explanation to Section 37(1) of the Act given by the Revenue is in the circumstances of this case not well founded. The other submission is that the such amount has to be taken as falling within the mischief of the said provision, in our opinion, is an incorrect premise. It is not every alleged violation of law, but such violation as results in a penal consequence. determined by that law, which is

attracted by Section 37(1). The other interpretation would confer jurisdiction on matters beyond the Income Tax Act. The revenue authorities do not have such powers. Revenue Authority argued that this is to decide what constitutes infraction of other provisions of law. No question of law arises, therefore, on this issue"

30. The Id. CIT DR heavily relied on the order of AO and submitted that it may be followed.

31. Heard the arguments of both the parties and perused the material available on record.

32. Undoubtedly, the issue is decided by the Co-ordinate Benches in almost 30 cases of the group concerns. Further, the appeal of department stands dismissed by Hon'ble Delhi High Court in case of one of Group Company of assessee on identical facts in case of Vasundhra Promoters Pvt. Ltd. (supra) wherein the identical addition made on account of disallowance of additional payment has been dismissed. Considering most of the decisions of ITAT, it is found that Co-ordinate Benches have followed the decisions of ITAT in ITA No. 1752/del/2013 dated 22.08.2014 in the case of M/s West Land Developers Pvt. Ltd. vs. ACIT. The Id. CIT DR could not show us any reason or fresh material that why earlier decisions of the coordinate benches should not be followed. Considering judicial discipline, rule of consistency and rule of precedence which requires that unless those orders are upset or reversed at later stage or something fresh is brought on record which necessitate for different view to be taken however which is not the case, earlier decisions of coordinate benches should be followed. Therefore respectfully following the decision of the coordinate benches and Hon'ble

Delhi High Court decision on this issue, Ground No. 2 of the Revenue's appeal is dismissed.

33. Ground No. 3 of Revenue appeal in respect of addition of Rs.4,58,000/- made by the AO on account of deemed dividend under section 2(22)(e) of the Income Tax Act, 1961 in respect of amounts received by the assessee from some of its group company where Mr. Kabul Chawla held substantial shareholding in assessee as well as payer companies.

34. The Id. AR submitted that the assessee is not a shareholder of companies who paid loan / advance to the assessee which is treated as deemed dividend by the AO. As dividend is to be received by shareholders only and considering the fact that the assessee is not shareholder of payer group companies who paid loan / advance to the assessee, amount received cannot be treated as deemed dividend in the hands of the assessee. This issue is squarely covered by the decision of the Hon'ble High Court of Delhi in CIT vs. M/s Ankitech Pvt. Ltd. 11 Taxmann.com 100 (Delhi) vide order dated 11.5.2011 wherein also on similar facts, similar addition made on account of deemed dividend in the hands of non-shareholders was deleted.

35. The Id. CIT DR requested that order of AO on this issue should be followed.

36. We have gone through submission of Id. AR as well as Id. CIT DR on this issue. As the assessee is not share holder of payer group companies who paid loan / advance to the assessee and considering the legal position that dividend is to be received by shareholder only, the amount received by the

assessee is not to be treated as deemed dividend in the hands of assessee. Moreover, this view is fully supported by decision of the Hon'ble Delhi High Court in case of CIT vs. M/s Ankitech Pvt. Ltd.

37. Accordingly, this ground of appeal no. 3 in respect of addition on account of deemed dividend raised by the Revenue is dismissed.

38. In the result, the appeals of the Revenue are dismissed and the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 15/02/2022.

Sd/-

(Amit Shukla)
Judicial Member

Dated: 15/02/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

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

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR