IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI AMARJIT SINGH, JM

ITA No. 86/Mum/2021
(Assessment Year 2017-18)

M/s Neelkamal Realtors Suburban Pvt. Ltd. DB House, Gen. A.K. Vaidya Marg, Yashodham, Goregaon (E), Mumbai-400 063	Vs.	The Asst. Commissioner of Income Tax, Central Circle-1(4), Room No. 902, 9th Floor, Pratishtha Bhavan, Old CGO Building Annexe, Mumbai-400 020
(Appellant)		**(Respondent)**
PAN No. AAACCN1892N		

Assessee by	:	Shri Siddharth Kothari, CA
Revenue by	:	Shri C.T. Mathews, DR

Date of hearing:	19.04.2022
Date of pronouncement :	28.04.2022

O R D E R

PER PRASHANT MAHARISHI, AM:

01. This appeal is field by the assessee against the order of the Commissioner of Income Tax (Appeals)-47, Mumbai [the learned CIT (A)] dated 14 September 2020 for Assessment Year 2017-18.

02. The assessee has raised the following three grounds of appeal.

"1. On the facts and circumstances of the case and in law, the learned CIT(A) erred in confirming AO's

action of making addition of ₹40157/- in respect of alleged untraceable credits in bank by invoking the provisions of section 68 of the Income Tax Act, 1961.

2. On the facts and circumstances of the appellant's case and in law, the Ld. CIT(A) erred in confirming the AO's action of disallowing a sum of ₹44,651/- under section 37(1) in respect of interest paid on delayed payments of service Tax, Provident Fund and VAT.

3. on the facts and the circumstances of the appellant's case and in law, the Learned. CIT(A) erred in confirming AO's action of disallowing a sum of ₹9,26,837/- on account of provisions for TDR."

03. The brief fact of the case shows that the assessee is a company engaged in the business of Real estate development and construction of residential cum commercial project at Dahisar. The assessee is in the business of construction of real estate and is following a percentage completion method for income-tax return. The assessee filed its return of income on 30 October 2017 declaring total income at Rs. Nil. The case of the assessee was picked up for scrutiny and necessary notices were issued. The learned Assessing Officer passed an assessment order under section 143(3) of the income-tax Act, 1961 (the Act) on 25th December, 2019, wherein following three additions were made:-

i. Interest on delayed payment of ₹44,651/-

ii. Unexplained cash credit under section 68 of the Act of ₹40,157/-

iii. (iii) Provision for Transferable Development Rights (TDRs) claimed as an expenditure of ₹9,26,837/-.

04. Aggrieved by the order of the learned Assessing Officer the assessee preferred the appeal before the learned CIT (A), which was dismissed, and therefore, the assessee is in appeal before us.

05. We find that the appeal is delayed by above 56 days. The fact shows that the CIT (A) passed an order on 14 September 2020. The assessee submits that it did not receive any communication. Order was uploaded on 28 January 2021. As soon as the order was available, assessee filed an appeal on 1 February 2021. As the time limit for filing of the appeal expired on 6 December 2020, the appeal was delayed by 56 days. The assessee submits that the delay caused is for sufficient reason. It is also supported by the affidavit. In view of this delay in filing of the appeal is condoned.

06. The first ground of appeal is with respect to addition of ₹40,157/-. The fact of the case shows that assessee has shown untraceable credit in the bank account of ₹12,19,155/- which include at an amount of ₹5,98,988/- which is already taxed under section 68 of the Act in Assessment Year 2016-17. Therefore, the assessee was

asked to show that why balance amount of ₹6,20,157/- should not be taxed under section 68 of the Act for this year. The assessee submitted that it represents various amount received from allottees towards various charges as well as service tax and VAT liability. It was stated that as assessee is showing revenue recognition on percentage completion method, revenue is recognized based on percentage of work and therefore there is no relevance of such entries in the bank account. Further assessee submitted that out of total of ₹6,20,157/- a sum of ₹5,80,000/- is traced and credited to respective allottees accounts. Further, ₹40,157/-, assessee was in communication with the bank. Therefore, the learned Assessing Officer made an addition of ₹40,157/- under section 68 of the Act. The learned CIT (A) vide Para no.5.1.1 confirmed these additions affirming the reasons given by the learned Assessing Officer. Therefore, this is challenged before us as per ground no. 1 of the appeal.

07. We have heard the rival parties. We find that assessee has shown untraceable credit entries in the bank account as a separate item. Such is the amount shown under the head Sundry debtors (others) having the credit items. Before us, it is shown that the entry dated 30 September 2016 is a TDS receivable for Assessment Year 2015-16 amounting to ₹40,157/- which has been taxed under section 68 of the Act by the learned Assessing Officer. Looking at the details placed at the page 89 of the Paper Book, we find that the same entry relates to TDS credit

receivable for Assessment Year 2015-16 amounting to ₹40,157/-. In view of the above facts, we find that the same amount cannot be added under section 68 of the Act. However, as same amount is related to credit received in the bank account, we direct the learned Assessing Officer to verify that whether any interest component is involved in it or not. If there is any interest component, it may be taxed; the balance amount is not chargeable to tax. Accordingly, we direct the Assessing Officer to delete the addition of ₹40,157/- and only tax interest component, if any. In the result, the ground no.1 of the appeal is allowed.

08. Ground no. 2 is with respect to disallowance of ₹44,651/- under section 37(1) of the Act in respect of delayed payment of service tax, provident fund, and VAT. During previous year assessee paid interest on delayed payment of service tax amounting to ₹1590/-, Interest on delayed payment of provident fund of ₹15,934/- and interest on VAT of ₹27,127/-. The assessee explained that this interest is compensatory in nature and therefore the same is allowable as expenditure. The learned Assessing Officer held that such payment is penal in nature and therefore disallowable. The learned CIT (A) confirmed the disallowance by affirming the reasons given by the learned Assessing Officer.

09. We have carefully considered the rival conditions. We find that identical issue has been decided by the co-ordinate

Bench in case of Emdee Digitronics Pvt. Ltd Vs. PCIT in ITA No. 361/Kol/2019 dated 28th June, 2019, wherein the co-ordinate Bench in Para No.12 relying on the decision of M/s Naaraayani Sons Pvt. Limited, in ITA No. 1796-1798/Kol/2017, order dated 21.08.2018 held that interest expense on late deposit of VAT, service tax, TDS etc are allowable expenditure under section 37(1) of the Act. In view of the above fact, respectfully following the decision of Kolkata Bench of ITAT, we hold that such expenses are not disallowable under section 37(1) of the Act. Further, VAT laws, provident laws and service tax laws clearly provide for payment of interest if there is a delay in payment of fees. Therefore, it is apparent that those respective laws allowed the belated payment along with interest. Therefore, those are not affected by explanation–1 to section 37(1) of the Act. In view of this ground no. 2 of the appeal is allowed.

010. The ground no. 3 is with respect to disallowance of provision of ₹9,26,837/- made in respect of purchase of TDRs. Fact shows that assessee has shown ₹6,08,67,000/- as provision for purchase of Transferable Development Rights. According to the assessee, it is an accrued liability and since the assessee is following percentage completion method, out of the total of ₹6,08,67,000/- as sum of ₹4,08,22,351/- has already been allowed as deduction in computing profits of the business up to 31st March, 2015. Applying the same percentage completion method for this year a sum of ₹9,26,837/- is claimed as deduction.

Assessee also submitted working of the same. The learned Assessing Officer disallowed the same stating that assessee has made provision of probable future purchase and the amount has not actually been incurred. On appeal before the learned CIT (A), the assessee reiterated same submission; the learned CIT (A) noted that since the Transferable Development Rights was first provided in Assessment Year 2009-10 and the same is claimed as deduction on provision basis is not allowable as deduction.

011. The learned Authorised Representative referred to Paper Book page no. 92 to 98 to show provisions made on base of percentage completion method. He further submitted that these appeal is pertaining to Assessment Year 2017-18 where for Assessment Year 2016-17, the learned CIT(A) as per detailed order dated 12th December, 2019 vide paragraph no. 22 onwards, following the decision of Co-ordinate Bench in DCIT vs. Rajgir Builders (1999) 70 ITD 226 and in Persepolis Construction Co. (P). Ltd. vs. Addl. CIT (2006) 99 TTJ 92 (Mumbai) has held that cost of transferable development rights is an accrued fastened liability and not a contingent liability. Therefore, he submitted that as such claim is allowed to the assessee since 2009-10 it should be allowed.

012. The learned Departmental Representative supported the order of the learned Assessing Officer and learned Commissioner of Income tax (Appeals).

013. We have carefully considered the rival contention and find that assessee company is engaged in developing real estate projects comprising of ₹1,65,138/- sq. mt. saleable area. For construction of this area, the permissible floor space index of the land is ₹1,63,604/- sq. mt. and therefore company is required to own FSI by purchasing transferable development rights. The assessee provided for cost of transferable development rights amounting to ₹6, 08, 67,000/-. The detail working of this TDR is given at page no. 92 of the Paper Book. At page no. 93 of the Paper Book, assessee has estimated the cost of the TDR considering the rate of TDR at ₹3083/– per sq. ft. up to 31st March, 2016, 90.27% of the area has been sold and assessee has already recognized TDR cost of ₹4,08,22,351/-. For this year, assessee has claimed a provision of ₹9,26,837/- on the basis of percentage of area sold. Therefore, it is apparent that the cost of the TDR is ascertained and liability related to the area sold by the assessee required to be provided, when income offered for taxation. Further, the assessee is claiming deduction since 2009-10 and has already been allowed deduction on the same methodology amounting to ₹4,08,22,351/- up to 31st March 2015. We do not find any reason to disturb it. Even otherwise, in percentage completion method the Revenue is recognized based on percentage of work completed and therefore all probable expenditure up to that percentage level are to be recognized as expenditure. In view of this, we reverse

orders of the lower authorities and direct learned Assessing Officer to delete the disallowance of ₹9,26,837/- on account of TDR. Thus, ground no. 3 of the appeal is allowed.

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

Order pronounced in the open court on 28.04.2022.

Sd/-
(AMARJIT SINGH)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 28.04.2022
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai