

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

BEFORE SHRI AMIT SHUKLA, JM
AND
SHRI PRASHANT MAHARISHI, AM

ITA No. 6748/Mum/2019

(Assessment Year 2011-12)

ITO, 28(2)(3)
R. no. 310, 3rd Floor,
Vashi Rly Station Complex,
Vashi Navi Mumbai
Mumbai-400 703

Vs.

M/s NG Group
Plot no.8, Sector 11, Opp
Juinagar Rly Station,
Sanpada,
Navi Mumbai-400 709

(Appellant)

(Respondent)

PAN No. AAFFN9159E

ITA No. 6589/Mum/2019

(Assessment Year 2011-12)

M/s NG Group
Plot no.8, Sector 11, Opp
Juinagar Rly Station,
Sanpada,
Navi Mumbai-400 709

Vs.

ITO, 28(2)(3)
R. no. 310, 3rd Floor,
Vashi Rly Station Complex,
Vashi Navi Mumbai
Mumbai-400 703

(Appellant)

(Respondent)

PAN No. AAFFN9159E

Assessee by : Ms. Nishita Mandalaywala, AR
Revenue by : Dr. Mahesh Akhade, CIT DR

Date of hearing: 04.08.2022
Date of pronouncement: 01.11.2022

ORDER

PER PRASHANT MAHARISHI, AM:

01. These are the cross appeals filed by the learned Income Tax Officer- 28(2)(3), Mumbai (the learned Assessing Officer) and M/s NG Group (assessee/appellant) for A.Y. 2011-12 against the appellate order passed by the learned Commissioner of

Income-tax (Appeals)-26, Mumbai [the learned CIT (A)] for A.Y. 2011-12.

02. ITA No. 6748/Mum/2019 is filed by the learned Assessing Officer raising following grounds of appeal:

-

"(1) Whether on the facts and in the circumstances of the case and in law, the Ld. CITIA has erred in deleting the addition of Rs.3.39.42,758/-/- on account of assessing the profits of the project Ellora Castle' to the tune of Rs.6.06,77.489/- as against returned profit of Rs 2,67,34,731/- thereby making an Rs.3,39,42,758/- without appreciating the fact that the said project has been addition of completed on 26.10.2010 i.e. during the FY 2010-11 relevant to A.Y 2011-12"?

(2) Whether on the facts and in the circumstances of the case and in law, the Ld. CITIA has erred in deleting the disallowance of the loss incurred on transfer of Plot No 807 and adding the same to the closing WIP of Plot No.786 thereby disallowing the claim of Rs.3,88,98,576/-"?

(3) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the reduction of interest income of Rs.87,91,409/?"

(4) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.2,24,00,000/- being unexplained cash credit u/s 68 of the Act without

appreciating the fact that assessee failed to prove the identity & creditworthiness of the lender and genuineness of the transaction"?

(5) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowing the interest expense of Rs.25,13,558/- u/s 36(1)(ii) of the Act by holding that interest bearing funds have not been diverted for giving interest free advances"?.

(6) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition u/s. 41(1) of the Act amounting to Rs. 13,04,108/ by holding that no event had taken place in the year under consideration to indicate remission or cessation of liabilities, without appreciating the fact that sundry creditors reflected in the Balance sheet of the assessee reveals certain amounts outstanding and the parties whose name appear in the list of suspicious dealers by the Sales Tax Deptt."?

7. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the A.O. to restrict the addition of bogus purchases to 12.5% as against 100% addition made by the Assessing Officer on account bogus purchases without appreciating the fact that parties from whom these purchases were made proven accommodation entry providers, as concluded by Sales Tax Authorities pursuant to the investigation carried out by them"?

(8) *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering the latest Apex Court decision in the case of N.K.Proteins Ltd Vs DCIT (769 OF 2017), wherein the Hon'ble Supreme Court has confirmed 100% addition made on account of bogus purchases.*

(9) *The appellant prays that the order of Ld. CIT (A) on the above grounds be reversed and that of the Assessing officer be restored.*

(10) *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."*

03. ITA No. 6589/Mum/2019 is filed by the assessee raising following grounds of appeal: -

"1. BECAUSE, Id. CIT(A) erred in law and on facts; in confirming addition to the tune of Rs.1,00,00,000/- (One Crore) u/s. 68 of the Act, 1961; wherein act of partisanship is manifested.

2. BECAUSE; assessment order dated 31/03/2011 and consequential CIT(A)'s order dated 30/08/2019 are passed in violation of principle of natural justice since no opportunity to cross examine M/s. Blue View Commodities Pvt. Ltd. and it's information has been granted to appellant.

3. BECAUSE, Id. CIT(A) erred in law and on facts; in confirming disallowance of 12.50% of purchases amounting to Rs.46,174.25/- (12.5% of Rs.3,69,394/-) u/s. 69C of the Act, 1961.

4. BECAUSE, Id. CIT(A) erred in law and on facts in sustaining ad-hoc disallowance of Rs.5 Lakhs out of various expenses claimed in Profit and loss account, merely based on presumption that they lack supporting evidence."

04. Brief facts of the case show that Assessee firm is a builder and developer. It filed its return of income on 30th September 2011 at a total loss of ₹33,74,432/-. The case of the assessee was picked up for scrutiny.

a. The assessee has shown one ongoing project at Navi Mumbai under construction which is transferred where assessee has shown a net loss of ₹3,01,07,165/- and in another residential project at Ellora Castle, the assessee has shown the profit of ₹2,67,34,731/- and thus, returned at loss of ₹33,72,435/-. During the assessment, the learned Assessing Officer verified the project profitability of Ellora. He found that assessee has not recognized sales though it follows Project Completion Method. The assessee has declared net profit of ₹2,67,34,731/- and shown work-in-progress carried forward of ₹22,12,89,283/-, resulting into total work-in-progress of ₹31,76,55,022/-. Thus, assessee has declared a profit of 8.41%. The learned Assessing Officer noted that assessee has sold six units during the year and accordingly, net profit was computed at ₹6,06,77,489/-. Thus, addition of ₹3,39,42,758/- was made on Ellora project profits. The learned Assessing Officer further noted that

assessee has shown loss on transfer of project of Bhoomi Net City project wherein assessee claimed loss of ₹3,88,98,576/-. The learned Assessing Officer disallowed the same as assessee failed to produce collaborative evidence of work in progress and closing stock.

- b. Assessee also received an unsecured loan from different parties amounting to ₹3,24,00,000/- where according to the learned Assessing Officer assessee failed to prove the identity and creditworthiness of the parties as well as the genuineness of the transactions. Thus, the learned Assessing Officer held that the loan of ₹1,20,00,000/- from Mr. Amit Jadhavji, HUF, ₹ 1 crore from Blue View Commotrade Pvt. Ltd. and ₹ 1 crore from Dimesh Jayantilal Vora fails test under Section 68 of the Act and thus, along with the interest paid was added to the total income of the assessee.
- c. The learned Assessing Officer also noted that the interest expenditure of ₹25,13,558/- of interest claimed by the assessee is not utilized for the purpose of the business as assessee has given interest free loans to sisters concern and other parties. Thus, disallowance of ₹25,13,558/- was made.
- d. Assessee was also asked to submit the details of purchase reflected in hawala list displayed on website of Sale Tax Department, Maharashtra.

Assessee was found to have purchase of ₹3,69,394/- from these parties and therefore, 100% of such purchases were disallowed.

e. There were sundry creditors reflected in the balance sheet whose name also appears in list of suspicious dealers published by the Sales Tax Department of ₹13,04,108/- in the name of two different parties, same were added under Section 41(1) of the Act.

f. An ad hoc disallowance of ₹5 lac various expenses was also made.

05. Accordingly, Assessment order under Section 143(3) of the Act dated 14th March 2014, the total income of the assessee was assessed at ₹10,99,84,768/- against the return loss of ₹33,72,434/-.

06. Assessee preferred the appeal before the learned CIT (A). As per order dated 30th August 2019, the addition of profitability with respect to Ellora Project and Bhoomi Net City Project were deleted by him. Further out of the addition of ₹3,24,00,000/- as unexplained cash credit under Section 68 of the Act, the addition of ₹2,24,00,000/- was deleted and addition of ₹1 crore was confirmed. The learned CIT (A) deleted the disallowance of interest expenditure of ₹25,13,558/- and also addition under Section 41(1) of the Act of ₹13,41,108/-. With respect to the bogus purchases, he directed the addition to be retained at 12.5% instead of 100% of bogus purchases. Accordingly, both the parties are aggrieved with the order and are in appeal before us.



07. We have heard the parties. The learned Authorized Representative has referred to the detailed paper books filed. The learned CIT Departmental Representative contested the appeal of the assessee where the addition of ₹1 crore under Section 68 of the Act is confirmed, heavily relied on his written submission dated 4th August 2022.
08. We have carefully considered the rival contention and perused the orders of the lower authorities.
09. Now, we will come to the appeal of the learned Assessing Officer first. As per ground nos.1 and 2 are against the deletion of estimation of income of the Ellora Castle project and the Bhoomi Net City. Ground no. 3 is with respect to the interest income of ₹87,91,409/- reduced from the loss on sale of plot. Both these additions have been deleted by the learned CIT (A). With respect to the addition of ₹3,88,98,576/- and reduction of interest income by ₹87,91,409/- from work in progress as well as the estimation of profit of ₹3,39,42,758/-, The learned authorized representative submitted that identical issue arose in the case of the assessee for assessment year 2012 – 13 wherein the AO has recomputed the profit as per his own method. The ITAT deleted the addition. Therefore, it was contested that the issue is squarely covered in favour of the assessee. Our findings are as under: -
- i. The assessee is engaged into project Ellora Castle which is consisting of 12 flats and construction was completed on 26th October



2010, based on this, the learned Assessing Officer computed the net profit of the above project at ₹6,06,77,489/-. The learned Assessing Officer rejected the methodology followed by the assessee because assessee did not recognize sales even though it follows the Project Completion Method. The assessee states that assessee has already declared profit of ₹2,67,34,730/- for the year attributable to the project and further final profit of ₹25,78,52,940/- has been declared in A.Y. 2013-14 which is accepted by the learned Assessing Officer in scrutiny assessment. The assessee also claimed that assessee did not receive occupation certificate based on this submission. The learned CIT (A) deleted the addition because for A.Y. 2013-14, the actual profit has been shown as offer to tax and same has been accepted by the learned Assessing Officer. For this year, the figure of profit shown by the books was not accepted without showing that how the profits shown are incorrect i.e., without rejecting the books of accounts. Further, the occupation certificate permission has not yet been received during the year and therefore, the significant risk and reward of the project properties have not been transferred to the buyer unless the risk and reward of the project are transferred to the ultimate buyer, the income could not have been accrued to the



assessee. If the income is shown or taxed in the hands of the assessee without passing on the risk and reward, it would be in violation of the revenue recognition guidelines. Even otherwise, the profit calculated by the learned Assessing Officer is merely on presumption which is neither the Project Completion Method nor Percentage Completion Method. Further identical issue arose in case of the assessee for assessment year 2012 - 13 (ITA number 7103/M/2019) wherein the coordinate bench deleted the identical addition made by the learned AO. Therefore even otherwise this issue is covered in favour of the assessee in his own case. In view of this, the learned CIT (A) has correctly deleted the addition with respect to Ellora Castle. No infirmity was shown to us in order of CIT (A) by the learned Departmental Representative. Accordingly, we confirm the order of the learned CIT (A) in deleting the addition of ₹3,39,42,758/- in the hands of the assessee on account of Ellora Castle Project. Accordingly, ground no.1 of the appeal is dismissed.

- ii. Ground nos.2 and 3 are with respect to the computation of income on transfer of plot no. 807. In the profit and loss account of Bhoomi Net City, assessee has shown transfer price of plot no.807 at ₹6,60,00,000/-. This was based



on a Conciliation deed dated 21st February, 2011, wherein the assessee firm arrived at consent with the other party. The assessee did not furnish the details of the opening work in progress (WIP) of ₹9,84,31,620/-. As the assessee did not furnish the details of opening and closing WIP, the loss was disallowed of ₹3,88,98,576/-. Before learned CIT (A), assessee submitted that it has entered into a Memorandum of Understanding on 31st December 2007 with Unitech Group for assignment of development rights in a respective plot no. 807 and plot no. 786 at Navi Mumbai. The assessee undertook the construction activity on plot no. 807 and incurred cost there on. Subsequently, there were dispute between the parties and assessee of surrendered development rights on plot no.807. As the assessee was maintaining separate books of account for both projects on different plots and the valuation of plot no.807 was arrived at ₹6.60 crore and plot no.786 was valued at ₹8.5 crore. Accordingly, on plot no.807 assessee disclosed a loss of ₹3,01,07,165/-. Assessee also charged interest on partners' capital of ₹87,91,409/- which was credited to the profit and loss account as income. The above interest income was reduced from the closing work-in-progress. The learned Assessing Officer failed to consider this



aspect. Accordingly, he disallowed the loss as also treatment of interest income incorrectly. The learned CIT (A) held that cost of construction of plot no.807 was ₹9,61,07,165/- . It has an opening WDV of ₹8,93,13,797/-, on which the expenditure during the year was incurred of ₹67,93,368/-. This project was sold at ₹6,60,00,000/-. Therefore, the loss incurred to the assessee was ₹3,01,07,165/-. The learned CIT (A) also asked the learned Assessing Officer about the addition made by him in the remand report and learned Assessing Officer did not comment anything adverse. Further, the interest charged on partners' capital account of ₹87,91,409/- was also required to be reduced from the work-in-progress. Accordingly, the learned CIT (A) deleted the addition of ₹3,88,98,576/-. The learned Assessing Officer in remand report and the learned Departmental Representative before us could not show any reason to not to allow the above claim. We also find that when the property is transferred based on the award of arbitration between the two parties and assessee incurred loss, such loss arises to the assessee in the business of real estate development and therefore, same is allowable. It is not the case of the learned Assessing Officer or Revenue that arbitration award is Sham. The connected ground is ground no.3



which is with respect to the treatment given to reduction of interest income of ₹87,91,409/-. In view of this ground nos. 2 and 3 of the appeal is dismissed.

- iii. Ground no.4 is the appeal of the learned Assessing Officer against the deletion of addition of ₹2.24 crore and ground no.1 and 2 of the appeal of the assessee against the confirmation of addition of ₹1 crore under Section 68 of the Act. The brief fact shows that assessee has borrowed a sum of ₹1,20,00,000/- from Mr. Amit Jadhavji, HUF, ₹ 1 crore from Blue View Commotrade Pvt. Ltd. and ₹ 1 crore from Dimesh Jayantilal Vora. The learned Assessing Officer repeatedly requested the assessee to furnish the details, part of the details were submitted by the assessee in Dak. In the remand proceedings notice under Section 133(6) of the Act were replied to. With respect to Blue View Commotrade Pvt. Ltd., the learned Assessing Officer mentioned that he has learned from the newspaper cutting of new India Express dated 1st November, 2014 that the said company is a suspicious company and involved in round tripping of cash. With respect to other two entities, assessee submitted that in case of Mr. Amit Jadhavji, HUF actual loan of ₹10 lacs taken on 7th May, 2008 and therefore, same is not accepted during the year. Above



loan is also repaid on 18th May, 2010. The assessee submitted the bank passbook, confirmation, copy of the return of the lender. As the above loan was old loan, the same could not have been added under Section 68 of the Act and therefore, the learned CIT (A) correctly deleted the addition for both the reason that the figures taken wrongly as well as the burden on the assessee was discharged.

- iv. With respect to Dimesh Jayantilal Vora, the learned Assessing Officer has made an addition of ₹1 crore. However, the actual loan is taken as ₹10 lacs. This loan was taken on 7th July, 2008 and in earlier years. During the year, assessee submitted the conformation, bank passbook, income tax return and PAN of the lender, the learned CIT (A) deleted the addition. In view of this ground no.4 of the appeal of the learned Assessing Officer is dismissed.
- v. With respect to the appeal of the assessee where the addition confirmed by the learned CIT (A) of ₹ 1 core of loan received from Blue View Commotrade Pvt. Ltd. is contested. The assessee submitted that the aforesaid loan has been repaid during the same financial year therefore assessee could not produce confirmation of the above party during assessment proceedings. In remand



proceedings, assessee submitted the confirmation, the bank statement of the above party. In the remand proceedings, in response to section 133(6) notice, the lender replied to the learned Assessing Officer confirming the above transaction. However, the learned Assessing Officer in remand report stated that as per the newspaper report the above company is involved in a suspicious trading as well as round tripping. Based in this remand report, the learned CIT (A) referred to the letter of the learned Assessing Officer wherein it was stated that the enquiry conducted by the investigation Wing at Kolkata shows that this company is a paper company used for providing accommodation entry. Accordingly, the addition was confirmed. We find that assessee has submitted the ledger account of the above party, confirmation, its bank statement, response to notice under Section 133(6) of the Act, copies of return of income, the audited accounts with all evidences that the lender and the assessee both confirmed the receipt of above loan of ₹1 crore from the lender. The learned Assessing Officer did not conduct any inquiry but merely relied upon the report of the investigation wing of Kolkata. None of the evidences were found to be not reliable, no analysis of the balance sheet or the bank statement of the lender was made. The

assessee was never asked to produce the directors of the above lender company. The learned Assessing Officer in remand report also relied upon the newspaper reports in New Indian Express. However, no efforts were made to corroborate same with the loan transactions of that company with the assessee. The learned CIT (A) also merely followed the findings of the learned Assessing Officer. If the assessee produced all the evidences which could have been possibly produced in case of a loan transaction, same cannot be ignored without making further inquiries proving that all such evidences are not reliable, addition under Section 68 of the Act cannot be made. Accordingly, we reverse the orders of the lower authorities and directed the learned Assessing Officer to delete the above addition of ₹1 crore under Section 68 of the Act. Accordingly, ground nos. 1 and 2 of the appeal of the assessee are allowed.

- vi. Ground no. 5 of the appeal of the learned Assessing Officer is against the deletion of the disallowance of the interest of ₹25,13,558/-. We find that the learned Assessing Officer noted that assessee has paid interest on unsecured loan of ₹38,08,195/- and also given interest free advances of ₹50,07,22,387/- to various associates without charging interest.



Therefore, the learned Assessing Officer disallowed the above interest expenditure. Before the learned CIT (A) it was shown that assessee has utilized the interest free funds received from partner Mr. Vijay Gajra giving these advances. It was further stated that in fact these are mere journal entries and there is no actual transfer of funds. The assessee also explained that with respect to each of the advances as per page number 22 to 25 of the order of learned CIT (A) it was further stated that on identical issue in the sisters concern the co-ordinate bench deleted the disallowances. The learned CIT (A) held that there is no payment but merely journal entries in the books of account to the partner Mr. Vijay Gajra. Thus, there is no diversion of interest bearing funds accordingly, disallowance was deleted and no infirmity was found in the order of the learned CIT (A). The assessee has also shown that each of the debt appearing in those parties account are either because of the funds received from Mr. Vijay Gajra or on account of conciliation deed dated 23.02.2011. There is no movement of funds involved, thus, there is no question of diversion of interest-bearing funds of the assessee to the non-interest bearing advances to sister concerns. Accordingly, the order of the learned CIT (A) is confirmed and

ground Nos. 5 of the appeal of the learned Assessing Officer is dismissed.

- vii. Ground no. 6 of the appeal with respect to deletion of addition under section 41(1) of the Act amounting to ₹13,04,108/-. During the course of assessment proceedings, two parties namely Shree Sai Traders amounting to ₹ 10,03,750/- and Shubham Enterprises of ₹3,00,358/- were found to be outstanding. Both these parties also appeared in the list of suspicious dealers of Sales Tax Department and therefore, the learned Assessing Officer was of the view that assessee has only taken accommodation entries from these two parties and no amount is payable to them. Thus, an addition under section 41 (1) of the Act was made. The learned CIT (A) noted that during the year no events have taken place to indicate remission or cessation of liabilities in question. Further, the material was purchased from these two parties in F.Y. 2008-09, therefore, these liability is recognized by the assessee. It was further noted that on 7.11.2011 some part payment were made to these parties. In view of this addition under section 41(1) of the Act was deleted. No infirmity was pointed out before us in the order of the learned CIT (A). Therefore, the order of the learned CIT (A) in deletion of addition is confirmed. Accordingly, ground



number 6 of appeal of learned Assessing Officer is dismissed.

- viii. Ground nos. 7 and 8 of the appeal of the learned Assessing Officer and ground no. 3 of the appeal of assessee is with respect to the addition of 12.5% sustained by the learned CIT (A). The fact shows that assessee has made purchase during the year amounting to ₹3,69,394/- from different parties which were in the list of suspicious dealers. Appellant did not submit any submission and therefore, the learned Assessing Officer made an addition of 100% of such sum. On appeal before the learned CIT (A), he restricted the same to the extent of 12.5%. Therefore, learned Assessing Officer and assessee are in appeal before us. We find that this issue is squarely covered by the decision of Hon'ble Bombay High Court in case of PCIT vs. Batliboi Environmental Engineering Ltd (2022) 446 ITR 238 (Bom) where in respect of entire amount of purchase the addition was restricted to 12.5%. Therefore, respectfully, following the decision of Hon'ble Bombay High court ground nos. 7 and 8 of the appeal of the learned Assessing Officer and ground no. 3 of the appeal of the assessee are dismissed.
- ix. Ground no. 4 of the appeal of the assessee is with respect to ad hoc disallowance of ₹5 lac



out of various expenses sustained by the learned CIT (A) but fact shown that during assessment proceedings, the assessee was asked by the learned Assessing Officer to produce the books of accounts as well as the details of expenses. Same were not produced. The Assessee has claimed total expenses as allowable by approximately 9 crore. The learned Assessing Officer in absence of any information made on ad hoc disallowance of ₹5 lac. The learned CIT (A) confirmed the same. We also find that assessee did not produce the books of account as well as the details of expenses before the lower authorities but merely produced the ledger account of expenses and bank statement. Thus, the lower authorities cannot be found fault with in confirming the disallowance on ad hoc basis. Accordingly, this ground of appeal of the assessee is dismissed.

010. In the result, the appeal of the learned Assessing Officer is dismissed and the appeal of the assessee is partly allowed.

Order pronounced in the open court on 01-11-2022

Sd/-
(AMIT SHUKLA)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 01-11-2022

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