

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

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.490/Mum./2022
(Assessment Year : 2014-15)

Asstt. Commissioner of Income Tax
Central Circle-7(3), Mumbai

...Appellant

v/s

M/s. Macrotech Developers Ltd.
(Successor to M/s. Bellissimo Hi-Rise
Builders Pvt. Ltd.), 412, 4th Floor
17-G, Vardhman Chambers
Cawasji Patel Road, Horniman Circle
Fort, Mumbai, Mumbai 400 001
PAN-AABCL2637A

.....Respondent

Assessee by : Shri Niraj Sheth
Revenue by : Shri Tejinder Pal Singh Anand

Date of Hearing- 17/08/2022

Date of Order- 10/11/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the Revenue challenging the impugned order dated 23/11/2021, passed under section 250 of the Income Tax Act, 1961 (*the Act*) by the learned Commissioner of Income Tax (Appeals)-49, Mumbai [*learned CIT(A)*], for the assessment year 2014-15.

2. The present appeal filed before us is delayed by 40 days. In this appeal, the impugned order dated 23/11/2021 was received by the Revenue on

06/12/2021. Thus, as per the provisions of section 253(3) of the Act, the Revenue was required to file the appeal within 60 days from the receipt of the order. However, the Revenue filed the appeal, for the year under consideration, on 16/03/2022. We find that the Hon'ble Supreme Court, vide order dated 10/01/2022, passed in M.A. no.21 of 2022, in M.A. no.665 of 2021, in Suo-Motu Writ Petition (Civil) no.3 of 2020, directed that the period from 15/03/2020 till 28/02/2022, shall stand excluded for the purpose of limitation as may be prescribed under any general or special laws in respect of all judicial and quasi judicial proceedings. As the due date for filing present appeal was falling within the aforesaid time-period, in view of the order passed by the Hon'ble Supreme Court, there is no delay in filing the present appeal and we proceed to decide the same on merits.

3. In this appeal, the Revenue has raised the following grounds:

"1. Whether on facts and circumstances of the case and in law, the Ld. CIT(A) is right in deleting the addition of Rs.11,13,552/- by Assessing Officer u/s 36(1)(iii) of the Income-tax Act, 1961."

2. On the fact and circumstances of the case, the Learned CIT(A) has erred in deleting the disallowance u/s 14A r.w.r. 8D without considering the ignoring the fact that disallowance of expenditure can be made even where taxpayer in a particular year has not earned any exempt income.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of loss of Rs.2,09,67,489/- incurred by the assessee in reselling Flat no C-4801 at lesser price than it was early sold to promoters wife Smt. Manjula Lodha and refunding her full money, which was higher than the resold value.

4. The issue arising in ground No. 1, raised in Revenue's appeal, is pertaining to the deletion of disallowance of Rs. 11,13,552, made under section 36(1)(iii) of the Act.

5. The brief facts of the case pertaining to this issue are: The assessee is a company engaged in the business of construction and development of real estate. For the year under consideration, the assessee filed its return of income on 30/11/2014, declaring a total loss of Rs. 14,27,33,008. The case of the assessee was selected for scrutiny under CASS. During the course of assessment proceedings, from the perusal of note 21 of the audited financial statement of the assessee, it was noticed that the assessee has incurred an interest expenditure of Rs. 196.57 lakh and earned an interest income of Rs. 90.90 lakh. In order to verify the rate of interest at which the funds are borrowed and the rate at which the funds were lent, the assessee was asked to furnish the details of interest received as well as the interest paid. On perusal of the details, it was noticed that the average borrowing rate of the assessee is 10.90% whereas the assessee has lent the money to company, namely, Gangotri Exim Private Limited at the rate of 9%. The assessee was asked to explain the reason for borrowing the money at a higher rate of interest and lending the money at a lower rate of interest and justification for claiming the differential amount as a deduction under section 36(1)(iii) of the Act. In absence of any justification, the Assessing Officer (AO) vide order dated 30/12/2016, passed under section 143(3) of the Act made an addition of Rs. 11,13,552, being the amount of rate difference between 10.90% and 9%, under section 36(1)(iii) of the Act.

6. The learned CIT(A), vide impugned order, allowed the appeal filed by the assessee on this issue by following its earlier decision rendered in case of

sister concern of the assessee. Being aggrieved, the Revenue is in appeal before us.

7. We have considered the submissions of both sides and perused the material available on record. From the record, it is evident that Macrotech Construction Private Limited (now merged with the assessee company) lent a sum of Rs. 25 crore to Gangotri Exim Private Limited from 04/04/2013, to 15/04/2013. From the perusal of the Balance Sheet of Macrotech Construction Private Limited for the year ending 31/03/2013, forming part of the paper book at Page-86, we find that it has a capital of Rs. 360.17 crore, which is more than the loan advanced by the assessee to Gangotri Exim Private Limited. We find that the Hon'ble Jurisdictional High Court in CIT v/s Reliance Utilities & Power Ltd., [2009] 313 ITR 340 (Bom.), held that if funds are available with the assessee, which are sufficient to meet the investment, then the presumption would arise that the investment is made out of funds so available with the assessee and, therefore, no disallowance under section 36(1)(iii) can be made. Thus, respectfully following the aforesaid decision, the impugned order on this issue is upheld. Accordingly, ground No. 1 raised by the Revenue is dismissed.

8. The issue arising in ground No. 2, raised in Revenue's appeal is pertaining to deletion of disallowance under section 14A r/w Rule 8D of the Income Tax Rules, 1962.

9. The brief facts of the case pertaining to this issue are: During the course of assessment proceedings, it was observed that the assessee has made an

investment of Rs. 1,02,49,010, in shares of subsidiary companies. The assessee was asked to explain why disallowance under section 14A r/w Rule 8D should not be made. In response thereto assessee submitted that it has not earned any exempt income during the year and therefore no disallowance under section 14A be made. The assessee also submitted that the investment was made in the shares of subsidiary companies with an intention to have controlling stakes therein. The AO vide assessment order passed under section 143(3) of the Act did not agree with the submissions of the assessee and held that provisions of section 14A is squarely applicable if the investment made is capable of generating exempt income irrespective of whether dividend income is earned or not. Accordingly, the AO made an addition of Rs. 31,71,040, under section 14 A read with Rule 8D after taking into consideration suo moto disallowance of Rs. 1,09,179, made by the assessee.

10. The learned CIT(A), vide impugned order, allowed the appeal filed by the assessee on this issue. Being aggrieved, the Revenue is in appeal before us.

11. Having considered the submissions of both sides and perused the material available on record, we find that in the present case it is undisputed that the assessee has not earned any exempt income during the year under consideration. Despite noting the aforesaid fact, the AO vide assessment order proceeded to compute the disallowance under section 14A r/w Rule 8D. We find that the learned CIT(A) after following various judicial pronouncements, wherein it was held that no disallowance under section 14A could be made in case no exempt income is received or receivable during the relevant previous

year, decided this issue in favour of the assessee. In light of the judicial pronouncements as referred by the learned CIT(A), we find no infirmity in the impugned order passed on this issue. Accordingly, ground No. 2 raised in Revenue's appeal is dismissed.

12. The issue arising in ground No. 3, raised in Revenue's appeal, is pertaining to the deletion of disallowance of loss of Rs. 2,09,67,489, incurred by the assessee in reselling the flat.

13. The brief facts of the case pertaining to this issue are: Macrotech Construction Private Limited (now merged with assessee company) sold 2 flats No. C-4801 and C-4701, in building Lodha Bellissimo to Smt. Manjula Lodha in the financial year 2012-13 for a consideration of Rs.28,00,80,000. Subsequently, vide deed of termination dated 28/05/2013 and 16/08/2013, the flats sold to Smt. Manjula Lodha, were cancelled and the entire amount was refunded. Thereafter, the same flat was sold to 3rd party at a lesser value than the value at which it was sold to Smt. Manjula Lodha, resulting in a loss of Rs. 4,34,43,909, to the assessee being the difference of amount refunded to Smt. Manjula Lodha, and the amount received from the third-party towards the sale of flat. During the course of assessment proceedings, the assessee was asked to explain the reason for cancelling the flat at a higher value and selling the same at a lower value. In reply assessee submitted that initially the flat was sold to Smt. Manjula Lodha, however, based on mutual consent between the parties, the said agreement was cancelled and thus flat was subsequently sold to another buyer. The AO vide assessment order passed

under section 143(3) of the Act did not agree with the submissions of the assessee and held that no businessman would cancel the flat sold at a higher value and sell the same flat at a lower value. The AO further held that the assessee chose to do only to create a loss in the company and the entire scheme is to manipulate the profit/income of the company. Out of the 2 flats cancelled and resold to third-party, income from flat No. G4701 was offered to tax in the hands of Macrotech Construction Private Limited and income from flat No. G-4801 was offered to tax in the hands of the assessee as Macrotech Construction Private Limited was merged with the assessee company from 10/08/2013. Accordingly, a loss of Rs. 2,09,67,489, incurred by the assessee on resale of flat No. C-4801 is added to the total income of the assessee.

14. The learned CIT(A) vide impugned order allowed the appeal filed by the assessee on this issue. Being aggrieved, the Revenue is in appeal before us.

15. We have considered the rival submissions and perused the material available on record. For the purpose of this appeal only the transaction pertaining to flat No. G-4801, in building Lodha Bellissimo is relevant as income from the said flat was offered to tax in the hands of the assessee as Macrotech Construction Private Limited was merged with the assessee company from 10/08/2013. The aforesaid flat was purchased by Smt Manjula Lodha, who is the wife of promoter of the assessee company, vide Agreement for Sale, duly registered and executed on 01/11/2012, for a total consideration of Rs. 14,00,40,000. In this regard, Smt. Manjula Lodha, paid a sum of Rs. 4,00,40,000, towards the booking of the said flat. As per the assessee,

subsequently, the transaction was cancelled vide deed of cancellation dated 28/05/2013, on account of financial difficulty on the part of the buyer i.e. Smt. Manjula Lodha. Pursuant thereto advance of Rs. 4,00,40,000, was refunded to Smt. Manjula Lodha. Thereafter, the said flat was sold to another buyer for a consideration lower than the original and thus the assessee has realised the lesser consideration of Rs. 2,09,67,489. As per the AO, the entire scheme is to manipulate the profit/income of the company and save the wife of the promoter from the losses in her books.

16. On the other hand, as per the assessee, the entire transaction is in the regular course of business operation, and consequently gain/loss, if any is exclusively part and parcel of the business and by no stretch of the imagination the same can be perceived as a manipulative transaction. In the submission before the learned CIT(A) the assessee referred to several cases where the assessee incurred losses, pursuant to the cancellation of the original booking, in respect of the flats in a project titled 'Lakeshore Greens' in the year under consideration. By reference to the ready reckoner rate of the property in the period of transaction, the assessee submitted that in the year 2012, when the property was purchased by Smt. Manjula Lodha, the value of property was Rs. 10,45,39,712. Further, the ready reckoner rate per square meter remained the same even in year 2013 when the property was resold at Rs. 11,90,72,511. Thus, it was submitted that it is not a case wherein the flat has been sold at a rate lower than the ready reckoner rate. The assessee also furnished the data regarding the various bookings made in the same building to show that the sale rate per square feet for flat G-4801 is similar to or close

to the other fresh flats booked during the year. Further, the decline in the sale rate was due to market conditions and the development of a new building opposite of Lodha Bellissimo building. After considering the aforesaid submissions, the learned CIT(A) vide impugned order observed as under:

"10.3.3. It is evident that the Ld. AO has made this addition on the basis of preponderance of probability which is that a property would not be sold subsequently at a lesser value than what it was sold previously. The assessee submitted that an agreement was made with Mrs. Manjula Lodha for sale of the said property at a value determined mutually, however the agreement was cancelled and the assessee returned the advance received from her subsequently the property was sold to a third party at a marginally lesser value because of the fact that the market rate of this property has come down primarily because of coming up of another building opposite the project of the assessee as highlighted in the article published in the Economic Times on 21.06.2013 I find that apart from the findings on the basis of preponderance of probability the Ld. AO has not brought any evidences on record so as to form an opinion that the transactions were not genuine or the assessee has intentionally suppressed the disclosed value of the property sold to the third party. The assessee has explained the reason for reduction in value which appears to be logical and explainable in the light of the article published in the Economic Times as referred to previously. The Id. AO has not brought anything on record to prove that the transactions were not genuine, more so when all necessary details relevant to the said transactions were furnished by the assessee. In absence of any evidence found for treating the transactions as not genuine, the impugned addition cannot survive. In the given facts of the case, I find that there are no evidences on record to make the above disallowance and the same is therefore directed to be deleted. The ground is accordingly allowed."

17. During the hearing before us, the Revenue could not bring anything on record to controvert the submissions of the assessee. Apart from making the allegation that the transaction is manipulative in nature, no evidence has been brought on record to show that the price at which the flat was resold was less than the market rate or the ready reckoner rate. On the other hand, the assessee has shown various circumstances wherein either the assessee has incurred similar losses or the flat in the same building was sold at less or equivalent per square feet rate.

18. Thus, in view of the above, we are of the considered opinion that comparing the price of the property at two different point of time without taking into consideration the market scenario and making the addition merely on account of difference in sale consideration is not justified unless and until material substantiating the claim that the transaction was merely bogus to book loss in the hands of the assessee is produced on record. Therefore, in view of the above, we find no infirmity in the impugned order passed by the learned CIT(A) on this issue. As a result, ground No. 3 raised in Revenue's appeal is dismissed.

19. In the result, the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 10/11/2022

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 10/11/2022

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai