

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.638/MUM/2016
निर्धारण वर्ष / Assessment Year: 2010-11

DCIT, Mumbai.	Circle-6(3)(2),	Vs.	Karjat Golf Club P. Ltd., Tower, 1502 B One India Bulls Centre, 841 Jupier Mills, Off Senapati Bpat Marg, Lower Parel, Mumbai- 400013 PAN : AADCK0915A
Appellant			Respondent

C.O. No.236/MUM/2017
(Arising out of ITA No.638/MUM/2016)
निर्धारण वर्ष / Assessment Year: 2010-11

Karjat Golf Club P. Ltd., Tower, 1502 B One India Bulls Centre, 841 Jupier Mills, Off Senapati Bpat Marg, Lower Parel, Mumbai- 400013 PAN : AADCK0915A	Vs.	DCIT, Circle-6(3)(2), Mumbai.
Appellant		Respondent

Revenue by : Shri Keyur Patel
Assessee by : Shri Vilesh Dalya

Date of hearing : 15.11.2022
Date of pronouncement : 23.11.2022

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the Revenue directed against the
order of Id. Commissioner of Income Tax (Appeals)- 12, Mumbai

[‘the CIT(A)’] dated 16.11.2015 for the assessment year 2010-11.

The Cross Objection filed by the assessee against the appeal of the Revenue.

2. First, we shall take up the Revenue’s appeal in ITA No.638/MUM/2016 for adjudication.

ITA No.638/MUM/2016 – By Revenue :

3. The Revenue raised the following grounds of appeal :-

“1. “Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of entire expenditure of Rs. 1,56,19,351/- as the assessee was not set up any business activities till during the year under consideration.”

2. “Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of written off advances of Rs.28,21,75,835/- without considering the fact that while assessee is accusing these parties of fraud, at the same time it has advanced an interest-free loan of Rs.7,50,000/- to M/s Silvex Reality Pvt. Ltd. during the year.”

3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of professional fees of Rs. 1,50,02,306/- claimed the current year on payment of appropriate taxes (which was disallowed last year) as the assessee was not set up any business activities till during the year under consideration.”

4. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of brought forward losses of Rs.32,79,73,356/- and carrying forward losses as the assessee was not set up any business activities till during the year under consideration as well as no scrutiny assessment was done for earlier assessment years i.e. 2008-09 and 2009-10.”

5. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.””

4. Briefly, the facts of the case are as under :

The respondent-assessee is a private limited company engaged in the business of development of a golf centric residential project. The return of income for the assessment year 2010-10 was filed on 15.10.2010 declaring loss of Rs.31,53,33,840/-. Against the said return of income, the assessment was completed by the Dy. Commissioner of Income Tax, Circle- 6(2), Mumbai ('the Assessing Officer') vide order dated 08.03.2013 passed u/s 143(3) of the Income Tax Act, 1961 ('the Act') at total loss of Rs.25,36,349/-. While doing so, the Assessing Officer disallowed the expenditure of Rs.1,56,19,351/- incurred on account of professional & consultancy charges and technical consultancy fees reimbursed to KGCPL who in turn made payment to M/s Greg Norman Golf Course Designed Pvt. Ltd., M/s Troon Hong Kong Ltd. and M/s. Silvex Realty Pvt. Ltd. on the ground that the said concern i.e. M/s Silvex Realty Pvt. Ltd. had not provided any technical services to the assessee nor the business had been set-up. Similarly, the Assessing Officer also disallowed a sum of Rs.28,21,75,835/- being the advances paid to M/s. Silvex Realty Pvt. Ltd. of Rs.10,57,39,185/- and M/s Sterling Construction System Pvt. Ltd. of Rs.17,63,78,889/- written off in the books of account and claimed as revenue expenditure on the

ground that the assessee had not set-up any business and the advances paid to the sister concerns was held to be sham transactions.

5. Being aggrieved, an appeal was filed before the Id. CIT(A) who vide impugned order held that the respondent-assessee had initiated the work of development of land by undertaking levelling of land and setting up civil structure and acquiring technical services for preparing project development plan and budget, conducting feasibility studies and obtaining consultancy services for development and management of gold facilities and directed the Assessing Officer to allow technical expenses of Rs.1,56,19,351/- placing reliance on the following decisions :-

- (i) *CIT vs. Saurashtra Cement & Chemical Industries Ltd., 91 ITR 170 (Gujarat).*
- (ii) *CIT vs. Arcane Developers (P.) Ltd., 368 ITR 627 (Delhi).*
- (iii) *Tetron Commercial Ltd. vs. CIT, 261 ITR 422 (Calcutta).*
- (vi) *CIT vs. Dhoomketu Builders & Development (P.) Ltd., 368 ITR 680 (Delhi).*

6. Similarly, the Id. CIT(A) allowed the advances written off of Rs.28,21,75,835/- by holding that the loss incurred during the course of carrying on ordinary business placing reliance on the decision of the Hon'ble Supreme Court in the case of Badridas Daga vs. CIT, 34 ITR 10 (SC) and Associated Banking Corporation

of India Ltd. vs. CIT, 56 ITR 1 (SC) accepting the submission of the respondent-assessee that the losses were incurred as result of misappropriation of embezzlement of funds which had been done by the Ex-CEO of the respondent-assessee company.

7. Being aggrieved the decision of the ld. CIT(A), the Revenue is in appeal before us in the present appeal.

8. It is primarily contended that the finding of the ld. CIT(A) in holding that the respondent-assessee had set-up the business are perverse, inasmuch as, there is material on record i.e. clearly indicates the respondent-assessee in the process of looking for strategic alliances with development companies to develop the project, which clearly indicates that business had not been set-up and secondly, it is submitted that there is no evidence on record that the associated concern of the respondent-assessee, namely, M/s. Silvex Reality Pvt. Ltd. had actually provided any technical services for the purpose of business of the respondent-assessee.

As regards to the allowance of advances written off as revenue expenditure, the ld. CIT(A) contends that there is no material brought on record by the respondent-assessee establishing these advances are made during the normal course of business.

9. On the other hand, ld. AR relying on the order of the ld. CIT(A) submits that the order of the ld. CIT(A) is proper appreciation of material on record in consonance with the settled position of law and no interference is called for.

10. We heard the rival submissions and perused the material on record. The issue that arises for consideration in the present appeal in the given facts of case is that can be it said that the respondent-assessee had set-up the business. If it is held that the respondent-assessee had set-up the business, the expenditure incurred during the interval between setting up of the business and actual commencement of business are allowable as deduction as held by the Hon'ble Supreme Court in the case of CIT vs. Ramaraju Surgical Cotton Mills Ltd, 63 ITR 478 (SC) and CIT vs. Sarabhai Management Corpn. Ltd., 192 ITR 151 (SC) followed by the Hon'ble Gujarat High Court in the case of Sarabhai Management Corpn. Ltd. vs. CIT, 102 ITR 25 (Guj.) and also followed by the Hon'ble Bombay High Court in the case of Western India Vegetable Products Ltd. vs. CTI, 26 ITR 151 (Bom.). In the present case, the ld. CIT(A) simply discussed the legal principles without adverting to the material facts on record and had not really decided the issue whether the assessee had set-up a business or not, which is a

question of facts, which is required to be adjudicated based on the material on record, even without meeting the case of the Assessing Officer that the respondent-assessee had not set-up the business and, therefore, the question of allowing the expenditure does not arise. Further, the Assessing Officer also held that no technical services were rendered by its sister concern, namely, M/s. Silvex Reality Pvt. Ltd..

As regards to the allowance of advances written off Rs.28,21,75,835/- as revenue loss/expenditure, the case of the Assessing Officer is that these transactions are sham transactions as the advances are made to the related parties. On appeal before the Id. CIT(A), the Id. CIT(A) allowed the claim of the respondent-assessee by holding that the respondent-assessee had set-up the business by placing reliance on certain judicial precedents referred to above (supra). As noted by us in earlier paragraphs of this order, whether an assessee had set-up a business or not is a purely question of fact which has to be adjudicated based on the material on record. On perusal of the orders of the Assessing Officer as well as the Id. CIT(A), it would be revealed that the appellant had not led on record any evidence to prove that the appellant had set-up the business or the advances made to these two parties, namely, M/s. Silvex Realty

Pvt. Ltd. and M/s Sterling Construction System Pvt. Ltd. were made during the ordinary course of business of the assessee nor the appellant made an attempt to controvert the findings of the Assessing Officer that the transactions of advances made to the sister concern are sham transactions. The ld. CIT(A) merely allowed the claim of the respondent-assessee without adverting to the material on record to prove that the appellant had set-up the business or advances written off are made during the ordinary course of the business of the assessee. The ld. CIT(A) merely placed reliance on the certain judicial precedents without discussing as to how the factual situation of the case fits into the ratio of the judicial decision relied upon by him. Thus, the order of the ld. CIT(A) is bereft of discussion of the factual situation, therefore, we set-aside the order of the ld. CIT(A) and remand the matter to the file of the ld. CIT(A) with direction the issue, in the present appeal should be decided based on the material on record. Thus, the grounds of appeal filed by the Revenue stand partly allowed for statistical purposes.

11. In the result, the appeal of the Revenue in ITA No.638/MUM/2016 for A.Y. 2010-11 stands partly allowed for statistical purposes.

C.O. No.236/MUM/2017 – By Assessee :

12. The Cross Objection filed by the assessee stands dismissed as not pressed.

13. To sum up, the appeal of the Revenue stands partly allowed for statistical purposes and the Cross Objection filed by the assessee stands dismissed.

Order pronounced on this 23rd day of November, 2022.

Sd/-
(S. S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 23rd November, 2022.

Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-12, Mumbai.
4. The Pr. CIT-6, Mumbai.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "A" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.