

आयकर अपीलिय अधिकरण, 'ए' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 1843/Chny/2015
(निर्धारण वर्ष / Assessment Year: 2012-13)

ACIT Corporate Circle 4(2), Chennai 600 034.	बनाम/ Vs.	M/s. KDH Properties Pvt. Ltd., KGN Towers, 9 th Floor,62, New Number, Ethiraj Salai, Egmore, Chennai – 600 034.
स्थायी लेखा सं./जीआइ आर सं./ PAN/GIR No. AACCK-6839-N		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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M/s. KDH Properties Pvt. Ltd., KGN Towers, 9 th Floor,62, New Number, Ethiraj Salai, Egmore, Chennai – 600 034.	बनाम/ Vs.	DCIT Corporate Circle 4(2), Chennai.
स्थायी लेखा सं./जीआइ आर सं./ PAN/GIR No. AACCK-6839-N		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओरसे/ Appellant by	:	None
प्रत्यर्थी की ओरसे/ Respondent by	:	Shri AR V Sreenivasan, Addl. CIT

सुनवाई की तारीख/ Date of Hearing	:	08.06.2022
घोषणा की तारीख / Date of Pronouncement	:	08.07.2022

आदेश / O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

These cross appeals, one by assessee and one by Revenue are arising out of the order of Commissioner of Income Tax (Appeals)-8, Chennai in appeal no. 186/15-16 order dated 12.06.2015. Assessment was framed by DCIT, Corporate Circle 4(2), Chennai vide AY 2012-13 u/s. 143(3) of the Income-tax Act, 1961 (herein after referred to as 'the Act') vide order dated 31.03.2015.

2. At the outset it is noticed that the appeals were filed in 2015 and these are marked as old appeal prior to 6 years filed by assessee and Revenue. These files came up for hearing almost 59 times and finally at 60th time this matter was heard *exparte quo assessee* for the reason that despite so many fixations, assessee did not attend and even the notices were served by the assessee. Except on few occasions one Mr. G.P. Mehta, CA appeared and he also asked for adjournment only on one pretext or the other. Hence, we have proceeded to hear these appeals *exparte quo assessee* and will decide on merits.

3. The first issue in this appeal of Revenue is as regards to the order of the CIT(A) deleting the additions made by AO by adding the recasted

value of closing stock. For this Revenue has raised following ground no.

2.1 to 2.3 which is reproduced as under:

"2.1. The learned CIT(A) erred in allowing the claim of the assessee that it had correctly valued the closing stock.

2.2. The learned CIT(A) failed to appreciate that value determined by the AO in respect of value of closing stock was based on facts and as per accounting principles.

2.3. The learned CIT(A) also failed to distinguish the facts of the case in the case of M/s Apollo Tyres, reported in 255 1TR 273(SC) and the assessee's case. In the former's case, only limited adjustments can be made while determining the book profit u/s 115J of the I.T. Act but in the assessee's case, the AO has correctly determined the value of closing stock as per accounting principles and as per the provisions of the I.T. Act."

4. The brief facts are that the assessee is engaged in property development business during the financial year 2011-12 relevant to assessment year 2012-13. The Assessing Officer during the course of assessment proceedings noted that 63,042 sq.ft. of area is not for sale as stated by assessee and it has to be allocated to the concerned parties. The Assessing Officer taking the findings of Hon'ble Madras High Court has accepted vide Memorandum of compromise dated 15.02.2001, which was upheld by Hon'ble Madras High Court vide order dated 15.12.2006 and 28.08.2008. The AO noted that this area due to respective allottees, the assessee has recovered a part of construction and reduced it from the cost of construction and accordingly assessee company is legally protected to recover the money spent towards the development of KGN towers. The Assessing Officer recomputed the income from construction and sale of property after considering this area of 64,978 sq.ft. as

opening balance and computed net profit at Rs. 6,14,13,736/- by noting as under:

"(viii) Hence the assessee's income from construction and sale of property is arrived as under:

<i>Particulars</i>	<i>Amount</i>	<i>Price Per Sq.ft</i>	<i>Sq.ft</i>	<i>Particulars</i>	<i>Amount</i>	<i>Price Per sq.ft.</i>	<i>Sq.ft</i>
<i>To opening balance</i>	<i>28,64,49,024</i>		<i>64,978</i>	<i>By Sales</i>	<i>30,60,84,600</i>	<i>8686</i>	<i>35,237</i>
<i>To Direct expenses</i>	<i>2,35,08,357</i>			<i>By Closing Balance</i>	<i>14,18,64,570</i>	<i>4770</i>	<i>29,741</i>
<i>To Gross Profit</i>	<i>13,79,91,789</i>						
	<i>44,79,49,170</i>		<i>64,978</i>		<i>44,79,49,170</i>		<i>64,978</i>

From the above chart showing the P&L account it can be seen that the net profit works out to Rs. 6,14,13,736/-. The same is adopted as income from business."

Aggrieved, assessee preferred appeal before the CIT(A).

5. The CIT(A) deleted the addition after considering the submissions of the assessee that this amount of Rs. 6,14,13,736/- was considered in financial year 2010-11 relevant to assessment year 2011-12 and gross profit was worked out at Rs. 13,79,91,789/- and that year is under appeal. The assessee before CIT(A) contended that the CIT(A) in assessment year 2011-12 in ITA 1706/13-14 order dated 23.03.2015 deleted the addition made at Rs. 16,52,72,766/- by considering the same area taking at closing stock and relevant findings of CIT(A) is reproduced as under:

"Para 6,29:- "In view of the above discussion, the AO's action in ignoring entire cost of construction as discussed above and calculation of the closing stock by taking the entire super built up area of the property of 1,28,373 sq.ft. and consequent determination of closing stock based on the same in the recasted

profit and loss account for the period 01.04.2010 to 31.03.2011 does not appear to be logically tenable or correct even from the accounting point of view as the whole cost of development incurred for the project was attributable to the area belonging to the assessee company alone in as much as, but for the construction and completion of the whole building the assessee company could not have bettered its rights, title and interest in the property and recover the cost incurred on acquisition from M/s. RBF Nidhi Ltd. and other allottees, as correctly contended by the AR.

Para 6.30:- The AO has all along not been able to appreciate the basic fact as pointed out earlier that area entitlement of allottees in the constructed building KGN Towers' had already been determined as per the Memorandum of Compromise and regardless that the allottees / creditors were put in possession or not of their share of area owned by them of 63,442 sq.ft., under no circumstances could that area belonging to the allottees be considered as appellant company's own stock and consequently, therefore could not have formed part of its closing stock.

Para 6.31;-Therefore to sum up, as stated earlier, the AO has nowhere conclusively established that any amount has been received on account of the property from the allottees in pursuance to the said Memorandum of Compromise except, in the case of KDH Investments Ltd. alone wherein amount was recovered Rs. 3,000/- per sq.ft. for an area of 6520 sq.ft. allotted to it. Therefore his making an addition of Rs. 16,52,72,766/- largely relying on a statement recorded of the erstwhile Director, Shri Murugappan without admittedly providing a copy of the same and without providing an adequate and reasonable opportunity of cross examination or even of being heard which, as already discussed and held above, was not a proper course of action besides being against natural justice and due process thereby calling into question the evidentiary nature of the same besides vitiating in substantial measure the assessment framed on the basis of the same and in adopting an arbitrary and hypothetical book version which flies in the face of normal accounting principles particularly relating to cost of construction and valuation of closing stock of the building/ project undertaken by the assessee following project completion method of accounting in recognizing revenue, appears erroneous and contrary to the factual matrix of the appellant's case."

After considering all these, the CIT(A) deleted the addition because the same addition was considered as closing stock for financial year 2010-11 relevant to assessment year 2011-12 by observing as under:

"6.4 The addition of the gross profits of Rs.6,1,13,736/- arrived at for the instant assessment year as a result of the recasting of the P&L Account done during the earlier assessment year i.e. AY 2011-12, following the same reasoning therein, which was rejected as legally untenable and also illogical and unwarranted even from the accounting stand point for the detailed

reasonings as extracted from the AR's submissions at the foregoing para 6.2, the addition made of Rs.6,14,13,736/- is directed to be deleted and. the AO is directed to retain the profit and loss account as determined by the assessee instead of the recasted figures adopted by him resulting in inflated gross profit of Rs.6,14,13,736/- as against loss of Rs.5,76,90,707/- returned by the assessee, This ground is therefore allowed."

Aggrieved, now Revenue is in appeal before us.

6. We have heard Ld. Sr. DR and gone through the facts and circumstances of the case. Before us, Ld. Sr. DR only made submission that he is not aware of the fate of the CIT(A) order for AY 2011-12 in ITA No. 1706/13-14 order dated 23.03.2015 and in case the addition there is sustained and has no objection in deleting the addition but if the re-casted closing stock in that year is deleted this addition has same way to be treated. We also noted that the CIT(A) has deleted the addition on the basis that the same was considered in the re-casted profit and loss account of earlier assessment year i.e., AY 2011-12 and hence he deleted the addition. We find no infirmity in the order of CIT(A) but in case the addition is deleted in AY 2011-12 and that re-casted profit and loss on account of valuation of closing stock is made and that addition is deleted on same reasoning, that this year the issue has to be dealt with on merits. In view of the above, we remand this matter back to the file of the AO for verification whether this addition is already considered in AY 2011-12 while making addition by the AO at Rs. 16,52,72,766/-. In case that addition is deleted on merits, the AO will verify and accordingly

decide the issue afresh after confronting to the assessee. This issue of the Revenue appeal is allowed for statistical purposes.

7. The second issue in the Revenue appeal is as regards to deleting of addition by CIT(A) on notional interest of Rs. 3,38,44,134/-. For this Revenue has raised following ground no. 3.1 & 3.2 as under:

"3.1 The learned CIT(A) erred in deleting the addition of Rs. 3,38,44,134/- on account of 'notional interest' on interest bearing funds advanced for non-business purposes interest free

3.2 The learned CIT(A) failed to appreciate the fact that the assessee has not explained any commercial expediency for giving interest free loans."

8. We have heard Ld SR. DR and gone through the facts and circumstances of the case. We noted that the AO disallowed interest expenses u/s. 36(1)(iii) of the Act for the reasoning that the assessee has obtained the short term loan from KDH Investments Pvt. Ltd @ 24% annual interest and given advances to the related parti Saba Khan at Rs. 1,25,50,000/- without charging any interest. Therefore, the interest paid at Rs. 30,12,200/- was disallowed.

9. Similarly, the AO also disallowed the interest on advances on sum of Rs. 6,81,44,749/- and another advances at Rs. 6,44,88,309/- being interest of Rs. 1,63,54,740/- and interest at Rs. 1,54,77,194/-. The interest bearing loans were obtained @ 24% and advances were given without interest. Accordingly, the AO disallowed the sum of Rs.

3,38,44,134/- . Aggrieved, assessee preferred appeal before CIT(A). The CIT(A) deleted the addition by observing that the assessee's interest free funds are to the tune of Rs. 10,54,40,323/- which are as under:

<i>Long Term borrowings (interest free)</i>	<i>96,48,900</i>
<i>Short Term borrowings (interest free)</i>	<i>3,50,46,348</i>
<i>Unpaid creditors for acquisitions</i>	<i>1,75,50,000</i>
<i>Advance of office space from customers (Unearmarked)</i>	<i>2,65,00,000</i>
<i>Rental receipts</i>	<i>1,67,95,124</i>
<i>Total interest free funds</i>	<i>10,55,40,323</i>

The advance free loans given are to the tune of Rs. 5,77,36,926/- to KDH Investment Pvt. Ltd excluding the opening balance and Rs. 6,81,44,748/- to common directors. The assessee before CIT(A) denied the other related parties findings of Rs. 6,44,88,309/- and he produced the complete accounts before the CIT(A). Thereby, the total advances interest free remains is Rs. 11,58,81,774/-, this includes the opening balance also. The CIT(A) going through these facts noted in para 9.5 to 9.8 read as under:

"9.5 The AO appears to have proceeded on the misplaced premise and assumption that the assessee after obtaining both short term / long term borrowings during the year on 24% flat interest utilised them for advances to various related parties as defined In Section 40(A)2B, interest free, for non business purposes and therefore has consequently disallowed and added back to the total income the notional interest 'receivable' on such advances aggregating to Rs.3.38 crores calculated at the flat rate of 24% per annum and that too, irrespective, of the dates of advancing of the amounts, without making any case, let alone a convincing case that it indeed was the case.

9.6 Further and more importantly the AO has nowhere established that the interest bearing term loan from Cosmos Bank was what was diverted for non business purpose, as he put it, free of interest to mostly related parties as also others. Neither has he made out a cogent case and led any evidence to indicate that funds received other than from Cosmos Bank from the assessee's business associates including Smt. Saba Khan, one to its Directors and customers suffered interest which was advanced to related parties and others interest free. As a matter of fact, the AR has stated that prior to making the aforesaid addition neither any details were called for by the AO nor an opportunity of being heard was granted to the appellant to explain that there was no diversion of borrowed funds, which, appears on the face of it correct, as the AO's discussion of the addition in the assessment order on account of the alleged diversion of borrowed funds for non business purposes does not even refer to the opening debit balances in the accounts of the various advances, borrowings during the year, dates and terms of borrowings, its utilisation vis-a-vis construction activities, all of which are crucial to first determine as to whether interest bearing funds were indeed diverted for non business. purposes interest free to related parties, in the first place, and if so, in calculating interest even if it is assumed without conceding that some interest was 'receivable', on the same, in a reasonable manner, in line with the prevalent banking / market norms and practices instead of the flat 24% rate per annum in a lump sum manner on which he has made the disallowances irrespective of the date of advances and its necessitating business exigencies, which appears quite illogical, as averred by the AR.

9.7 On the other hand, the AR in his detailed submission during the appellate hearings, reproduced supra, along with supporting evidence explained how loan of Rs.30 crores was initially borrowed from Cosmos Co-operative Bank for period of two years which was almost entirely utilised for the construction of the appellant's project called 'KGN Towers' completed around 20.07.2010 and out c the sales of which, when the appellant could not settle the liability to Cosmos Bank by 13.03.2011 and on the express written insistence of Cosmos Bank for squaring up of the loan account leading to the appellant company approaching KMIL for extending financial assistance and the said KMIL agreed to grant loan to the appellant and consequently took over the entire liability of the appellant with Cosmos Bank on 31.03.2011 without actual physical disbursement of the loan amount to the assessee and therefore the loan granted by KMIL was never available to the appellant company for any other purpose including the alleged diversion of the same interest free to related parties which fact has neither been questioned or controverted by the AO.

9.8 The above taking over of the loan liability owed to Cosmos Bank by KN duly evidenced by an agreement between the two parties and the subsequent payment of interest of Rs.6.3 crores thereof, as also part of the principal amount of Rs.12.92 crores totalling in all to Rs.19.4 crores appears to have not even been considered by the AO while disallowing the interest at a flat rate of 24% on the alleged interest free advances, mostly to

related parties as he put it, as there is precious little discussion on the matter in the assessment order."

And deleted the addition by observing para 9.16 as under:

*"9.16 To sum up, the AO in the context and factual matrix of the instant case has failed, in the first instance, to establish that interest bearing funds borrowed were diverted interest free for non business purposes mostly for related parties, as he put it, and therefore the question of disallowance of the same at a flat rate of 24% per annum in an adhoc and arbitrary manner was also not justifiable or tenable, besides being contrary to the material facts available on record as also the detailed submissions on the break-up of the amounts advanced party-wise as extracted aforesaid from which it was reasonably clear that the advances given to different persons were out of interest free funds and due to business exigencies and on mutual basis, whereby the appellant company also benefitted. In this view of the matter and the fact that there was no diversion of borrowed funds and the advances given out of interest free funds and keeping in mind the ratio of the jurisdictional Court among others cited supra, the impugned disallowance of interest is directed to be deleted. This ground of appeal is therefore **allowed.**"*

10. We noted that the Revenue now before us could not controvert the above facts situation that there are funds available with both interest free in making these interest bearing advances and few there are opening balance also. Once interest free funds available with the assessee, which is more than the interest free advances, no disallowance can be made by resorting the provision of section 36(1)(iii) of the Act. We noted no infirmity in the order of CIT(A) and hence this issue of Revenue appeal is dismissed.

11. Coming to assessee's appeal, the only issue in this appeal of assessee is as regards to the order of the CIT(A) confirming the action of the AO despite of the fact that the assessment order was barred by

limitation. For this assessee has raised following ground no. 2 read as under:

"2. The assessment order passed by the Assessing Officer and upheld by the learned Commissioner of Income Tax (Appeals), is ab-initio void, in as much as, said assessment order was passed beyond the limitation period prescribed vide sec. 153 of the I.T. Act, 1961."

12. We have heard Ld. Sr. DR and gone through the facts and circumstances of the case. We noted that the assessment order was framed vide order dated 31.03.2015 and passed within time limit i.e., 31.03.2015, but it was served on the assessee only on 13.04.2015. The limitation expires on 31.03.2015. The assessment order passed was within the limitation and accordingly, we dismiss this ground of appeal.

13. In the result, the appeal filed by the assessee is dismissed and the appeal filed by the Revenue is allowed for statistical purposes.

Order pronounced on 08th July, 2022.

Sd/-
(मनोज कुमार अग्रवाल)
(MANOJ KUMAR AGGARWAL)
लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-
(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /VICE PRESIDENT

चेन्नई / Chennai; दिनांक / Dated : 08-07-2022

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF