

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'H' BENCH
MUMBAI**

**BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.6574/Mum/2019
(Assessment Year :2012-13)**

&

**ITA No.6575/Mum/2019
(Assessment Year :2013-14)**

M/s. Suchetan Commercial & Marketing Pvt. Ltd., Mafatlal House Ground Floor H T Parekh Marg Mumbai – 400 021	Vs.	Income Tax Officer – 2(3)(2) Room No.581A, Aaykar Bhavan M.K.Road, Churchgate – 400 021
PAN/GIR No.AAACS8070M		
(Appellant)	..	(Respondent)

Assessee by	Shri Aditya Ajgaonkar
Revenue by	Shri Samuel Pitta
Date of Hearing	15/07/2022
Date of Pronouncement	07/09/2022

आदेश / ORDER

PER M. BALAGANESH (A.M):

These appeals in ITA No.6574/Mum/2019 & 6575/Mum/2019 for A.Yrs.2012-13 & 2013-14 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-6, Mumbai in appeal Nos. CIT(A)-6/IT-47/2015-16 and CIT(A)-6/IT-129/188/2016-17 dated 16/08/2019 & 23/08/2019 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of

the Income Tax Act, 1961 (hereinafter referred to as Act) dated 10/03/2016 & 26/03/2015 respectively by the Id. Income Tax Officer – 2(3)(2), Mumbai (hereinafter referred to as Id. AO).

Identical issues are involved in both these appeals and hence they are taken up together and disposed of by this common order for the sake of convenience.

2. With the consent of both the parties, the appeal of the assessee in ITA No. 6574/Mum/2019 for the Asst Year 2012-13 is taken as the lead year and decision rendered thereon would apply with equal force for Asst Year 2013-14 for identical issues, except with variance in figures.

3. The first issue to be decided in this appeal is as to whether the Id.CIT(A) was justified in treating the receipt of Rs 84,98,670/- on sale of shops and flat as "Income from Other Sources" u/s 56(1) of the Act as against "Income from Business".

3.1. We have heard the rival submissions and perused the materials available on record. The assessee is engaged in the business of trading, renting of immovable property and IT related services. The assessee had reported activity of trading in shops and flats during the year. The assessee filed its return of income for the Asst Year 2012-13 declaring total income of Rs Nil after setting off the loss of the brought forward losses under normal provisions of the Act and declaring book profits of Rs 3,02,64,526/- u/s 115JB of the Act. We find from the perusal of the audited balance sheet and profit and loss account of the assessee as on 31.3.2012, which is enclosed in pages 25 to 34 of the paper book filed before us, that the assessee had shown sale of shops and flats in the sum

of Rs 84,98,670/- under the head "Revenue from Operations" in Note 18 to the financial statements. In Note 20 to the financial statements, the assessee had disclosed the movement in inventory of finished goods containing flats and shops and debited a sum of Rs 67,77,600/- in the profit and loss account. We also find that the closing stock of flats and shops are held as stock in trade by the assessee which is evident from page 31 of the paper book filed before us.

3.2. During the Asst Year 2011-12, the assessee through Memorandum of Understanding (MOU in short) agreed to purchase 8 shops and 2 flats from Jamshri Ranjitsingji Spinning & Weaving Mills Co. Ltd (Jammill in short) for a total consideration of Rs 98,10,300/-. The MOU for Shop purchase dated 31.3.2011 is enclosed in pages 19 to 21 of the paper book filed before us. The MOU for flat purchase dated 31.3.2011 is enclosed in pages 22 to 241 of the paper book filed before us. These MOUs were executed on a stamped document of Rs 100 and acted upon by both the parties. Out of the above 8 shops and 2 flats, the assessee sold 7 shops and 1 flat during the year under consideration and continue to hold unsold 1 shop and 1 flat as stock in trade as on 31.3.2012. The details of opening stock, flats / shops sold and closing stock as on 31.3.2012 are tabulated as under:-

Shop/Flat No.	Cost of Purchase	Date of Sale	Sale Value	Closing Stock as on 31/03/2012
Shop B-1	7,26,900	N.A.	N.A.	7,26,900
Shop B-2	7,60,200	09.01.2012	11,40,600	
Shop B-3	6,38,400	10.01.2012	9,50,350	
Shop B-4	6,36,300	24.10.2011	9,34,800	
Shop B-5	3,09,300	31.03.2011	3,27,450	

Shop B-6	6,02,400	20.06.2011	6,48,000	
Shop B-8	7,26,900	13.06.2011	7,85,610	
Shop B-9	7,98,300	13.06.2011	8,60,860	
Flat T3 & T4	46,11,600	31.10.2011	28,51,000	23,05,800
	98,10,300		84,98,670	30,32,700

3.3. We find that the entire cost of purchases of shops and flats amounting to Rs 98,10,300/- were shown as inventory in the audited accounts for the year ended 31.3.2011 and similarly value of 1 shop and 1 flat amounting to Rs 30,32,700/- is also shown as inventory in the audited accounts for the year ended 31.3.2012. The assessee had computed gross profit of Rs 17,21,070/- in respect of sale of 7 shops and 1 flat as under:-

Sale consideration of 7 shops and 1 flat	- Rs 84,98,670
Less: Cost of acquisition of above (9810300-3032700)	- Rs 67,77,600
Gross profit from this trading transaction	Rs 17,21,070

3.4. We find that the income from sale of shops and flat were offered to tax by the assessee as business income. We find that the Id. AO made addition of sale value of above flats and shop of Rs 84,98,670/- as unexplained cash credit u/s 68 of the Act ; treated amount of Rs 38,35,500/- as unexplained investment u/s 69 of the Act and treated cost of shops and flat sold of Rs 67,77,600/- as unexplained expenditure u/s 69C of the Act. The Id. CIT(A) observed that the submissions made by the assessee indicated that these three issues were interlinked and pertain to the same transaction of acquisition of shops and flats from Jamshri and sales thereon. The Id. CIT(A) during the course of appellate proceedings called for a remand report on the following issues :-

- a) Whether there was an actual sale of the shops or flat ?
- b) Whether cost was incurred by the assessee towards purchase of the shops and flat so sold ?
- c) Verification of source through which acquisition of shops was made during the year.

3.5. The Id. AO submitted the remand report by stating as under:-

- a) That the MOUs were neither registered nor stamped.
- b) There were no terms as to how the payment was to be made in the MOU.
- c) It was also verified that the purchases were made by adjusting amounts of loan outstanding and that the purchases were shown in Asst Year 2011-12.
- d) It was also mentioned that the confirmation of accounts were produced by the assessee.
- e) That the sale agreements were made by Jamshri Spinning & Weaving Mills Co. Ltd and third party. The said sums were received by Jamshri and then transferred to the assessee through their bank account.
- f) The profit from the trading transaction was shown in the audited financial statement for the said year.

3.6. The Id. CIT(A) held that the transaction would have resulted in capital gains in the hands of Jamshri as the assessee did not receive any title to the property as the provisions of Transfer of Property Act and Stamp Act were not complied with. The Id. CIT(A) held that in the facts of the case, as the amounts had been received in the hands of the assessee, the same would be subjected to tax under the provisions of section 56(1) of the Act as Income from Other Sources as against unexplained cash credit u/s 68 of the Act. The Id. CIT(A) however

deleted the additions made u/s 69 and 69C of the Act stating that the amounts towards the cost of shops and flats were reflected in the books of accounts of Jamshri as confirmed by AO in the remand report. It is pertinent to note that the revenue is not in appeal against the order of the Id. CIT(A).

3.7. It is not in dispute that the MOUs were entered into by the assessee for purchase of shops and flats. The existence of these MOUs (though unregistered) is not doubted by the revenue before us. The purchase of shops and flats pursuant to MOUs , as stated supra, were shown as stock in trade in the balance sheet of the assessee. The Id. AR also drew our attention to pages 38 to 106 of the paper book containing the sale deeds and letters executed by the assessee requesting Jamshri to execute direct sale deeds with the purchasers of the property. It is not in dispute that the entire sale consideration was received from Jamshri by the assessee. The confirmation of accounts from Jamshri was filed before the lower authorities, copy of which is also enclosed in pages 107 and 108 of the paper book filed before us.

3.8. We find that the Id. AR before us vehemently argued that the assessee had carried on the activity of acquisition of flats / shops in a systematic and organized manner and hence the profit earned from the said activity is to be construed as income from business and not income from other sources. But we find from the records that the only document available with the assessee is the unregistered MOUs pursuant to which shops / flats were acquired. Hence this cannot be construed as an organized and systematic activity of carrying on real estate business, so as to bring the receipts thereon under the ambit of income from business. We find that the predominant activity of the assessee is only

BPO services from which income is earned by the assessee. Hence the reliance placed by the Id. AR on the decision of Hon'ble Jurisdictional High Court in the case of Central Provinces Manganese Ore Co. Ltd vs CIT reported in 80 taxmann.com 59 (Bom HC) does not advance the case of the assessee, as in that case, the loans were advanced in the regular course of business as an organized activity and the resultant income or loss was directed to be assessed under the head income from business. We have already held that the activity of purchase and sale of shops / flats would not be construed as an organized activity of carrying on business supra. Moreover, merely because the assessee had shown the closing stock of flats / shops as stock in trade in its balance sheet, it would not amount to carrying on business by the assessee. It is not in dispute that the assessee is not the owner of the flats / shops. In any case, entries in the books of accounts are not determinative of taxable income under the Act. Reliance in this regard is placed on the decision of Hon'ble Supreme Court in the case of Kedarnath Jute Manufacturing Co. Ltd reported in 82 ITR 363 (SC) and Taparia Tools Ltd vs JCIT reported in 372 ITR 605 (SC).

3.9. It is not in dispute that the MOUs entered into by the assessee for acquisitions of shops and flats were not registered. No stamp duty has been paid by the assessee at the time of its acquisition as the transactions had not been routed through the Stamp duty authorities. No evidence to prove that assessee had taken possession of the shops and flats acquired pursuant to MOUs. Accordingly, the compliance to Transfer of Property Act provisions were also not made by the assessee. This fact has not been controverted by the Id. AR before us by providing contrary evidences. Hence in principle, we uphold the finding of the Id. CIT(A) that the sale proceeds is to be taxed only under the head income from

other sources. However, the cost of shops / flat would certainly be allowable as deduction even under the head income from other sources. Hence the Id. AO is directed to allow deduction of cost of 7 shops and 1 flat in the sum of Rs 67,77,600/- as expenditure under the head income from other sources. Accordingly, the Ground No. 1 raised by the assessee is partly allowed.

4. The Ground No. 2 raised by the assessee is challenging the disallowance of depreciation of Rs 20,43,520/-, being the correct amount (though wrongly disallowed by the Id. AO at Rs 23,38,870/-) on assets purchased from Iping Technologies Pvt Ltd.

4.1. We have heard the rival submissions and perused the materials available on record. The Id. AO noticed that the assessee had made additions to fixed assets totaling to Rs 1,26,80,147/- and claimed depreciation. The assessee submitted all the details with supporting documents along with proof of acquisition. The Id. AO on perusal of the same noticed that the following assets had been acquired from one of the group concerns of the assessee:-

Furniture & Fixtures – Rs 17,96,600/-

Computers - Rs 63,22,300/-

The assessee furnished the copy of bills prepared on a letter head, which was not properly stamped without containing any terms for payment , details of delivery , transportation etc. The Id. AO issued a detailed questionnaire to the assessee seeking more details, which were duly replied by the assessee. However, the Id. AO did not find the said reply to be acceptable. Accordingly, he issued notice u/s 133(6) of the Act to

Iping Technologies Pvt Ltd calling for various details. In response to notice u/s 133(6) of the Act, Iping Technologies Pvt Ltd submitted its explanation with supporting evidences. The Id. AO however observed that these assets were purchased from related party i.e. Iping Technologies Pvt Ltd, the provisions of section 40A(2) of the Act would be applicable and accordingly proceeded to disallow the entire depreciation of Rs 23,38,870/- in the assessment.

4.2. We find that during the financial year 2011-12, Iping Technologies Pvt Ltd, which were hitherto engaged in the business of rendering BPO services, had transferred all assets of their BPO division at Solapur to the assessee for a total consideration of Rs 92,59,500/-. Iping also permitted assessee to use their logo "Iping Technologies" while rendering services from acquired BPO division at Solapur in order to ensure continuity of services to existing clients and for that purpose, even the employees were deputed to the assessee for an initial period of 3 months on reimbursement of actual salary to them. Hence during this period, there were occasions where certain invoices of assessee were signed by Iping Technologies by the employees of Iping. Regarding ownership details of building situated at Solapur, it was submitted that the property belonged to Chatur Property Pvt Ltd at Fatehchand Damani Nagar, Solapur-1 which was used by Iping rent free and maintenance was paid by them. All these facts are borne out from the reply sent by Iping in response to notice u/s 133(6) of the Act directly before the Id. AO.

4.3. It is not in dispute that the assessee had furnished the following details and explanations before the Id. AO :-

- a) All invoices for purchase of fixed assets from Iping containing description of the assets, number of items, rate per item, total amount for each type of assets, detailed description of configuration of computers (i.e. hardware) by way of separate enclosure to invoice etc
- b) Ledger account of Iping in the books of assessee duly confirmed by Iping which contains the details of purchases of fixed assets , payments made through banking channels etc.
- c) Bank statements duly highlighting the relevant portion of payments made to Iping for purchase of fixed assets together with the respective source of payments .

In addition to the above, Iping had also directly confirmed the fact by narrating the entire transactions in response to notice u/s 133(6) of the Act directly before the Id. AO.

4.4. The Id. CIT(A) sought for a remand report from the Id. AO during the course of first appellate proceedings.

4.5. The Id. AO furnished the remand report dated 19.2.2019 which was duly forwarded through the office of Additional CIT vide letter dated 5.4.2019 before the Id. CIT(A), by observing as under:-

- a) There is no agreement between Iping Technologies Pvt Ltd and assessee for sale of above assets.
- b) Iping has raised 4 invoices in the name of Suchetan Commercial and Marketing Pvt Ltd (i.e assessee herein) dated 26.3.2012 for total sum of Rs 84,50,900/-.

c) All invoices were made on same date and these invoices does not have the details of VAT / CST TIN numbers on it nor has the VAT / Sales tax amount. These invoices does not have the certifications / declaration like all other genuine invoices/tax invoices. No sales tax has been paid on these sales. There is no transfer of title to goods from Iping to assessee on account of sale of assets and the same does not constitute sale under the Sale of Goods Act . As a result , the assessee does not become the owner of those assets and consequently not eligible for depreciation.

d) In any case, the assessee had not justified the rates at which assets were acquired to be at fair market price in view of the fact that the said assets were purchased from related party within the meaning of section 40A(2) of the Act.

e) Iping has set off the Short Term Capital Gains of Rs 19,15,841/- on sale of depreciable assets against its business losses thus declaring Nil income. On the other hand, the assessee has claimed depreciation on those assets. Hence the entire arrangement between two related concerns is only a method adopted to avoid tax and the said arranged transaction could not be considered as bonafide and genuine.

4.6. The assessee made rejoinder to the remand report by making both factual and legal submissions before the Id. CIT(A) which are reproduced in para 7.5. of his order.

4.7. We find that the Id. CIT(A) had ultimately confirmed the disallowance of depreciation on fixed assets on the following grounds:-

- a) no sales tax was levied / paid on the sale of assets by Iping to the assessee;
- b) the consideration paid by the assessee to Iping is excessive for acquiring the assets from Iping;

Hence he concluded that fixed assets were not actually transferred to assessee by Iping and consequently depreciation is not eligible to the assessee thereon.

4.8. It is not in dispute that the assessee had offered business income during the year under consideration from BPO services. Admittedly, the assets acquired from Iping only has been used by the assessee for earning the said revenue from BPO services. Moreover, Iping had already offered short term capital gains in its returns on sale of depreciable assets u/s 50 of the Act and had also confirmed directly before the Id. AO that no depreciation has been claimed on the assets transferred to assessee. It is a fact on record that the assessee had actually paid consideration to Iping for purchase of assets. It is also a fact on record that the said consideration has been shown as receipt in the books of Iping, which fact is also confirmed by them in response to notice u/s 133(6) of the Act directly filed before the Id. AO. We hold that without the usage of the assets acquired from BPO division of Iping, the assessee could not have earned any revenue from BPO services during the year under consideration and offered business income thereon. Hence it could be safely concluded that the assets acquired from Iping had been duly put to use and utilized by the assessee for the purpose of its BPO services and hence depreciation would be eligible for the same to the assessee. The entire transactions have been duly confirmed by Iping directly before the Id. AO in response to notice u/s 133(6) of the Act. Even if all the alleged defects pointed out by the revenue is to be accepted, still the fact remains that the assets so acquired had been utilized by the assessee herein for the purpose of its BPO services and business income derived thereon. We hold that in this regard, the reliance has been rightly placed by the Id. AR on the decision of Hon'ble

Supreme Court in the case of Mysore Minerals Ltd vs CIT reported in 239 ITR 775 (SC). Hence we have no hesitation in directing the Id. AO to grant depreciation to the assessee for the correct amount of Rs 20,43,520/- and make corresponding rectification for the mistakes committed by him while calculating the depreciation. Accordingly, the Ground No. 2 raised by the assessee is allowed.

5. The Ground No. 3 raised by the assessee is challenging the disallowance of Rs. 4,36,940/- being amount reimbursed to Iping u/s 40(a)(ia) of the Act.

5.1. We have heard the rival submissions and perused the materials available on record. As stated in Ground No. 2 supra the assessee had requested Iping to provide support to it for an initial period of 3 months for smooth transition of BPO business. The break up of expenses reimbursed to Iping by assessee were provided to Id. CIT(A) which is also reproduced in page 32 of the order of Id. CIT(A). It is an undisputed fact that the employees of Iping are deputed to the assessee company for continuity in BPO services and also to ensure that the customers get accustomed to assessee . This is done for smooth transition of BPO business from Iping to assessee. It is a fact on record that assessee had earned revenue from BPO services during the year at Rs 1,79,056/-. The assessee categorically stated that the entire infrastructure of BPO division of Iping together with its assets were transferred to assessee by Iping and hence certain expenditure like to telephone bill, rent for diesel generator, security services, etc were used by the assessee which had to be reimbursed to Iping apart from the salaries , incentives , PF / ESI contributions etc of employees deputed to assessee. It was specifically pointed out that all the expenses were reimbursed to Iping on cost to cost

without any mark up thereon. Accordingly, it was pleaded that the provisions of section 194C of the Act read with section 40(a)(ia) of the Act would not be applicable for actual reimbursement of expenses on cost to cost. Without prejudice basis, it was also stated that in either case, Iping had duly accounted for the said receipts from assessee in its books and had filed its income tax returns. This is also confirmed by Iping while giving reply in response to notice u/s 133(6) of the Act before the Id. AO by submitting its audited financial statements which included the amounts received as reimbursement from assessee. Accordingly, in view of the second proviso to section 40(a)(ia) read with section 201 of the Act, no disallowance u/s 40(a)(ia) of the Act could be made in the hands of the assessee payer.

5.2. The Id. CIT(A) sought for a remand report from the Id. AO during the course of first appellate proceedings.

5.3. The Id. AO furnished the remand report dated 19.2.2019 which was duly forwarded through the office of Additional CIT vide letter dated 5.4.2019 before the Id. CIT(A), by observing as under:-

As there is no agreement nor any terms and conditions for such expenses between M/s Iping Technologies Pvt Ltd and assessee, the question of such payment is doubtful and not acceptable. In para no. 5, we have not accepted the sale of assets, hence the veracity of such expenses is doubtful. The assessee company nor M/s Iping Technologies Pvt Ltd has produced any evidence of TDS deducted on such payments. Hence the expenses are to be disallowed.

5.4. The assessee filed rejoinder to the aforesaid remand report before the Id. CIT(A).

5.5. We find that the Id. CIT(A) in para 8.6. of his order had observed that the assessee had made payment of expenses to Iping on actual cost basis pursuant to oral agreement / understanding entered into with Iping for smooth transition of BPO business acquired from Iping by assessee. The Id. CIT(A) having accepted the fact that expenses were paid by assessee to Iping only on actual cost basis, had practically agreed to the contention of the assessee that it is only reimbursement. We hold that the Id. CIT(A) having accepted that it is only reimbursement of expenses, he ought not to have confirmed the disallowance u/s 40(a)(ia) of the Act for violation, if any, of provisions of section 194C of the Act. We hold that the provisions of section 194C of the Act cannot be applied for actual reimbursement of expenses without any mark up. Hence we hold that the Id. CIT(A) grossly erred in this aspect in his order. Further, the Id. CIT(A) had observed that the second proviso to section 40(a)(ia) and 201 of the Act would be applicable only from 1.7.2012 onwards and cannot be applied for Asst Year 2012-13. In this regard, we find that the Hon'ble Delhi High Court in the case of CIT vs Ansal Landmark Township (P) Ltd reported in 377 ITR 635 (Del) had categorically held that the second proviso brought in section 40(a)(ia) and section 201 of the Act need to be applied retrospectively. Accordingly, even on this count, no disallowance u/s 40(a)(ia) of the Act could be made in the instant case. Hence the Ground No. 3 raised by the assessee is allowed.

6. The Ground No. 4 raised by the assessee is challenging the action of Id. CIT(A) in confirming the disallowance of brokerage of Rs 6,00,000/- incurred in relation to sale of capital assets as deduction u/s 48 of the Act.

6.1. We have heard the rival submissions and perused the materials available on record. We find that the assessee had claimed brokerage of Rs 6,00,000/- in relation to sale of its property situated at Vikas Building in Mumbai. The assessee had pleaded that the said expenditure should be disallowed as business expenditure and should be allowed as deduction u/s 48 of the Act while computing capital gains on sale of property. The Id. AO disallowed such claim of the assessee by observing that no details for services rendered were shown on the bill that was raised and also on the ground that the said claim was not made by filing a revised return of income. It is not in dispute that the assessee had furnished the bills for brokerage before the Id. AO and the brokerage paid was exactly 2% of the consideration amount, which is the normal prevailing market rate for immovable property. We find that the assessee had indeed made the claim of brokerage as deduction in the return of income under the head income from business. During the course of assessment proceedings, the assessee had only sought to shift the head of income from 'income from business' to 'income from capital gains', as the brokerage would be eligible for deduction u/s 48 of the Act as expenses on transfer while computing capital gains. The bill for brokerage submitted contained even the PAN of the broker. In view of the aforesaid observations there is no question of doubting the said expenditure on brokerage. Hence we direct the Id. AO to grant deduction for brokerage in the sum of Rs 6,00,000/- as expenditure incurred on transfer of capital assets and recompute the capital gains accordingly. The Ground No. 4 raised by the assessee is allowed.

7. In the result, the appeal of the assessee in ITA No. 6574/Mum/2019 for Asst Year 2012-13 is partly allowed.

ITA No. 6575/Mum/2019 – Asst Year 2013-14 – Assessee Appeal

8. The Ground No. 1 raised herein is similar to Ground No. 2 raised by the assessee for Asst Year 2012-13 supra. Hence the decision rendered thereon for Asst Year 2012-13 shall apply mutatis mutandis for this Asst Year also , except with variance in figures.

9. The Ground No. 2 raised herein is similar to Ground No. 1 raised by the assessee for Asst Year 2012-13 supra. Hence the decision rendered thereon for Asst Year 2012-13 shall apply mutatis mutandis for this Asst Year also , except with variance in figures.

10. Accordingly, the appeal of the assessee in ITA No. 6575/Mum/2019 for Asst Year 2013-14 is partly allowed.

11. In the result, both the appeals of the assessee are partly allowed.

Order pronounced on 07/09/2022 by way of proper mentioning in the notice board.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 07/09/2022
KARUNA, sr.ps

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai