



॥ आयकर अपीलीय न्यायाधिकरण, पुणे "बी" न्यायपीठ, पुणे में ॥



IN THE INCOME TAX APPELLATE TRIBUNAL, PUNE "B" BENCH, PUNE
BEFORE SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

AND

SHRI G. D. PADMAHSHALI, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA Nos. 2406/PUN/2017

निर्धारण वर्ष / Assessment Years : 2012-2013

Devi Construction Company
1161/10, Devi Niwas, Shivaji Nagar,
Pune - 411005.

PAN:AAAFD8922A

..... अपीलार्थी / Appellant

बनाम / V/s.

Dy. Commissioner of Income Tax,
Circle 2, Pune

..... प्रत्यर्थी / Respondent

द्वारा / Appearances

Assessee by : Shri Kishor Phadke

Revenue by : Shri M. G. Jasnani

सुनवाई की तारीख / Date of conclusive Hearing : 28/09/2022

घोषणा की तारीख / Date of Pronouncement : 11/11/2022

आदेश / ORDER

PER G. D. PADMAHSHALI, AM;

The extant appeal is directed against the order of Commissioner of Income Tax (Appeals)-2, Pune [for short "**CIT(A)**"] all dt. 10/08/017 passed u/s 250 of the Income-tax Act, 1961 [for short "**the Act**"], which dove out of order of assessment dt. 30/03/2015 passed u/s 143(3) by the Dy. Commissioner of Income Tax, Circle 2, Pune [for short "**AO**"] for assessment years [for short "**AY**"] 2012-13.



2. Before coming to facts of the case, its apt to state that, neither the original grounds raised through the appeal memo nor the **modified grounds challenged** by letter dt. 01/06/201, are in consonance with rule 8 of Income Tax Appellate Tribunal Rules, 1963 [for short "**ITAT Rules**"], hence reproduction thereof is dispensed with. However for the purpose of adjudication it shall suffice to state that, in all there are eight (8) modified grounds, of which ground number 1 being general and 4 relating to disallowance of routine overhead, is submitted as not pressed, whereas ground number 8 being procedural remained quiescent.

3. **Pithily stated the facts of the case are;**

3.1 The assessee is partnership firm engaged in the business of construction and wind power generation, has for the impugned AY filed its return of income [for short "**ITR**"] dt. 28/09/2013 declaring total taxable income of ₹28,75,41,887/- after claiming 80IB(4) deduction, which initially was summarily processed u/s 143(1) and then subjected to scrutiny through CASS serving the statutory notice u/s 143(2) of the Act.



3.2 Considering the written submission filed by the assessee in response to notices during the assessment proceedings, the Ld. AO carried out in as much as sixteen disallowances / additions on multiple issues, which were assailed before the first appellate authority [for short "**FAA**"], who in turn appreciating the facts granted partial relief, however culminated the appellate proceedings with enhanced assessment.

3.3 Aggrieved by the orders of both the tax authorities below [for short "**TAB**"], the appellant firm through this extant appeal is before the Tribunal seeking relief against the following;

- a.** Taxing the revenue from windmill in the year under consideration [Ground number 2 and its counter parts]
- b.** Disallowance of claim of depreciation @80% on road development expenses [Ground number 3]
- c.** Disallowance of interest u/s 36(1)(iii) [Ground number 5 and its counter parts]
- d.** Disallowance of provision for contractual liabilities [Ground number 6 and its counter parts] and
- e.** Disallowance of cancellation charges paid to related parties [Ground number 7 and its counter parts]



4. In the course of physical hearing, the learned representative for the assessee [for short "**AR**"] summarised the facts of the case quickly and adverting to the paper book reiterated the submission put forwarded before the Ld. **TAB** and candidly drawn our attention to para 17-23 of order of co-ordinate bench in appellants own case for preceding AY 2011-12 (ITA 2405/PUN/2017) and requested for remanding the case back to Ld. AO for the limited issue of verification of diversion of interest bearing funds for non-business activities / purpose & consequential allowance vis-à-vis capitalisation. **Au contraire** the learned departmental representative [for short "**DR**"] adverting to various case laws, has strongly placed his reliance on the orders of **TAB** in seeking dismissing the appeal of the appellant in toto.

5. After hearing to rival contentions of both the parties; and subject to the provisions of rule 18 of **ITAT, Rules** perused the material placed on record, case laws relied upon by the appellant as well the respondent and duly considered the facts of the case in the light of settled legal position forewarned to parties present.



6. Now we shall deal with substantive, modified grounds one by one as recapitulated para 3.3 hereinbefore;

6.1 Taxing the revenue from windmill in the year under consideration [Ground number 2 and its counter parts]

i. It shall suffice to state that, the Ld. **FAA** while dealing with the claim of depreciation on windmill, in the evince of agreement entered with MSEDCL for sale of energy/power generated from the newly installed windmill, has brought to tax the unbilled amount of revenue of ₹43,72,95/- on the satisfaction that, the windmill was duly commissioned and put to generation of energy/power w.e.f. August, 2011 so the claim of depreciation. Per contra, the Ld. AR contended that, Ld. **FAA** erred in bringing to tax the revenue in the year under consideration in the absence of agreement with purchaser i.e. MSEDCL which was entered on 11/03/2013 and a right to receive revenue which has crystallized at a later stage in terms agreement entered and hence offered for taxation in the subsequent year & taxed accordingly.



ii. Undisputedly, the income generating asset i.e. windmill was installed, erected, commissioned and became operational w.e.f. August 2011 and from then generated energy/power therefrom was continuously in supply to the grid of the MSEDCL in the year under consideration, hence the contention of appellant that, right to receive revenue was not accrued is perverse, as to the supplier appellant for the corresponding period in terms of accrual principle the right to receive revenue stands accrued as soon supply was made irrespective of actual date of agreement signed with the MSEDCL, as the said agreement merely creates & validates enforcement of right and does not intervene with accrual of right. Further the evince of invoices placed at page 83 to 91 pertaining to supply of energy/power from august 2011 to march 2012 has solidified the right to receive revenue was undisputedly accrued to the appellant and for the reason the claim of the appellant fails like a house of cards, consequently the modified ground number 2.1 and 2.2. Insofar the double taxation of revenue



agitated in ground number 2.3 is concerned; it shall suffice to state the appellant is free to follow the recourse available under the provisions of law with respect thereto, resultantly the modified ground number 2 and its counter parts stands dismissed.

6.2 Disallowance of claim of depreciation @80% on road development expenses [Ground number 3]

i. Ostensibly it transpires that, the appellant has incurred expenditure towards development of internal road to provide access to income generating plant i.e. windmill and such expenditure included as a part of windmill and found capitalised in a block of plant of machinery carrying 80% rate of depreciation. The Ld. **FAA** while allowing depreciation on civil foundation and electrical fittings as part of plant carrying even rate of depreciation directed the Ld. AO to restrict the depreciation on the road development capitalisation to 10% instead of 80% allowed.

ii. Aggrieved appellant placing reliance on the decision of Hon'ble Jurisdictional High Court of



Bombay in “**CIT Vs Cooper Foundry Pvt Ltd.**” (ITA 1326 of 2010) contended that, without the access road windmill-plant cannot be accessed; hence the cost of developed road being an integral part to follows the same block of windmill-plant itself.

iii. We are not inclined to concur with the Ld. AR for the reasons that, if this analogy is accepted then the land without which windmill-plant cannot stand on its leg should also became plant carrying same rate depreciation as that of windmill, such analogy shall defeat the purpose and very classification of block as envisaged by section 2(11) of the Act. And on the other hand there was complete **absentia** of evidence showcasing that such developed road was a part civil foundation and was necessary pursuant to technical specification so as to fallow the same block, on the contrary Ld. AO vouched such expense as incurred on **repairs & maintenance charges**, for the reason we see no infirmity with the direction of Ld. CIT(A) in restricting the depreciation to 10% as against 80% inadvertently allowed in the assessment.



6.3 Disallowance of interest u/s 36(1)(iii) [Ground number 5 and its counter parts]

i. In the course of assessment proceeding the Ld. AO observed that, the appellant made huge investment in land out of the interest bearing funds and after considering the appellants submission, invoked the provisions of section 36(1)(iii) of the Act and disallowed the proportionate interest @11% computed on the total investment made. In an appeal before the Ld. **FAA**, the appellant made equi submission, however it didn't inspire any confidence in taking any a divergent view from that of Ld. AO.

ii. Before us, the appellant submitted that such investment in land isn't as stock-in-trade but investment in the Balance-sheet, and are funded out of advances received from customer & maturity proceeds of fixed deposits etc., and for the purpose submitted bank ledger a/c in support the claim. Considering the submission, in our opinion, realisation from customer should go to reduce loan account and the contention of appellant that



investment are out of fixed deposit which represent surplus non-interest bearing funds cannot be accepted as the surplus of the firm held by partners are subjected to interest funds. After a thoughtful consideration of facts and circumstance and in the absence of document explicitly showcasing investment in land are out of non-interest funds, in the light of judicial pronouncement relied upon by the Ld. **TAB**, we reverberate the views taken by them, ergo, modified ground number 5.1 is dismissed.

iii. However, the appellant should not be deprived for alternate claim of capitalisation of aforesaid disallowance, consequent to acceptance of alternate claim assailed in modified ground number 5.2, we on direct the Ld. AO to allow the capitalisation of disallowed interest to land, consequently ground number 5.2 stands allowed for statistical purpose.

6.4 Disallowance of provision for contractual liabilities [Ground number 6 and its counter parts]

i. For the year under consideration, the appellant



firm has made a provision @1% of agreement cost in the profit & loss account [for short "**P&L**"] towards cost to be incurred in relation to four construction completed projects namely; DGTP, Express Tower, Sacred World and SHT M6 without giving effect to closing stock, the Ld. AO however disallowed the provision citing dual reasons that, firstly it represents the future expenses in respect of completed projects where the completion certificate is already received, and secondly estimated cost goes to inflate actual cost, hence the cost to be incurred represent future expenses. In an appellate proceeding, the Ld. **FAA** finding no force in the submission of the appellant, upheld the disallowance holding it to be non-existing of liability at the time provision and being contingent in nature in the light of decision Hon'ble Apex Court in "Indian Molasses Co. Pvt. Ltd. Vs CIT" reported in 37 ITR 86 and "Shree Sajjan Mills Ltd. Vs CIT" reported at 156 ITR 585.

ii. In reaching the north pole of adjudication on the clinching subject matter, it is sufficient to state that,



while computing the income under chapter IV-D of the Act, the assessee is entitled to claim only that business expenditure towards which the liability is already & actually incurred and it is pre-existing as at the time of making any provision toward. It is needless to quote that, in the absence of pre-existing liability at the relevant time disentitles the assessee from making any provision in the P&L as it partakes the characteristic of contingency.

iii. Insofar as the present claim of provision is concerned, the Ld. AR fairly took us through the Paperbook Page 98-113 demonstrating the actual expenditure incurred in subsequent years pursuant to provisions made in the year under consideration, however failed to prove with shreds of evidences that, such liability was incurred in the impugned AY and pre-existing at the relevant time of making provisions in the P&L A/c, in the event and for the reasons we find force in the views taken by the Ld. **TAB**, ergo this modified ground and all its counter parts stands dismissed in the light of "**Indian Molasses Co. Pvt.**



Ltd. Vs CIT” and “Shree Sajjan Mills Ltd. Vs CIT”
(Supra)

6.5 Disallowance of cancellation charges paid to related parties [Ground number 7 and its counter parts]

i. Undisputedly, the appellant has paid an amount of ₹354.80Lakhs to a sister concern M/s Devi Construction Co. Pvt. Ltd. and ₹32.00Lakhs to a partner Mr. Ravi Mehbubani as compensation charges towards cancellation of booking on account of failure to deliver the booked units (flats/commercial spaces) and claimed as expenditure by charging it to P&L A/c. The Ld. **TAB** underlining the absence of proof of bookings by the related parties has pinpointed multiple flaws in the claim which the appellant could not repute consequently carried out the addition by disallowance.

ii. In the course of physical hearing, the Ld. AR adverting to Paperbook Page 114-151, candidly confirmed that, in these cases no registered



document were entered by the appellant either at the time of bookings or at the time of cancellation of bookings, however failure to deliver the agreed units triggered the penalty action in the form of compensation.

iii. On perusal of ledger account of appellant in the books of sister concerned M/s Devi Contraction Co. Pvt., it is noticed that, the sister concern started making payment since 30/07/2007 i.e. financial year [for short "**FY**"] 2007-2008 and in the said FY has initially accounted the part of the impugned amount ₹19,62,168/- as interest received against the balance standing as on the closure of said FY with corresponding TDS thereon amounting to ₹4,44,627/- which was subsequently reversed. **Per contra**, in the appellant books, the ledger of sister concern M/s Devi Construction Pvt. Ltd. commences the financial transaction w.e.f. 01/04/2005 i.e. FY 2005-2006 with an opening credit balance of ₹11,55,20,000/- and no entries for the subsequent FY till 2010-2011. The conjoint reading of ledger account in the absence of



registered agreement entered for booking of immovable property under consideration and any concrete evidentiary material showcasing the cancellation thereof is enough to lose allowability.

iv. Further in case of compensation to partner Mr. Ravi Mehbubani is concerned, neither of the aforestated documents were placed to substantiate the allowability of claim as genuine except a ledger a/c of ET-A1201 with a single entry dt. 30/06/2011 of ₹60Lakhs on which cancellation compensation of ₹32Lakhs was paid on 20/02/2011. The appellant failed to prove the genuineness and prudence in paying more than 50% on alleged booking as compensation for a period less than eight (8) months from receipt.

v. Insofar as the discharge of tax liability by the recipient related parties is concerned, it shall serve to say that, the adjudication do not travel beyond scope of subject matter of taxation brought before the bench, hence contention of the Ld. AR falls out of scope of adjudication.



- vi. In toto, we find that, both the Ld. **TAB** has come to an acceptable conclusion in the absence of denotive evidential material in support of claim as genuine and bonafied, for the reason we without an iota of scepticism, find any infirmity with the action of both the Ld. **TAB**, in consequence this modified ground with its counter parts are dismissed.
7. In nutshell, modified ground number 5.2 the case is remanded back to the file of Ld. AO for statistical purpose and all other remaining modified grounds & their counter parts are adjudicated against the appellant assessee.
- 8. Resultantly, all the appeal of the appellant assessee is PARTLY ALLOWED for statistical purpose in above terms.**
- In terms of rule 34 of ITAT Rules, the order pronounced in the open court on this Friday 11th day of November, 2022.

-S/d-

S. S. VISWANETHRA RAVI,
JUDICIAL MEMBER

-S/d-

G. D. PADMAHSHALI
ACCOUNTANT MEMBER

पुणे / PUNE ; दिनांक / Dated : 11th day of October, 2022.

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

- | | |
|--|----------------------------------|
| 1. अपीलार्थी / The Appellant. | 2. प्रत्यर्थी / The Respondent. |
| 3. The Pr. CIT-Circle-2, Pune (Mh-India) | 4. The CIT(A)-2, Pune (Mh-India) |
| 5. DR, ITAT, Pune Bench 'B', Pune | 6. गार्डफ़ाइल / Guard File. |

आदेशानुसार / By order
वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय न्यायाधिकरण, पुणे / ITAT, Pune.