

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
Dr ARJUN LAL SAINI, ACCOUNTANT MEMBER

आ.अ.सं./ITA No.02/SRT/2021 (AY 2011-12)

(Hearing in Physical Court)

M/s C.J. Group & Gajras Builders & Developers, Bhoomi Land Mark, Plot No. 30-30A, Sector-17, Khan Colony, Panvel-410206, Maharashtra PAN No. AAGFC 4658 J	Vs	Deputy Commissioner of Income Tax, Circle-1, Bharuch
अपीलार्थी/ Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से /Assessee by	Shri Mayur J Gorsani, C.A
राजस्व की ओर से /Revenue by	Shri Vinod Kumar, Sr-DR
सुनवाई की तारीख/Date of hearing	14.12.2022
उद्घोषणा की तारीख/Date of pronouncement	.02.2023

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee is directed against the order of ld. Commissioner of Income-tax (Appeals)-3, Vadodara [for short to as "Ld. CIT(A)"] dated 24.08.2020 for the assessment year 2011-12, which in turn arises out of assessment order passed by Assessing Officer under section 143(3) of Income Tax Act, 1961 (hereinafter referred to as 'the Act' for the sake of brevity) on 24.03.2014.

2. On perusal of record shows that impugned order was passed by Ld. CIT(A) on 24.08.2020, however, assessee has filed present appeal on 05.01.2021. Thus, there is delay of 65 days in filing appeal beyond the statutory limit of sixty days for filing appeal before the Tribunal. The learned Authorized Representative (Ld.AR) for the assessee submits that period of delay is covered by the decision of Hon'ble Apex Court Hon'ble Apex Court in *Suo Motu* Writ Petition (C) No.3 of 2020, wherein the time limit for filing various appeals under general law as well as under special law were extended till 28.02.2022 and further 90 days' grace period was allowed with effect from 01.03.2022. Thus, the present appeal filed by assessee is within the extended period of limitation as prescribed by Hon'ble Apex Court to file appeal/appeals before various judicial forum / authorities. The ld AR for the assessee prayed for condonation of delay in filing the present appeal.
3. On the other hand, Ld. Senior Departmental Representative (Ld. Sr-DR) for the Revenue has not specifically objected for condonation of delay taken by Ld. AR for the assessee.

4. After considering the submission of both the parties, we find that the assessee has filed the present appeal, within the period covered by the order of Hon'ble Apex Court in *Suo Motu* Writ Petition (C) No.3 of 2020 dated 08.03.2021. Thus, delay in the present appeal filed by assessee is condoned and the appeal is admitted for adjudication on merits. Now advertng to the merits of the case.
5. Brief facts are that assessee is a firm engaged in the business of land development and builder. During the period under consideration, the assessee undertook a project in the name of "Harmony-II". The assessee while filing its return of income has declared income at Rs.16,50,001/- for assessment year 2011-12. The case was selected for scrutiny assessment. During the assessment, the Assessing Officer noted that in the profit and loss account, the assessee has debited a sum of Rs.34,98,888/- on account of brokerage charges. The assessee was asked to furnish the details consisting the bills along with names of brokers. The assessee furnished certain details about the brokerage expenses. On perusal of such details, the Assessing Officer found discrepancies. The assessing officer noted that in case

of one of the broker namely; Amit Pal, the cost of flats and the brokerage was missing; in case of Gunjan Mehta, a lump sum amount was shown without specifying flat number, rate of percentage of brokerage. Thus, by pointing out such discrepancies, the assessee was asked to furnish a chart showing name of brokerages, PAN No., flat No. in which they had assisted for sale, sale value of the flats, brokerage paid and the payment details. On furnishing such details, the Assessing Officer found that assessee has shown brokerage for purchase of land, which is not shown as forming part of asset of assessee. The rate of brokerage was paid at the higher rate than the prevailing in the real estate business. The assessing officer was of the view that general trend of commission in the business of real estate is @ 2% of sale value of flats. The assessee has shown payment of Rs.6,84,000/- for a sale of flat at Rs.2.09 crore. Thus, payment in excess of 2% thereon that is Rs.2,65,555/- (6,84,000- 4,18,445) was disallowed. From the details furnished by assessee the Assessing Officer further noted that Rs.23 lakhs was being shown as brokerage paid to three brokers and the reasons mentioned as purchase of

land but no land was shown in the asset side in balance-sheet of assessee. The Assessing Officer was of the view that such commission must have been paid for purchasing of land on which project "Harmony-II" was being constructed and such fact was confronted with the assessee. The Assessing Officer also confronted the fact that assessee was following the accrual method of accounting for income as well as expenses, the expenses of brokerage should have been accounted in the year in which, it was incurred i.e., in preceding year and not in the current year. The assessee has not furnished any conclusive evidence whether any services were rendered by those persons to whom brokerage shown to have been paid. The Assessing Officer further noted that entire estimate sale of the project was at Rs.8.77 crores on which the brokerage could be worked out at Rs.13,16,558/-. Though, assessee has claimed brokerage commission of Rs.34,98,838/- with is excessive and no comparable stances for incurring such brokerage expenses are given. Accordingly, the Assessing Officer also disallowed the brokerage expenses of Rs.23 lakhs while passing the assessment order.

6. Aggrieved by the addition / disallowance of brokerage expenses, the assessee filed appeal before Ld. CIT(A). Before Ld. CIT(A) the assessee filed detailed written submission. The submission of assessee is recorded in **para-3.2 to 5.2.3** of the order of Ld. CIT(A). In the written submission, the assessee relied upon various decisions of Hon'ble Apex Court and various High Courts e.g. in CIT Vs. Dalmia Cement (Bharat) Ltd. (2002) 254 ITR 377(Del), in the case of Shahzada Nand & Sons vs. CIT (1977) 108 ITR 358 (SC); in the case of J.K. Steel Industries vs. CIT (1978) 112 ITR 285 (Cal); in the case of CIT vs. Keshavlal Chandulal (1966) 59 ITR 120 (Guj). On the basis of ratio of aforesaid decisions, the assessee submitted that the transaction of payment of commission is *bona fide* and genuine. The commission was paid for sale of flats to sole selling agents. The assessee also filed rectification letter for topographical mistake by taking plea that commission of brokerage include as commission for purchase of land. It was submitted the expenditure has to be judged from the point of view of the businessman and not the revenue. The taxing authority have no right to substitute the market price or average price in place of

agreed price. On the basis of such submission, the assessee prayed for deleting the addition.

7. The Id CIT(A) summarised the submissions of assessee and forwarded to Assessing Officer for his comment vide order dated 27.12.2015. The Assessing Officer furnished his reply vide reply dated 10.02.2020. The contents of reply of assessing officer is recorded in **para-5.2.2** of the order of Ld. CIT(A). In such reply; the Assessing Officer reported that ITO Ward-35(2)(3) was subsequently transferred the concerned letter issued from the office of ITO Ward-34(2)(6) transmitted e-mail dated 06.11.2019 intimated that he was holding additional charges of more than 235 cases and requested to seek time up to January, 2020. Ultimately, no remand report was furnished by Assessing Officer. The reply of Assessing Officer was provided to assessee for its comments. In reply, assessee filed his reply dated 18.03.2020 stated that Assessing Officer has accepted the contention of assessee resultantly Assessing Officer has not made any adverse remark. Thus, assessee may be grant relief by setting aside the addition.

8. The Ld. CIT(A) after considering the submission of assessee and the assessment order upheld both the additions. While upholding the disallowance addition of Rs 2,65,555/-, ld. CIT(A) held that Assessing Officer restricted the brokerage commission @ 2% of the sale value of flats by point out discrepancies and Assessing Officer disallowed the remaining amount of brokerage commission of Rs.2,65,555/-. On other disallowance of commissions payment of Rs.23 lakhs, Ld. CIT(A) held that before him, the assessee contended that there was a topographical mistake and assessee mentioned “brokerage commission payment” of Rs.23 lakhs against purchase of land. Such stand took by ae is self-serving statement, the assessee has taken this stand to wriggle out the situation, when Assessing Officer pointed out that no land was purchased by assessee during the year. Thus, the disallowance of Rs.23 lakhs was upheld by Ld. CIT(A). On various case law, Ld. CIT(A) differentiated the fact of present case vis-à-vis the case law relied by assessee. Further aggrieved, the assessee has filed present appeal before the Tribunal.

9. On perusal of various grounds of appeal, we find that assessee has not framed various grounds of appeal as per Income Tax (Appellate Tribunal) Rules, 1963. The assessee has drafted the grounds of appeal in a narrative by referring various decisions of superior courts, which is not in accordance with law with the prescribed Rules. Therefore, for adjudication of core issues, we reframe the grounds of appeal in the following manner:

- i) Whether the Ld. CIT(A) erred in law in confirming the addition of Rs.2,65,555/- being paid over and above @ 2% of agreement value of sale of flats or the same is without any justification?
- ii) Whether the Ld. CIT(A) has erred in law and on fact by confirming the addition of Rs.23 lakhs by ignoring the merits of assessee's submission?
- iii) Whether the order of Ld. CIT(A) is bad in law and against the principle of natural justice?

10. We have heard the submissions of ld. AR for the assessee and Ld. Sr-DR for the Revenue and have gone through the orders of lower authorities carefully. The Ld. AR for the assessee submits that assessee is engaged in real estate and developer and during the assessment, the assessee submitted all details required before Assessing Officer and books of account is accepted by the Revenue Authority.

During the period under consideration, the assessee undertook a real estate development project in the name of “Harmony-II” at Plot No.30, Sector-301, Kharghar, Navi Mumbai, Maharashtra and said project was spread over period of time more than one year. During the year under consideration, the assessee paid brokerage commission of Rs.34,98,838/- to various persons and such payments were made through account payee cheque. The Assessing Officer made addition/ disallowance of Rs.23 lakhs by doubting reasonableness of expenses paid to unrelated parties. The commission expenses were incurred wholly and exclusively for the purpose of business. The genuineness of such expenses is not doubted by Revenue but the reasonableness of expenditure was doubted and brokerage commission is not bogus, fictitious or sham transaction and not paid on same transaction which was not paid to avoid the tax liability. The Ld. AR for the assessee submits that payment was made to related parties even if the expenditure was treated for earlier year but same must have been allowed in the previous year and corresponding effect to be given in the closing work-in-progress account of the assessee. The

closing work-in-progress is for the current year opening work-in-progress that in such entire exercise, the Revenue will be taxed neutral as there is no change in the tax rate in case of the partnership firm. So far as other addition of Rs.2,65,555/- is concerned, the Ld. AR for the assessee submits that assessee paid brokerage commission on sale of flats and assessee paid brokerage commission of Rs.6,84,000/- on total sale value of flats at Rs.2.09 crores. The Assessing Officer allowed brokerage commission @ 2% of sale value and remaining were disallowed. The expenditure of brokerage commission was incurred wholly and exclusively for the purpose of assessee's business. The genuineness of such expenses were not in doubt. The Ld. AR for the assessee submits that when genuineness of such expense is not doubted and expenses incurred wholly and exclusively for the purpose of assessee's business, same should be allowed and reasonableness of the expenditure has to be checked from the point of view of businessman as has been held in case of CIT vs. Dalmia Cement (Bharat) Ltd. (2002) 254 ITR 377 (SC). The ld. AR for the assessee also relied on the following case law:

- Shiv Raj Gupta Vs.s CIT, Delhi-IV (Civil Appeal No.12044 of 2016) dated 22.07.2020 (SC)
- CIT vs. Walchand &Co. (1967) 3 SCR 214 (SC)
- J.K.Woolen Manufacturers vs. CIT (1969) 1 SCR 525 (SC)
- CIT vs. Panipat Woollen & General Mills Co. Ltd. (1976) 2 SCC 5 (SC)
- Shahzada Nand & Sons v. CIT (1977) 3 SCC 432 (SC)
- S.A Builders Ltd. vs. CIT (12007) 1 SCC 781 (SC)
- Kay Dee Industries vs. JCIT (ITA No.2069 of 2016) dated 09.08.2018 (Trib-Delhi)
- CIT vs. Navsari Cotton Silk Mills Ltd. (1982) 135 ITR 546 (Guj)

11. On the other hand, Ld. Sr-DR for the Revenue supported the order of lower authorities. On the addition of Rs.2,65,555/-, the ld. Sr-DR for the Revenue submits that the Assessing Officer reasonably allowed the brokerage commission of Rs. 4,18,445/- for sale of flats for aggregate value of Rs.2.09 crores @ 2% which is generally accepted prevailing the brokerage commission rate in the real estate business and remaining amount of Rs. 2,65,555/- was disallowed. On the other addition / disallowance of Rs.23 lakhs, Ld. Sr-DR for the Revenue submits that such brokerage commission has no nexus with the sale of assessee's flats/ units, the total estimated value of constructed project was at Rs.8.77 crores and 75% is considered during the year and normal brokerage commission payment @ 2% would be hardly

about Rs.13 lakhs. The brokerage commission bill placed by assessee before the Tribunal for the first time but was not filed before the lower authorities and no certificate of filing such documents is filed on record. All documents / evidence of brokerage commission are self-serving documents. The ld. Sr-DR for the Revenue prayed for upholding the order of lower authorities.

12. We have considered the rival submission of both the parties and have gone through the orders of lower authorities carefully. Ground No. 1 relates to disallowance of Rs. 265,555/-. We find that the assessing officer made disallowance of Rs.2.65 Lakhs by taking view that normally in real estate the commissions of paid @2% of the sale value of the flats. The assessee has shown commission of Rs. 6,84,000/-on the sale value of Rs. 2.09 Crore. Thus, the assessing officer disallowed Rs. 2.65 lakhs which was in excess of 2% of the sale value of flats. The ld CIT(A) upheld the addition by concurring the action of assessing officer. Before us, the ld AR for the assessee has not given any convincing factor for making payment of such commission,

which is not the prevailing in the real estate business, except making submissions that it was incurred/ paid wholly and exclusively for the purpose of business. In our view the assessing officer rightly disallowed the commissions payment which is more than the reasonable rate of commission in the real estate business. Thus, the ground No. 1 of the appeal is dismissed.

13. Ground No.2 of the appeal relates to disallowance of Rs. 23 lakhs. We find that the assessing officer made disallowance of such commissions expenses by taking view that on show cause the assessee took its stand that such commission was paid for purchase of land, however, no such land is shown in the asset side in the balance sheet. The assessing officer also examined the fact from other angle that total estimate cost of project is Rs. 8.77 Crore and if 75% is recognise, the brokerage would be Rs. 13,16,558/-, the assessee had claimed about Rs. 35 lakhs (Approx). We find that Id CIT(A) that confirmed the addition by holding that no land was purchased by assessee during the year. The plea of typographical error 'commission paid for land' is self-serving

statement of assessee and made to wriggle out of situation when the assessing officer pointed out the discrepancy. As noted earlier, before us, the ld AR for the assessee has vehemently argued that when genuineness of such expenses were not in doubt and expenses incurred wholly and exclusively for the purpose of assessee's business, same should be allowed and reasonableness of the expenditure has to be checked from the point of view of businessman. We are not convinced with the submissions of the ld AR for the assessee, when the commission expense is wholly unreasonable and the assessee has taken such stand that the alleged commission was paid for purchase of land and in fact no such land was admittedly purchased during the year, the revenue authority cannot examine the reasonableness of the expenses on peculiar facts of the case. Therefore, we do not find any reason to interfere with the finding of the present case. In the result, this ground of appeal is also dismissed.

14. Ground No. 3 relates to violation of natural justice. We find that during the hearing of the appeal no submissions on this

issue was made, thus, the ground of appeal is treated as not pressed and resultantly dismissed.

15. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 27/02/2023

Sd/- (Dr ARJUN LAL SAINI) [लेखा सदस्य/ ACCOUNTANT MEMBER]	Sd/- (PAWAN SINGH) [न्यायिक सदस्य JUDICIAL MEMBER]
Surat, Dated: 27/02/2023 <i>Dkp. Out Sourcing Sr.P.S</i>	

Copy to:

1. Appellant-
2. Respondent-
3. CIT(A)-
4. CIT
5. DR
6. Guard File

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By order

Sr. Private Secretary/Private Secretary/
Assistant Registrar, ITAT, Surat