

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

Before Sh. Saktijit Dey, Judicial Member

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

ITA No. 166/Del/2017 : Asstt. Year : 2009-10

YG Realty Pvt. Ltd., 1A-D, Vandhna Building, 11, Tolstoy Marg, New Delhi-110001	Vs	Income Tax Officer, Ward-18(4), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAACY3336L		

Assessee by : Sh. R. S. Singhvi, CA &

Sh. Satyajit Goel, CA

Revenue by : Ms. Indu Bala Saini, Sr. DR

Date of Hearing: 29.06.2022

Date of Pronouncement: 22.09.2022

ORDER

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

The present appeal has been filed by the assessee against the order of Id. CIT(A)-22, New Delhi dated 09.11.2016.

2. Following grounds have been raised by the assessee:

"1. The assessment order passed u/s 143(3) of the Act on 31.03.2013 is illegal, bad in law, without jurisdiction and the additions/ disallowances made by the Assessing Officer ('AO') and upheld by the Learned Commissioner of Income Tax (Appeals)- 22 ('Ld. CIT(A)') are illegal and bad in law.

2. That the Ld. CIT(A)/ AO has erred, in law and on facts and circumstances of the case, in disallowing a sum of Rs. 385.12 crores from Capital work in progress ('CWIP') and in further stating that the said amount shall not be available to the appellant at the time when the appellant debits CWIP to its P&L A/c.

3. That on the facts and circumstances of the case and in law, the Ld. CIT(A)/ AO has erred in

proceeding with the assumption that the amount paid by the appellant to M/s DLF Home Developers Ltd. ('DHDL') and M/s DLF Ltd. ('DLF') amounting to Rs. 385.12 crores and Rs. 37 crores respectively are for purchase of development rights and are in similar nature. However, Rs. 37 crores were paid by the appellant to DLF on account of purchase of development rights and Rs. 385.12 crores were paid to DFIDL as a premium for nomination by DHDL for acquisition of development right.

4. That on the facts and circumstances of the case and in law, the Ld. CIT(A)/ AO has erred in appreciating that the appellant has made the payments to DHDL and DLF under separate and distinct contracts and the said payments shall not be construed of similar nature. Hence, there is no duplication of payment at all.

5. That on the facts and circumstances of the case and in law, the Ld. CIT(A)/ AO has grossly erred in proceeding on the basis that the amount of Rs. 385.12 crores paid by the appellant to DLF is merely to artificially inflate the cost of project and accordingly the said amount shall not form part of CWIP.

6. Without prejudice, the Ld. CIT(A)/ AO has erred, on the facts and circumstances and in law, in not appreciating that payment made by the appellant to DHDL is made to the owner of nomination rights as permitted to the appellant by DHDL and confirmed by DLF being the confirming party to the agreement.

7. That the Ld. CIT(A)/ AO has, in way of facts and circumstances of the case, erred in law and in facts in ignoring the vital fact that the amount of Rs.385.12 crores received by DHDL has been included in the income by the said party and DHDL has paid taxes on the same and as such observations and findings of the lower authorities are merely surmises and conjectures.

8. That the material and facts available on record have been wrongly and illegally ignored. The observations and findings of the lower authorities cannot be justified by any material on record.

9. That the order of Ld. CIT(A)/ AO is based on suspicion, conjectures, surmises without cogent material or substantive basis. Adjustments in CWIP have been made on erroneous, vague and unlawful basis. Accordingly also the adverse inferences deserve to be struck."

3. The assessee company is engaged in development of Real Estate Projects. The main shareholders of assessee company are a Mauritius based company Hines Asia Real Estate Project II Ltd. & DLF Home Developers Ltd (DHDL). They invested Rs.74.01 lakhs & Rs 3.95 lakhs respectively in shares of assessee on 25.6.2008. Further, the assessee company also received CCDs during the year, in three phases. The investors were Rs. 255,59,04,000/- from Gidja Investments Ltd. of Cyprus, a similar amount from DHDL, in series II DHDL invested in CCDs of Rs. 71,05,760/- and in third phase Hines Asia Real Estate Projects II Ltd. Mauritius invested Rs. 19,44,16,072/-. Relevant inquiry about source of investment of foreign entities have been made through FT&TR and placed on record. From the enquiry, it has come to light that Hines India Fund LP, a USA based entity has made the investments by routing them through the Hines Asia Real Estate Projects II Ltd. Mauritius & Gidja Investments of Cyprus.

4. The basic purpose of all such investments was to develop a commercial space with floor space index of 6,50,000 sq. ft. which would have estimated saleable/rentable area of 8,50,000 sq. ft. to be constructed on plot of land measuring 11 acres, located on Golf Course Road, Opposite DLF Golf Links, Sec. 43, Phase-V, Gurgaon, Haryana. To transfer the assessee the rights in that particular area, a series of agreements were signed between the assessee and,

a) DLF - The entity having Development rights in the area

- b) DLF Utilities Ltd. - DUL - (earlier known as Neelgiri Cultivation Pvt. Ltd.) - owner of the said land &
- c) M/s DLF Home Developers Ltd. (DHDL)

5. The main dispute involved in this case is reduction of capitalized work in progress by the AO by Rs. 385.12 crores in one scenario and by Rs. 37 crores in second scenario. Both the findings have been given as complete facts were not clear at the time of assessment proceedings.

6. As per the assessment order, M/s DLF Ltd. sold one project to its associate concerns M/s DHDL (M/s DLF Home Developers Ltd.) in November, 2006. Subsequently, vide agreement dated 01.06.2008, the development rights were transferred to DHDL for Rs. 117 crores. Vide another agreement dated 25.06.2008, the same development rights were transferred to the assessee by M/s DLF Ltd. for Rs. 37 crores. The assessee was also expected to pay Rs. 385.12 crores to DHDL for confirming the transfer of development rights to the assessee as the same were earlier transferred to DHDL. There was one more agreement dated 25.06.2008 by which M/s DLF Ltd. transferred the land rights to the assessee for Rs. 80 crores. To summarize, the assessee was to make payment of Rs.502.12 crores as under:

- (a) Rs. 385.12 crores to DHDL for development right.
- (b) Rs. 37 crores to M/s DLF Ltd for development rights.
- (c) Rs. 80 crores to M/s DLF Ltd for land.

7. The Assessing Officer analyzed two scenarios.

8. In the first scenario, the AO presumed that M/s DHDL did not pay Rs. 117 crores to M/s DLF Ltd. for acquisition of

development rights. Since, the agreement dated 01.06.2008 provided vesting of rights in DHDL only after such payment, M/s DHDL had no such right for which the appellant paid Rs. 385.12 crores vide agreement dated 25.06.2008. In such a situation, the AO held that the capital work in progress would be reduced by Rs. 385.12 crores. Since CWIP was shown at Rs. 529,38,41,536/-, it gets reduced to Rs. 144,26,41,536/-.

9. In the second scenario, due to this addition, the AO presumed that the payment of Rs. 117 crores was made before 25.06.2008 by M/s DHDL to M/s DLF Ltd. In that case, M/s DLF Ltd. had no development rights for which the assessee paid Rs. 37 crores to it. In the second scenario, the capital work in progress was to be reduced by Rs. 37 crores. In this case the CWIP of Rs.529,38,41,536/- gets reduced to Rs. 492,38,41,536/-.

10. To summarize, the AO's case of artificial inflation of the project cost in the books of accounts by paper transactions amongst group companies so as to reduce the taxable profits when the project is sold.

11. M/s DHDL is also one of the main shareholders in the appellant company. As per the assessment order, M/s DHDL initially invested Rs. 3.95 lakhs in shares and Rs. 255.59 crores as CCDS. A further investment of CCDS by DHDL of Rs. 71.06 lakhs was also made. The project is on a plot of land measuring 11 acres located in Sector-43, Phase-V, Gurgaon, Haryana.

12. From the details filed by the appellant during the course of appellate proceedings, the payment of Rs. 117 crores was made by the appellant to M/s DLF Ltd. on 25.06.2008. The payment of Rs. 385.12 crores was also made by the appellant

to M/s DHDL on 25.06.2008. The Id. CIT(A) held that there is no mention of the payment of Rs. 117 crores, to be paid by DHDL to M/s DLF Ltd. as per agreement dated 01.06.2008. From the same, it appears that no such payment has been made, and M/s DLF Ltd. got only Rs. 117 crores from appellant but M/s DHDL got Rs. 385.12 crores without paying anything. It was held that the facts within scenario one mentioned by the AO in which the amount of Rs. 385.12 crores is only an artificial inflation of capitalized work in progress and CWIP gets reduced to Rs.144,26,41,536/-.

13. In the return of income filed in A.Y. 09-10, an amount of Rs.5,02,12,83,200/- was capitalized under the head "Real Estate Project". The source of funds is mainly from compulsorily convertible debentures of Series I, Series II and Series III accumulating to Rs. 531.35 crores besides share capital of Rs. 78.96 lakhs. The Profit & Loss account, declared a loss of Rs. 7,48,962/-.

14. During the course of proceedings before the Id. CIT(A), it was explained that M/s DLF Utilities Pvt. Ltd. (DUL) and DLF Ltd. collectively owned land of 527 acres. There was a tripartite unregistered agreement between DLF Ltd, DUL and DHDL on 3.11.2006. On the said land, plans to construct 3.2 million sq. feet were finalized by DLF Ltd. and there were plans to develop further 30 million sq. feet of built up area. DUL and DLF agreed to sell the said built up area of 30 million sq. feet, to be constructed on the said land to DHDL at Rs.3000/- sq. feet i.e. Rs.9,000 crores. DHDL got rights to market and sell the said project (i.e. full rights on constructed area and proportionate land rights) to be constructed by M/s. DLF Ltd. The

consideration of Rs.9,000/- crores was to be paid by DHDL to DLF.

15. Vide first agreement dated 25.06.2006, the assessee acquired development rights of 6,50,000/- sq. feet of land. This agreement was between DLF, DUL, DHDL and the assessee for Rs. 37 crores. Vide second agreement dated 25.06.2006, the assessee purchased proportionate land also for Rs. 80 crores. This agreement was also between DLF, DUL, DHDL and appellant. The total cost comes to Rs. 117 crores and this entire amount was payable to M/s. DLF Ltd. This amount is same as that payable by DHDL to M/s. DLF Ltd. as per agreement dated 01.06.2008. So, initially M/s. DHDL entered into an agreement with DLF and DUL for purchase of 30 million sq. feet of built up area at Rs. 3000/- per sq. feet. Then, for 6,50,000 sq. feet out of the same, the DHDL took responsibility of development as well for which the consideration was reduced to Rs. 117 crores at 1800/- sq. feet against Rs. 3000/- per sq. ft. if M/s DLF had constructed the property. Therefore, DHDL acquired (land+ development rights) for 6,50,000/- sq. feet built up area at 1800/- sq. feet. For remaining built up area out of 30 million sq. ft. the consideration of completed construction with land was Rs.3000/- sq. feet.

16. Vide agreement dated 01.06.2008 between DLF, DUL and DHDL, DHDL expressed willingness to develop 6,50,000/- sq. feet of built up area out of 30 million sq. feet.(approx 2.17% of total built up area) itself, rather than getting it developed by M/s DLF Ltd. Therefore rights of development with proportionately land rights of 650000 sq. ft. of built up area were to be transferred to DHDL on payment of Rs.117 crores by DHDL to DLF Ltd. The consideration comes to Rs.1800/- per sq.

feet against Rs.3000/- per sq. feet, if M/s. DLF Ltd. had developed this built up area of 6,50,000/- sq. feet. DHDL had right to appoint a nominee to acquire the right to develop the land and obtain sale deed in its favor for this built up area of 6,50,000 sq. ft. For remaining area out of 30 million sq. feet, the agreement dated 03.11.2006 was operative.

17. Vide agreement dated 26.06.2008 DHDL received Rs. 385.12 crores from appellant. This agreement is again between DUL, DLF, DHDL and appellant. The average cost of this consideration comes to Rs.5925/- per sq. feet. The appellant claims regarding considering the assessee as nominee of DHDL for all its rights in respect of built up area of 650,000 sq. ft. Rs. 385.12 crore was the consideration for that, which was confirmed by deed of confirmation dated 26.06.2008.

18. From the above it was noticed that what DHDL was getting from M/s. DLF for Rs.3000/- sq. feet, the appellant got the same at (5925+1800) Rs.7725/- sq. feet, thereby M/s. DHDL made a profit of Rs. 4725/-sq. feet for transferring development/ land and sale rights to appellant without any payment. It was alleged that this resulted in inflation of project cost by 307.13 crores (4725X650000), than that had M/s DLF Ltd. developed it and sold it to M/s DHDL as per original agreement dated 03.11.2006.

19. During the course of appellant proceedings, the Ld CIT(A) found that the appellant also filed the assessment order of A.Y. 10-11, in which the AO has taken the opening CWIP of Rs. 492,38,41,536/- i.e. the CWIP taken by the AO in the order under appeal in scenario II disallowing the payment of Rs. 37 crores by the appellant of M/S DLF Ltd. for development rights. For reference, the

corresponding para 2.5 of the assessment order is reproduced herein under:

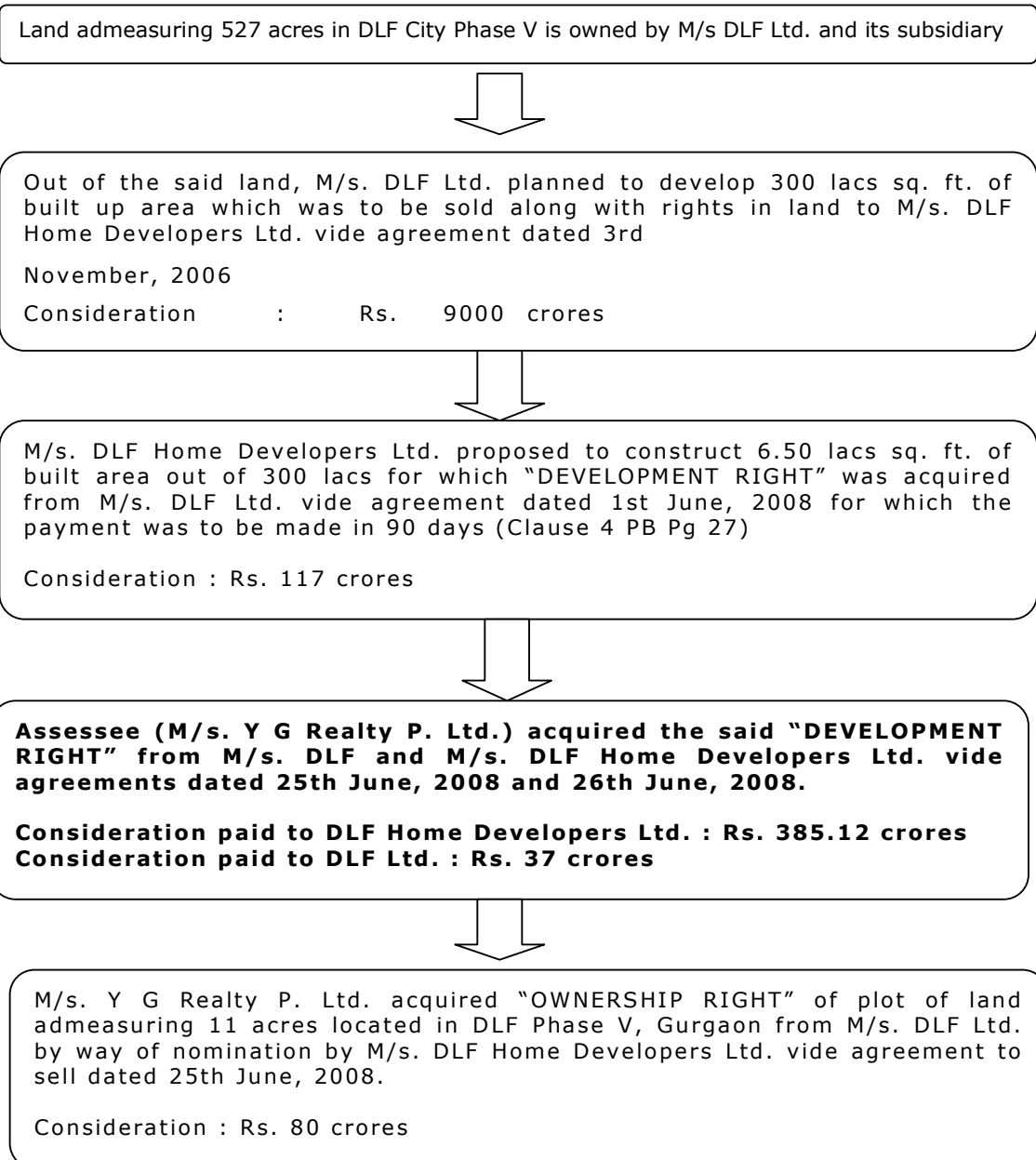
"2.5 Working of Capita Work in Progress;

"As per assessment order for A.Y. 2009-10 AO has worked out WIP as on 31.03.2009 at Rs. 4,92,38,41,536/-. The assessee has also shown addition to work in progress of Rs. 8,45,19,066/- during the F.Y. 2009-10. Further, an amount of Rs. 23,93,939/- being exchange fluctuations gain was adjusted against work in progress. As such value of capital work in progress as on 31.03.2010 was computed at Rs. 5,00,59,66,673/-(4,92,38,41.536 + 8,45,19,066 - 23,93,929)."

20. Though the appellant filed an appeal before the Hon'ble ITAT against the said order, which was passed pursuant to the order of DRP dated 02.12.2014 and the order u/s 92CA(3) dated 29.01.2014, the appellant did not challenge the AO's action of taking the opening CWIP at Rs. 492,38,41,536/-. From a perusal of the para 2.5 of the assessment order of A.Y. 10-11 reproduced above, it is apparent that the AO has made an incorrect factual observation in para 2.5 regarding the CWIP in the assessment order of A.Y. 09-10 at Rs. 492,38,41,536/-. It was CWIP only in situation II. There was no discussion of situation 1, nor any finding as to why the AO accepted CWIP of situation II in the assessment order for A.Y. 10-11. Though, the decision by AO in A.Y. 10-11 on the basis of incorrect factual observation has no bearing as far as the present appeal is concerned, Ld.CIT(A) held that it does establish that the appellant surrendered its claim of payment of Rs. 37 crores for development rights to DLF. Ld. CIT(A) held that it also confirms the observation that all these agreements (unregistered) were paper transactions only for artificial inflation of cost of project.

21. Therefore, the Id. CIT(A) held that since M/s DHDL did not pay any amount, in pursuance of agreement dated 01.06.2016, it never acquired any rights of development and proportionate land of 650000 sq. ft. of built up area. Therefore, payment of Rs. 385.12 crores is only artificial inflation of cost of project and shall not form part of CWIP. Holding thus, the Id. CIT(A) determined that closing CWIP shall be Rs. 144,26,41,536/-.

22. The pertinent facts are as under:



23. For acquiring land and development rights, the assessee paid total consideration of Rs. 502.12 crores as under:

- For Land rights (to M/s. DLF Ltd) : Rs. 80 crores
- For Development rights (to M/s. DLF Flome Developers Ltd.) : Rs. 385.12 crores
- For endorsement of Development rights (to M/s. DLF Ltd.) : Rs. 37 crores

24. The Assessing Officer considered the disallowance on the basis of observation recorded at Page 3 Para 4 of the Assessment Order. The gist of relevant observations of the AO are as under:

Situation 1: Disallowance of Rs. 385.12 crores paid to M/s.DLF Home Developers Ltd. (DHDL) for purchase of rights in land.

(Agreement dated 26/06/2008)

- a. It was observed that DHDL did not have any development rights in the said land as DHDL had not made any payment to DLF Ltd. for purchase of Development and Land rights by 26/06/2008.
- b. As DHDL did not have any rights in the said land, the nature of payment of Rs. 385.12 crores by the assessee is unknown and unexplainable.
- c. Even otherwise, there is no connection between the payment and business activities of the assessee and as such it was held that the impugned payment is not for the purpose of business of the assessee. (Section 37)

Situation 2: Disallowance of Rs. 37 crores paid to M/s. DLF Ltd. for purchase of development rights.

(Agreement dated 25/06/2008)

- a. The AO has observed that DLF Ltd. did not have any development rights in the said piece of land as DHDL had made payment to DLF Ltd. before 25/06/2008 and as such the latter no longer had any development rights in the said piece of land.
- b. Accordingly, it was observed by AO that since DLF Ltd. had no rights, the nature of payment of consideration of Rs. 37 crores by assessee to DLF Ltd. is unknown and unexplainable.
- c. Even otherwise, there is no connection between the payment and business activities of the assessee and as such it was held that the impugned payment is not for the purpose of business of the assessee. (Section 37)

25. Accordingly, the Assessing Officer considered disallowance of Capital work-in-progress as follows:

Under Situation 1: Cost of Capital work-in-Progress was reduced by Rs. 385.12 cr.

Under Situation 2: Cost of Capital work-in-Progress was reduced by Rs. 37 cr.

26. We find that against the two calculations (situations) of WIP by the Assessing Officer for the A.Y. 2009-10 mentioned above of this order which was Rs.144.26 Cr. in Situation 1 and Rs.492.82 Cr. in Situation 2, the Assessing Officer vide

assessment order for A.Y. 2009-10, has worked out WIP as on 31.03.2009 at Rs.492,38,41,536/-. Thus, the Assessing Officer for the succeeding year has considered the WIP as in Situation-2. The assessee has also shown addition to work-in-progress of Rs.8,45,19,066/- during the F.Y. 2009-10. Further, an amount of Rs.23,93,929/- being exchange fluctuations gain was adjusted against work-in-progress. As such value of capital work-in-progress as on 31.03.2010 was computed at Rs.500,59,66,673/-. The draft Assessment Order was passed on 07.03.2014 determining the total income at Rs.8,66,13,450/- which has been a subject matter of proceedings before the Id. DRP-2, New Delhi. Based on the directions given vide order dated 02.12.2014 by the Id. DRP, the AO has finally determined the taxable income at Rs.8,66,13,450/-.

27. This effectively culminates into disallowance of Rs.37 Cr. only which was paid on account of development rights transferred by DLF to the assessee vide development agreement dated 25.06.2008.

28. Thus, the issue before us narrows down as to "whether the amount of Rs.37 Cr. paid by the assessee on account of development rights transferred by DLF to the assessee vide development agreement dated 25.06.2008 is an eligible expenses or not".

29. We have gone through the development agreement by and amongst DLF Utilities Pvt. Ltd., DLF Ltd., YG Realty Pvt. Ltd. and DLF Home Developers Ltd. dated 25.06.2008 wherein at clause para 3 pertaining to Consideration, para 3.1 reads as under:

"3.1 The total consideration for the rights granted pursuant to this agreement to YG is Rs.37,00,00,000/- (Rupees Thirty seven crores only), which amount has been paid by YG to DLF, simultaneously with the execution of this agreement, on the agreement date, and DLF acknowledges receipt of the said amount of Rs.37,00,00,000/- (Rupees Thirty seven crores only)."

30. Thus, the amount has been paid to DLF and DLF acknowledges the receipt of the amount. The payments to DLF Home Developers of Rs.385.12 crores is not in dispute and also an amount of Rs.80 crores paid to DLF on account of land rights has also been accepted by the revenue. All these amounts have been duly reflected in the receipts of DLF Ltd. There was no finding that agreement was invalid or bogus or that there was collusion or that fictitious values were adopted. Hence, disputing Rs.37 crores paid to DLF Ltd. on account of development rights by the same composite agreement between DLF Utilities Pvt. Ltd., the assessee and DLF Ltd. cannot be disputed.

31. Further, we have also examined the profitability of the entire deal which reveals the profit as under:

- Acquisition cost of rights
in the hands of the assessee : Rs. 7,725/- sq. ft.
- Value of rights as per
Valuation report as on 25/06/08: Rs. 12,500/- sq. ft.
- Aggregate acquisition and
development cost on 31/03/15: Rs. 12,649/- sq. ft.
- Sale price of the
developed property : Rs. 19,340/- sq. ft.

32. The assessee has paid taxes on the profits on this transactions and DLF Ltd. the recipient has also paid taxes in absolute terms.

33. Hence, keeping in view the entire facts, we hold that the amount of Rs.37 crores paid by the assessee to DLF Ltd. cannot be treated as disallowable and the reworking of the work-in-progress cannot be held to be tenable.

34. In the result, the appeal of the assessee is allowed.
Order Pronounced in the Open Court on 22/09/2022.

Sd/-

(Saktijit Dey)
Judicial Member

Sd/-

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

Dated: 22/09/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR