

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.2515/Kol/2018
Assessment Year: 2013-14**

Assistant Commissioner of Income Tax, Circle-11(2), Kolkata.	Vs.	Safal Properties Pvt. Ltd., 52/1, Amrapali Apartment, Flat No.53, 4 th Floor, K. M. Naskar, Tollygunge, Kolkata- 700040. (PAN: AALCS2547J)
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Vijay Kumar, Addl. CIT

Respondent by : Shri Saurav Bagharia & Shri Ritesh Goel, AR

Date of Hearing : 18.01.2023

Date of Pronouncement : 16.03.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the revenue is against the order of Ld. CIT(A)-4, Kolkata vide appeal No. 162/CIT(A)-4/16-17 dated 03.08.2018 against the order of Ld. DCIT, Circle-11(2), Kolkata passed u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") dated 26.03.2016.

2. Grounds of appeal raised by the revenue are reproduced as under:

"1. That on the facts and in circumstances of the case the Ld. CIT(A) has erred in facts and law in allowing the appeal on the issue of disallowance u/s. 14A of the Income Tax Act, whereas it is primarily a responsibility of the Assessee to show the source of acquisition of shares by production of material during assessment stage, as decided by the Hon'ble High Court of Calcutta in the case of Dhanuka & Sons vs. CIT Central-l.

2. That on the facts and in circumstances of the case the Ld. CIT(A) has erred in facts as well as law, in deleting the disallowance u/s. 40A(2) of the Income Tax Act since the party M/s. Carvan Creation Pvt. Ltd. charged interest at an exorbitant rate compared to the remaining 17 other body corporate/parties in the case and the assessee had no explanation for the same.

3. That on the facts and in circumstances of the case the Ld. CIT(A) has erred in directing to allow depreciation on the rental income of the boat, when no depreciation is allowable if the income is treated as an income from other sources.

4. That on the facts and in circumstances of the case the Ld. CIT(A) has erred in facts and law in deleting the addition made on the issue of undisclosed stock on the basis of additional evidences of Joint Venture (JV) agreement with Japna Estates produced by the assessee, whereas, the Ld. CIT(A) should have sent the additional evidences to the AO for further verification and furnishing Remand Report.

5. That on the facts and in circumstances of the case the Ld. CIT(A) has erred in deleting the addition made on the issue of Bogus Purchase related to the earlier issue of undisclosed stock, which is related in nature. The Ld. CIT(A) should have referred this issue also to the AO for verification and furnishing Remand Report.

6. That the appellant craves to add, alter/or amend any of the grounds of appeal during the course of hearing.”

3. Brief facts of the case are that assessee is in the business of construction contract and stone chips mining. It filed its return of income on 30.09.2013 reporting total loss of Rs.1,20,99,476/-. In the course of assessment proceeding, Ld. AO called for details in respect of various expenses and claims made by assessee which were duly complied with. However, Ld. AO made certain additions and disallowances and completed the assessment at an assessed total income of Rs.1,55,07,720/-. Aggrieved by the additions and disallowances, assessee went in appeal before the Ld. CIT(A). Ld. CIT(A) after considering the submissions made by the assessee and objectively dealing with the issues partly allowed the appeal of the assessee. In respect of the relief granted by the Ld. CIT(A), the revenue is in appeal before the

Tribunal by taking the above stated five grounds which are dealt hereunder in seriatim.

4. First ground is in respect of disallowance made u/s. 14A of the Act of Rs.2,23,250/- by applying the provisions of Rule 8D(2)(iii) of the Income Tax Rules, 1962 (hereinafter referred to as the 'Rules'). In this respect, Ld. Counsel for the assessee submitted before us that assessee has earned no exempt income during the year. Further, assessee had its own funds which are more than the investment made by it in the unquoted shares. Ld. CIT(A) considering these facts and by placing reliance on the decision of CIT Vs. Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom.) and CIT Vs. HDFC Bank Ltd. (2014) 49 taxmann.com 335 (Bom.) deleted the disallowance so made. We find that the issue where assessee has earned no exempt income during the year no disallowance is called for u/s. 14A of the Act has been addressed by the Hon'ble Delhi High Court in the case of PCIT Vs. Era Infrastructure (India) Ltd. in ITA No. 204/2022 & C. M. Application No. 31445/2022 which has been followed by the coordinate bench of ITAT, Kolkata in the case of *Babul Fiscal Services (P) Ltd v. ACIT in ITA No. 318/Kol/2022 dated 02.08.2022* holding that no disallowance is required to be made in the case of the assessee because it has not earned any tax-free income and allowed the appeal of the assessee by deleting the addition so made.

4.1. Further, the issue relating to assessee having own fund more than the investments made in the investments yielding exempt income has been dealt with in favour of the assessee by the Hon'ble jurisdictional High court of Calcutta in the case of REI Agro Ltd. Vs. DCIT in G.A. 3022 of 2013 ITAT 161 of 2013, dt. 23rd December,

2013. Thus, considering the facts on record and the judicial precedents referred above, we do not find any reason to interfere with the finding given by the Ld. CIT(A). Accordingly, ground no. 1 is dismissed.

5. Ground no. 2 relates to disallowance made u/s. 40A(2) of the Act in respect of interest charged by one party M/s. Carvan Creations Pvt. Ltd. at a rate of interest namely, 16% compared to 10% by the remaining other parties. In this respect, Ld. Counsel referred to the difference in terms and conditions for the amount borrowed by the assessee from M/s. Carvan Creation Pvt. Ltd. vis-à-vis the other parties. This party had offered flexible repayment terms. Ld. CIT(A) had referred to the relevant part of the agreement in this respect which is reproduced as under:

“AND WHEREAS lender has agreed to advance to the borrowers the required sum of money upto INR 40,00,00,000/- , on the above representation of the borrower to be paid back on demand or renewable on mutual consent at the interest rate of 16% per annum.”

5.1. Ld. CIT(A) further observed that there is nothing on record to establish that this party is a related party within the meaning of clause (b) to sub-section (2) of section 40A of the Act and held that it is a business decision of the assessee which cannot be interfered. Ld. CIT(A) noted that AO cannot step into the shoes of a businessman and thus, deleted the disallowance so made amounting to Rs.92,62,860/-. We note that there is no dispute on the payment of interest. The issue is in respect of rate of interest which has been charged @ 16% vis-à-vis 10% by the other parties. We note that the difference in terms and conditions with Carvan Creations Pvt. Ltd. which have been effectively brought on record and considered by the Ld. CIT(A), and also the fact that how this party is a related party within the meaning of sec. 40A(2)(b) of the Act for which nothing is brought on record to establish

the said relationship. Considering these facts on record, we do not find any reason to interfere with the finding given by the Ld. CIT(A) and accordingly, dismiss ground no. 2 taken by the revenue in this respect.

6. Ground no. 3 is in respect of depreciation claimed by the assessee on its speed boat which according to the revenue is rental income from the said boat, which is not allowable. In this respect, Ld. Counsel referred to the fact as stated in the order of Ld. CIT(A), according to which assessee had let out its speed boat to M/s. Easyfit Jewellery Ltd. for a monthly rent of Rs.25,000/-. The boat was given for a period of eleven months. However, after three months, the boat was taken back for assessee's use. Accordingly, rental receipts for only three months have been shown in the financials of the assessee.

6.1. Ld. CIT(A) noted that rental income from boat has to be assessed either as business income or income from other sources. It cannot be assessed as income from house property. Accordingly, depreciation was allowed on the boat even though it had earned rentals for three months amounting to Rs. 75,000/-. We do agree with the observations and findings of Ld. CIT(A) in allowing the claim of depreciation of Rs.4,84,843/- on the boat and accordingly, dismiss this ground of appeal of the revenue.

7. Ground no. 4 is in respect of deleting the addition made on the issue of undisclosed stock a property which was developed under a Joint Venture Agreement (JV) with Japna Estates. In this respect, assessee had a property at plot no. 3, Model Town, Delhi which was developed having four floors and stilt. The property was constructed under a JV with Japna Estates. The facts of the transaction as submitted by the assessee are as under:

"a. The assessee bought a Land/Plot admeasuring 300 sq. mtr. at 2.70 crores.

b. Incurred Stamp Duty of INR 21 lakhs.

c. Total cost of Plot - 2.91 crores.

d. Entered into Joint Venture agreement with Japna Estates for construction.

e. As per JV terms the Developer (Japna Estate) will develop G+4 Building.

f. "As per JV agreement - after completion the 4th floor with roof right will be transferred to Developer and 1st, 2nd and 3rd floor will belong to the assessee.

g. The assessee had incurred no further cost towards the project.

The assessee had sold 2nd and 3rd floor in FY 11-12 and thus 1st floor remained in his possession which he sold in the relevant AY 13-14. Accordingly 4th floor was not appearing under stock of the assessee as the same does not belong to the assessee as per JV agreement. Hence the act of AO by addition of INR 72,89,373/- ($2,91,57,491/4=72,89,373$) is not correct in law and accordingly the assessee should be allowed relief in the same."

7.1. On these facts, Ld. CIT(A) noted that Ld. AO has overlooked the fact of JV Agreement, according to which, 4th floor and the roof rights will be with the developer i.e. Japna Estates, in respect of cost incurred by it for the developer of the property. Since 4th floor and the roof rights was with the development in terms of the JV Agreement, there was no question of this being disclosed in the inventory of the assessee in the books and the financial statement of the assessee, though, in this respect, Ld. AO has noted that 4th floor was not sold and should have formed part of the closing stock of the assessee. Ld. CIT(A) after going through the facts of the case and the terms and conditions of the JV Agreement, found that 4th floor of the building belonged to the developer in terms of the JV agreement and, therefore, there was no question of this floor being shown as part of stock of the assessee and, therefore, there cannot be any undisclosed stock on account of 4th floor of the building. He thus, deleted the addition made in this respect amounting to Rs.72,89,373/-. Revenue has also raised the contention that Ld. CIT(A) should have called for a remand report in respect of additional evidence for which we note that Ld.

CIT(A) has objectively analysed and gone through the JV agreement placed before him in accordance with coterminous power vested into him. On perusal of the facts and the observations made by the Ld. CIT(A), we do not find any reason to interfere with the findings given by Ld. CIT(A). Accordingly, this ground of appeal of the revenue is dismissed.

8. Ground no. 5 is in respect of deletion of addition made towards bogus purchase relating to the issue of undisclosed stock detailed in ground no. 4 above. Since the facts of this issue have already been discussed while dealing with ground no. 4 above, whereby only three floors of the building were with the assessee and the 4th floor and the roof rights was with the developer, there was no element of any bogus purchase on this account. Ld. CIT(A) by observing these facts has deleted the addition made on this account of Rs.24,29,790/-. We agree with the finding given by the Ld. CIT(A) and accordingly dismiss the ground of appeal of the revenue in this respect.

9. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 16th March, 2023.

Sd/-
(Rajpal Yadav)
Vice President

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 16th March, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:
 3. CIT(A)-4, Kolkata
 4. DCIT, Circle-11(2), Kolkata
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata