

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI
BEFORE
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 183/Del/2020

Asstt. Year: 2014-15

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| ACIT Circle-28(1), New Delhi. | Vs. | M/s Modesty Garments, B-304, New Friends Colony, New Delhi – 110 065 PAN AAAPM1598F |
| (Appellant) | | (Respondent) |

CO No. 132/Del/2022

Arising out of ITA No. 183/Del/2020

Asstt. Year: 2014-15

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| M/s Modesty Garments, B-304, New Friends Colony, New Delhi – 110 065. PAN AAAPM1598F | Vs. | ACIT Circle-28(1), New Delhi |
| (Appellant) | | (Respondent) |

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|----------------------------|--|
| Assessee by: | Sh. Mohit Gupta, CA, Sh. Neeraj Singh, CA, Sh. Nitin Sharma, CA |
| Department by : | Shri Sumit Kumar Verma, Sr. DR |
| Date of Hearing : | 21.03.2023 |
| Date of pronouncement : | 29.03.2023 |

ORDER

PER ASTHA CHANDRA, JM

This is an appeal filed by the Revenue against the order dated 28.10.2019 of the Ld. Commissioner of Income Tax (Appeals)-10, New Delhi

(“CIT(A)”) and Cross Objection bearing No. CO 132/Del/2020 filed by the assessee pertaining to Assessment Year **(“AY”)** 2014-15.

2. The Revenue has raised the following grounds of appeal:-

- I Whether on facts and in circumstances of the case, the Ld. CIT (A) has erred in law and on facts in deleting the addition of Rs, 29,80,649/- made by the AO to the income of the assessee on account of disallowance out of amount claimed under the head ‘interest paid to partners’ in P&L account ignoring the fact that partnership deed filed does not mention or authorize about the payment of any interest to partners?*
- II. Whether on facts and in circumstances of the case, the Ld, CIT(A) has erred in law and on facts in deleting the addition of Rs. 3,46,50,000/- made by the AO to the income of the assessee on account of disallowance of Rs. 3,46,50,000/- u/s 68 of the Income Tax Act, 1961 ignoring the fact that the- assessee failed to substantiate the claim ?*
- III. Whether on facts and in circumstances of the case, the Ld. CIT(A) has erred in law and on facts in allowing the long term capital loss of Rs. 9,770/- instead of short term capital gain of Rs. 206,25,643/- as computed by AO in remand report ignoring the fact that assessee failed to substantiate the claim?”*

3. The cross objection filed by the assessee is in support of the order of the Ld. CIT(A).

4. Facts in brief are that the assessee is a firm of six partners engaged in the business of trading of apparels. It e-filed its return for AY 2014-15 on 30.11.2014 declaring income of Rs. 25,08,170/-.After initial processing of the return under section 143(1) of the Income Tax, 1961 **(the “Act”)** the case was selected for complete scrutiny through CASS. Statutory notice was served, in response to which details / information called for were submitted. The Ld. Assessing Officer **(“AO”)** examined them.

5. During the assessment proceedings the Ld. AO perused the details of unsecured loans and found that interest of Rs. 29,80,679/- has been paid to the partners from whom the firm had obtained unsecured loans but tax had not been deducted at source therefrom. On query the assessee explained that it was not required to deduct TDS in view of the provisions of section 194A(3)(iv) of the Act. The explanation was not acceptable to the Ld. AO who disallowed the said interest debited to P&L account observing inter alia that interest payment to partners is not authorised by the deed of partnership. He, therefore, made the disallowance under section 40(b)(ii) and added to the income of the assessee.

6. The Ld. AO also found that the assessee has debited Rs. 1,49,968/- to P&L account under the head 'interest and penalties'. Since the assessee has itself disallowed Rs. 27,559/-, the Ld. AO disallowed Rs. 1,22,409/- under section 37(1) of the Act being not an allowable deduction.

7. The Ld. AO also found that the assessee has declared profit of Rs.3,46,50,000/- from sale of land/building. The Ld. AO required the assessee to show cause why the said profit be not considered as credits under section 68 as no detail has been submitted. In reply the assessee stated that TDS under section 194IA has been deducted on the amount of sale consideration received and payment has been accepted through banking channel. The deal is genuine and calls for no addition. The Ld. AO did not accept the explanation and added Rs. 3,46,50,000/- to the income of the assessee under section 68 of the Act.

8. The Ld. AO disallowed 1/10th out of expenses debited to P&L account observing that possibility of personal use cannot be ruled out which resulted in disallowance of Rs. 2,46,358/- out of claim of Rs. 24,63,580/- under the head 'Misc. Expenses' and disallowance of Rs. 6,73,368/- out of claim of Rs. 67,33,677/- under the head "Travelling and Conveyance". The disallowance thus aggregated to Rs. 9,17,726/- out of total claim of Rs. 91,97,257/-

under the aforesaid two heads of account.

9. Accordingly, the Ld. AO computed the total income of the firm at Rs. 4,11,80,980/- on 27.12.2016 under section 143(3) of the Act.

10. The assessee preferred appeal before the Ld. CIT(A) who deleted the disallowance of Rs.29,80,679/- being interest paid to the partners to the firm; deleted addition of Rs.3,46,50,000/- made by the Ld. AO under section 68 of the Act; restricted the disallowance to Rs. 74,785/- out of Misc. Expenses claimed at Rs. 2,46,358/-; sustained 10% disallowance out of tour and travel expenses claimed at Rs. 18,60,985/- allowing the rest of the claim under other heads of expenses.

11. The Revenue is aggrieved by the deletion of disallowance of interest of Rs. 29,80,679/- paid to the partners; deletion of addition of Rs. 3,46,50,000/- under section 68 of the Act and allowing by the Ld. CIT(A) long term capital loss of Rs. 9,770/- instead of short term capital gain computed by the Ld. AO in remand report. All the three grounds of appeal relate thereto.

12. The Ld. DR supported the order of the Ld. AO whereas Ld. AR relied and supported the finding of the Ld. CIT(A) and drew our attention to the submissions contained in the Cross Objection filed by the assessee before the Tribunal.

13. Ground No. 1 relates to disallowance of Rs. 29,80,679/- on account of interest payment on secured loans by the assessee firm to its partners which the Ld. CIT(A) has deleted. On this issue the Ld. CIT(A) observed and recorded the following findings:-

“ 8.0.....This disallowance has been made on two accounts i.e. (i) the assessee has not deducted TDS on payment of interest on such loans and (ii) there is no provision of section 40(b)(ii) of the Act for payment of interest to partners in the absence of authentication in the deed of partnership. The contention of the assessee against the disallowance of interest paid to partners is that due to inadvertent mistake the complete partnership deed

could not be filed before the AO in the assessment proceedings which included the authorization of interest to partners on their loan accounts in the partnership deed. In order to rectify this mistake, the assessee filed along with application under rule 46A both the deeds namely copy of deed filed before the AO during assessment proceedings and a complete set of deed of partnership filed as additional evidence to explain the difference between the deeds of partnership originally filed before AO and filed as additional evidence and had submitted that the payment of interest was duly authorized in the partnership deed and therefore, no disallowance on this account should be made.

8.1 However, the AO in his remand report had stated that the deed of partnership filed during assessment proceedings and as an additional evidence are the same and therefore, no relief should be allowed to the assessee in this regard.

8.2 On a specific prayer made by the assessee I called for the assessment records and upon verification of the facts from the said file, found that the deed of partnership filed during assessment proceedings was incomplete meaning thereby pages containing paras 10 to 18 of the deed of partnership and the last page of the partnership deed were missing there from whereas in the additional evidence now filed and placed in the paper book at pages 75 to 83 both these papers are placed and that in para 10 of the partnership deed at page 81 of the paper book it is specifically stated that “the partners shall be entitled to interest on their loan accounts with the firm at such rates as are prescribed under the Income Tax Act, 1961.”

8.3 In such circumstances, the report of the Assessing Officer under rule 46A is found to be faulty and not in accordance with the assessment records of the assessee.

8.4 Further, with respect to deduction of tax at source the AR of the assessee has drawn my attention to the provisions of section 194A(3)(iv) of the Act which read as under:-

“(3): The provisions of sub-section (1) shall not apply 0)

(i)

(ii)

(iii)

(iv) To such income credited or paid by a firm to a partner of the firm ”

8.5 In these circumstances also the basis of disallowance of the AO does not stand to reason and is therefore, not justified.

8.6 From the aforesaid discussion evidently the deduction of TDS under the provisions of section 194A on interest paid to partners was not required to be made and in the deed of partnership filed as an additional evidence it is

evident that partners have been authorized to interest on their loan accounts with the firm at such rates as are prescribed under Income Tax Act, 1961. Thus, in accordance with the facts of the case I hereby allow the payment of interest to partners as having been made in accordance with law and duly authorized for payment in the partnership deed and also direct the AO to delete the addition made of Rs.29,80,649/-."

14. We have carefully considered the rival contentions and perused the records. We observe that the Ld. AO disallowed the assessee's claim of interest payment to the partners for two reasons, namely non-deduction of TDS and non-authorisation of interest payment to partners by the deed of partnership. The Ld. AO rejected the contention of the assessee that as per section 194A(3)(iv) income credited or paid by a firm to a partner falls outside the ambit of the provision of sub-section (1) of section 194A without assigning any reasons at all. He made the impugned disallowance on flimsy ground ignoring that deed of partnership filed before him was incomplete which fact has been verified by the Ld. CIT(A) from the assessment record. Instead of obtaining complete set of deed of partnership from the assessee during assessment proceedings, the Ld. AO chose to make the impugned disallowance on the basis of missing para 10 to 18 of the deed of partnership and the last page thereof. This is not fair. The assessee was clearly denied the opportunity of producing the complete set of deed of partnership during assessment proceedings. The assessee made an application under rule 46A of the Income Tax Rules, 1962 for filing complete set of deed of partnership (copies at pages 75 to 83 of the Paper Book) which the Ld. CIT(A) rightly admitted as additional evidence. Para 10 thereof mentions that the partners shall be entitled to interest on their loan accounts with the firm at such rates as are prescribed under the Act. In this view of the matter, we hold that the Ld. CIT(A) was perfectly justified in deleting the impugned disallowance. Ground No. 1 of the Revenue being devoid of any legal substance is rejected.

15. Ground No. 2 and 3 are taken up together as they are co-related. The Ld. AO made addition of Rs. 3,46,50,000/- under section 68 of the Act. The

Ld. CIT(A) dealt with the issue in para 10 of his appellate order and deleted the impugned addition and allowed capital loss of Rs. 9,770/- as claimed by the assessee after recording detailed reasons therefor as under:-

“10.1 In the appellate proceedings the assessee filed a copy of the purchase deed as well as sale deed of the property as additional evidence under Rule 46A and prayed that the addition made u/s 68 be cancelled and the returned loss of Rs.9,770/- under the head capital gains be allowed in accordance with law.

10.2 In the remand report the AO objected to the same although admitted that addition u/s 68 needs to be deleted but short term capital gain of Rs.2,06,25,643/- is assessable in the hands of the assessee since a conveyance deed in favour of the assessee firm was executed only on 19.3.2013 for a consideration of Rs.1,35,93,600/- and sale deed of the same was executed on 23.01.2014 for a sale value of Rs.3,50,00,000/- . Since the capital asset was held by the assessee for a period of less than 36 months the said transaction is covered as short term capital gain in the hands of the assessee.

10.3 In the rejoinder submission the assessee contended that the land as allotted to it by HSIIDC on 22.12.2008 which is duly stated by the HSIIDC in the Conveyance Deed executed on 19.3.2013 at page 115 of the paper book where it is stated as under:-

“Whereas, industrial plot No. 152, Phase/Block/Sector-4, in Industrial Estate IMT-Manesar measuring 1800 sq. mtrs was allotted to M/s Modesty Garments for setting up of project of manufacturing readymade garments in pursuance to his/its application for allotment/transfer of the plot, as per the terms & conditions, contained in the agreement dated 3.2.2009 and regular allotment letter dated 22.12.2008 which shall continue to remain part & parcel of this deed.”

10.4 It was also contended that the assessee had paid a total amount towards acquisition of the land as under:-

| <i>Assessment Year</i> | <i>Amount</i> |
|------------------------|-------------------------|
| <i>2009- 10</i> | <i>47,30,206/-</i> |
| <i>2010- 11</i> | <i>38,93,400/-</i> |
| <i>2011- 12</i> | <i>12,30,751/-</i> |
| <i>2013- 14</i> | <i>45,20,000/-</i> |
| <i>2014- 15</i> | <i>3,63,350/-</i> |
| | <i>Rs.1,47,37,707/-</i> |

10.5 It was also stated by the assessee that immediately after allotment of the land the possession of the land was given to the firm and the assessee also constructed a building thereon by incurring a sum of Rs.46,07,747/- in

A.Y.2009-10 and a sum of Rs.1,79,660/- in A.Y. 2014-15. It had been claiming depreciation on the same since A.Y. 2009-10 which is also being allowed to it. The assessee also contended that some of the portion of the building was still under construction on which total sum of Rs. 1,15,11,802/- was incurred. The assessee further contended that under the provisions of section 2(14) of the Act any kind of property held by an assessee would come within the definition of capital asset. Under the provisions of section 2(47) of the Act enjoyment of possession of immovable property as well as the interest in any asset are held to be transferable capital asset and any transfer of such asset will be deemed to be transfer of a capital asset. The CBDT in Circular No.471 dated 15.10.1986 is of the view that the allotment is final unless it is cancelled or the allottee withdraws from the scheme. The allottee gets title of the property on the issuance of the allotment letter and the payment of instalment is only a follow up action and taking the delivery of possession is only a formality. The assessee further drew my attention to the following decisions/ definitions/terms in this regard:-

- 1) Gulshan Malik Vs CIT 43 Taxman.com 200 (Delhi)
- 2) Madhu Kaul Vs CIT 43 Taxman.com 417 (Punj. & Haryana)
- 3) Meaning of Long Term Capital Asset under Section 2(42a)
- 4) DCIT Mumbai Vs Deepak Shashi Bhushan Roy 96 Taxman.com 648 (Mumbai Tribunal)
- 5) Definition of Transfer under Section 2(47)(ii)

10.6 It was thus contended that payments made towards cost of land in A.Y. 2009-10 and 2010-11 are eligible for benefit of indexation and after reducing the indexed cost of land, cost of depreciated, cost of building and building under construction, there is a loss of Rs.9,770/- under the head capital gains which should be allowed to the assessee.

10.7 I have considered the submission made by the assessee and the objection of the AO in his report under Rule 46A. It is also seen that in clause 15 of the conveyance deed dated 19.3.2013 at page 119 of the paper book, it is provided that for further transfer of the aforesaid plot/shed the transferee shall apply to the transferor i.e. HSIIDC along with following documents besides others:-

- a) Original letter of allotment
- b) Proposed agreement to sell

10.8 Thus, it was contended that since these papers were filed before HSIIDC such papers are not available with it but it is evident from the sale deed itself that the land was allotted to the assessee firm in the year 2008 i.e., beyond a period of thirty six months.

10.9 I have also found that the High Court of Madras in the case of South India Mineral Corporation Ltd. Vs ACIT Chennai in 417 ITR 306 (Madras) it is specifically held in para 18 & 19 as under:-

"18. We agree with the learned counsel for the Revenue to a certain extent that the circular was issued bearing in mind the cases arising under Sections 54 and 54A of the TP Act, more particularly, relating to residential accommodation, but what we note from the circular is that the Board held that the date of allotment of the flat should be reckoned for the purposes of computing the capital gain. We would be well justified in applying the said decision of the Board to the case on hand also, though the present case does not relate to a residential accommodation. In any event, the terms and conditions of the agreement are more or less similar and both are wholly owned Government of Tamil Nadu Undertakings which have allotted the properties, that is, in the case of the assessee which has been allotted by the SIDCO and in the circular issued by the Board, it is an allotment by the Delhi Development Authority.

19. Thus, we are of the clear view that the order passed by the Assessing Officer treating the industrial sheds as short term capital asset is incorrect and it should be treated as a long term capital asset and the gains arising therefrom should be assessed as low tax effect. "

10.10 From the perusal of the records produced before me, the submissions made by the assessee and the remand report of the AO along with records produced and rejoinder submission of the assessee, I am of the view that the transaction of sale of industrial plot together with building constructed thereon is a long term capital asset in the hands of the assessee since the land was allotted to it in the year 2008 relevant to A.Y. 2009-10 and was sold in A.Y. 2014-15 i.e. after a period of 36 months of the original allotment of land. So far as possession of the land is concerned evidently a building had been constructed by the assessee on the said plot of land in A.Y. 2009-10 on which the department had been allowing depreciation year after year, therefore, the possession of the land cannot be disputed at this stage. The computation of capital gain as provided by the assessee is also found to be correct and in accordance with law since no indexation claim has been made by the assessee towards depreciated value of building and part of building under construction and the payments made towards cost of land within a period of 36 months of sale thereof. From the decision of Madras High Court reported in 417 ITR 306 it is also relevant to note that Circular No.471 dated 15.10.1986 is not relevant only to a residential accommodation but an industrial plot allotted by HSIIDC is also fully & squarely covered under the terms of the said Circular issued by CBDT which is binding.

10.11 The AO is thus directed to delete the addition made of Rs.3,46,50,000/- made u/s 68 of the Act and allow the assessee long term capital loss of Rs.9,770/- as claimed by it."

16. Perusal of assessment order reveals that it was explained by the assessee during assessment proceedings that the said amount of Rs.

3,46,50,000/- represents profit on sale of land/building. Sale proceeds have been accepted through banking channels. TDS under section 194A has been deducted which is duly reflected in Form 26AS. The transaction is genuine yet the Ld. AO made the impugned addition for the only reason that no authentic evidence/detail is produced. The Ld. CIT(A) under Rule 46A admitted purchase as also sale deed and confronted the Ld. AO who in his remand report admitted that addition under section 68 needs to be deleted and contended that the impugned transaction is covered as short term capital gain in the hands of the assessee firm. However, the sale deed/conveyance deed (copy at pages 113-123 of Paper Book) revealed that the land was allotted to the firm in the year 2008 i.e. beyond a period of 36 months. On appreciation of the entire evidence on record and remand report of the Ld. AO, the CBDT circular No. 471 dated 15.06.1986 and the decision of Hon'ble Madras High Court in South India Corporation Ltd. vs. ACIT 417 ITR 306 (Mad.), the Ld. CIT(A) reached the conclusion that the transaction of sale of industrial plot together with building constructed thereon is a long term capital asset. Land was allotted in the year 2008 relevant to AY 2009-10 and building was constructed thereon. The department has been allowing depreciation year after year. Hence, possession of land cannot be disputed. The Ld. CIT(A) recorded the finding that the computation of capital gain as provided by the assessee is correct and in accordance with law. Nothing has been brought on record by the Revenue to dismantle the above finding of the fact recorded by the Ld. CIT(A). We, therefore, decline to interfere and uphold the order of the Ld. CIT(A) on the issue and reject these ground No. 2 and 3 of the Revenue.

17. In the result, the appeal of the Revenue stands dismissed.

18. The Cross Objection filed by the assessee is only in support of the Ld. CIT(A)'s order. Since we have dismissed the appeal of the Revenue, the Cross Objection of the assessee became infructuous. We therefore dismiss the same as such.

19. In the result, Cross Objection of the assessee is dismissed.

20. In nutshell, appeal of the Revenue in ITA No. 183/Del/2020 and Cross Objection No. 132/Del/2022 filed by the assessee, both are dismissed.

Order pronounced in the open court on 29th March, 2023.

sd/-

**(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

sd/-

**(ASTHA CHANDRA)
JUDICIAL MEMBER**

Dated: 29/03/2023

Veena

Copy forwarded to -

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2. Respondent
3. CIT
4. CIT (A)
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ASSISTANT REGISTRAR
ITAT, New Delhi

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