

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : C : DELHI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITAs No.2849 & 2850/Del/2016
Assessment Years: 2010-11 & 2011-12

ACIT,
Central Circle-26,
New Delhi.

Vs IREO Waterfront Pvt. Ltd.,
5, Dahanraj Chambers,
1st Floor, Satbari,
New Delhi.
PAN: AACCV2433R

CO Nos.235 & 236/2016
ITA No.2849 & 2850/Del/2016
Assessment Years: 2010-11 & 2011-12

IREO Waterfront Pvt. Ltd.,
5, Dahanraj Chambers,
1st Floor, Satbari,
New Delhi.
PAN: AACCV2433R

Vs. ACIT,
Central Circle-26,
New Delhi.

ITA No.910 & 911/Del/2017
Assessment Years: 2010-11 & 2011-12

ACIT,
Central Circle-26,
New Delhi.

Vs. IREO Pvt. Ltd.,
A-11, 1st Floor,
Neeti Bagh,
New Delhi.

PAN: AAACO6644B

CO Nos.99 & 100/2017
ITA No.910 & 911/Del/2017
Assessment Years: 2010-11 & 2011-12

IREO Pvt. Ltd.,
A-11, 1st Floor,
Neeti Bagh,
New Delhi.

Vs. ACIT,
Central Circle-26,
New Delhi.

PAN: AAACO6644B

(Appellant/Cross Objector)

(Respondent)

Assessee by : Shri S. Krishnan, Advocate
Revenue by : Shri Mohd. Gaysuddin Ansari, CIT, DR

Date of Hearing : 10.05.2023
Date of Pronouncement : 16.05.2023

ORDER

PER: M. BALAGANESH, AM:

The appeals and Cross Objections in the case of **IREO Waterfront Pvt. Ltd.**, in ITAs No.2849 & 2850/Del/2016 for AY 2010-11 & 2011-12 and CO Nos.235 & 236/Del/2016 arise out of the orders of the Commissioner of Income Tax (Appeals)-29, New Delhi, [hereinafter referred to as 'Id. CIT(A)', in short] in Appeals No.71/14-15/CIT(A)-29 & 72/14-15/CIT(A)-29 both dated 12.02.2016 against the orders of assessment passed u/s 153A/143(3) and 143(3), respectively, of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 31.03.2014 by the Id. Assessing Officer, Central Circle-2, New Delhi

(hereinafter referred to as 'Id. AO'). The appeals and Cross Objections in the case of **IREO Pvt. Ltd.**, in ITAs No.910 & 911/Del/2017 also for AY 2010-11 & 2011-12 and CO Nos.99 & 100/Del/2017 arise out of the orders of the Commissioner of Income Tax (Appeals)-29, New Delhi, [hereinafter referred to as 'Id. CIT(A)', in short] in Appeals No.205/13-14/CIT(A)-29 & 76/14-15/CIT(A)-29 both dated 29.11.2016 against the orders of assessment passed u/s 153A/143(3) and 143(3), respectively, of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 26.03.2013 and 30.03.,2014, respectively, by the Id. Assessing Officer, Central Circle-2, New Delhi (hereinafter referred to as 'Id. AO').

2. The issues involved in all these appeals are identical and hence they are taken up together and disposed of by this common order for the sake of convenience.

3. With the consent of both the parties, the appeal of the revenue in the case of IREO Waterfront Pvt Ltd in ITA No. 2849/Del/2016 for A.Y.2010-11 and Cross Objections of the assessee in CO No. 235/Del/2016 are taken up first.

4. The first identical issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in deleting the addition of Rs 3,44,55,262/- on the ground that the capitalization of selling and marketing expenses by the Id. AO is contrary to Guidance Note on Accounting for Real Estate transactions issued by ICAI .

4.1. We have heard the rival submissions and perused the materials available on record. The assessee is a private limited company engaged in the business of construction and development of real estate business. The return of income for the A.Y. 2010-11 was filed by the assessee company on 15.10.2010 declaring Nil income with loss for the year under consideration declared at Rs 4,46,56,632/-. A search and seizure action u/s 132 of the Act was carried out on 19.10.2010 in

the case of IREO Group of Cases, wherein the assessee was also covered. Pursuant to the search, notice u/s 153A of the Act was issued to the assessee on 30.12.2011 . In response thereto, the assessee filed its return on 1.5.2012 declaring nil income claiming the loss for the year at Rs 4,46,56,632/-. The assessee had furnished the copy of Profit and Loss Account and Balance Sheet together with Auditor's Report before the Id. AO.

4.2. The Id. AO noticed that assessee had launched an integrated township projects in Ludhiana, Punjab. As per accounting policies adopted for revenue recognition by the assessee company, revenue is recognised in relation to the sold areas only, upon transfer of all significant risks and rewards of ownership of such property as per the terms of contracts entered into with buyers which generally coincides with firming up of the buyers' agreements, on the basis of **Percentage of Completion Method**. The assessee company had received a sum of Rs 63,63,000/- as booking advance from its customers which was shown under the head 'current liabilities' in its financial statements. The assessee has shown the following income in its profit and loss account:-

Interest on fixed deposits with Bank	- Rs 3,19,12,588
Dividend income	- Rs 73,09,395
Total Receipts	Rs 3,92,21,983

4.3. The Id. AO observed that no income was shown from the booking or sale of the flats. But the assessee company had claimed expenses incurred on Publicity, Advertisement and Business/Sales promotion of Rs 3,97,41,443/- which was debited in the profit and loss account and claimed as deduction under the head 'income from business'. The Id. AO listed out the entire details of expenditure mentioning the date of incurrance of expenditure, description of the bill produced

by the assessee thereon, party to whom it was paid and the amount involved therein , in a tabular form in pages 6 to 8 of his assessment order. The assessee also furnished the complete explanation of the expenses incurred on publicity, advertisement & sales /business promotion. The reply of the assessee vide letter dated 25.02.2014 as reproduced by the Id. AO in page 9 of his assessment order is as under:-

'Publicity, advertisement & sale promotion:- During the year under consideration the assessee company has incurred expenses of Rs, 3,49,24,911/- on sales promotion expenses. Out of this total amount, major amount i.e. Rs. 78,00,008/- has been paid to Matthew Brain Roche towards production of & creation of CG image, animation & lightshow for Ludhiana, Rs.79,19,451/- to Lead Advertisers towards the display charges for project in Ludhiana and balance amount of is towards various activities like printing of Brochure, making website, organizing Conference, meals for business promotion & advertisement gifts, publishing of full page advertisement in The Indian Express Newspaper, launch campaign for Ludhiana Township project etc.

Business Promotion:- The assessee company has incurred expenses of Rs. 48,16,532/- in this a major amount is paid to Matthew Brain Roche for supply of Ludhiana Township Architectural Model for sales office, purchase of gifts for business promotion purposes. It is a part of custom to distribution gifts to promote business. The assessee company has paid expenses wholly and exclusively for the purpose of its business to maintain & enhance its cordial relationships with various people important for business. "

4.4. The Id. AO observed that assessee had shown Rs 429.14 crores as 'Project in Progress' in its Balance Sheet as on 31.03.2010. The assessee company has incurred expenditure during the year under consideration to the tune of Rs 74.70 crores related to the above project and shown these expenses in Balance Sheet

as 'Project in Progress'. The Id. AO observed that however, the assessee company has not shown the expenses incurred on publicity, advertisement & sales/business promotion (i.e Selling and Marketing Expenses) in 'Project in Progress' as a Balance sheet item and instead had claimed the same as revenue expenditure in the return. The Id. AO observed that the said expenditure is not related with the income earned by the assessee during the year under consideration, proceeded to capitalize the said selling and marketing expenses for inclusion in 'Project in Progress'. Accordingly the Id. AO disallowed the selling and marketing expenses by treating it as capital in nature to be added to 'Project in Progress' account in the balance sheet. To this extent, the Id. AO brought down the loss claimed by the assessee and finally assessed the total loss at Rs 88,25,250/- after making some other disallowance of expenses u/s 14A of the Act.

4.5. The Id. CIT(A) observed that out of total expenditure incurred towards publicity, advertisement & sales/business promotion in the sum of Rs 3,57,78,862/-, a sum of Rs 13,23,600/- incurred on 2.3.2010 pertains to the bill of Result Services Pvt Ltd towards advance payable for Waterfront Lunch. Since this is an advance payment and the expenditure appeared to have not been crystallized for the year under consideration, therefore the same cannot be treated to have been incurred for the relevant previous year and sustained the addition to the extent of Rs 13,23,600/-. However, the remaining sum of Rs 3,44,55,262/- was allowed as revenue expenditure by the Id. CIT(A) by appreciating the fact that assessee is following percentage of completion method and as per the Guidance Note issued on 'Accounting for Real Estate Transactions' by ICAI, the selling and marketing expenses should not form part of project cost and to be allowed as revenue expenditure. Aggrieved, only the revenue is in appeal before us.

4.6. It is not in dispute that the assessee is following 'Percentage of Completion' Method for recognition of revenue from real estate transactions carried out by the assessee. It is not in dispute that the assessee had indeed launched the project at Ludhiana and had collected advance from customers (shown in the liabilities side of balance sheet under current liabilities) and had also shown the 'Project in Progress' in the asset side of the balance sheet in respect of all expenditures incurred which are directly attributable to the project. This accounting is done strictly in accordance with the Guidance Note issued for 'Accounting for Real Estate Transactions' by ICAI. For the sake of convenience, the relevant portion of the Guidance Note issued by ICAI are reproduced below:-

"1.3 The Guidance Note primarily provides guidance on application of percentage of completion method where it is appropriate to apply this method as explained in subsequent paragraphs as such transactions and activities of real estate have the same economic substance as construction contracts. For this purpose, the Guidance Note draws upon the principles enunciated in Accounting Standard (AS) 7, Construction Contracts. In respect of transactions of real estate which are in substance similar to delivery of goods principles enunciated in Accounting Standard (AS) 9, Revenue Recognition, are applied.

1.4 Real estate -transactions of the nature covered by Accounting Standard (AS) 10, Accounting for fixed Assets, Accounting Standard (AS) 12, Accounting for Government Grants, Accounting Standard (AS) 19, Leases, and Accounting Standard (AS) 26, Intangible Assets, are outside the scope of this Guidance Note.

1.5 This Guidance Note should be applied to all projects in real estate which are commenced on or after April 1,2012 and also to projects which have already commenced but where revenue is being recognised for the first time on or after April 1,2012. An enterprise may choose to apply this Guidance Note from an earlier date provided it applies this Guidance Note to all transactions which commenced or were entered into on or after such earlier date. This Guidance Note supersedes the Guidance Note on Recognition of Revenue by Real Estate Developers, issued by the Institute of Chartered Accountants of India in 2006, when this Guidance Note is applied as above.

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2.2 Project Costs - Project costs in relation to a project ordinarily comprise:

(a) Cost of land and cost of development rights -All costs related to the acquisition of land, development rights in the land or property including cost of land, cost of development rights, rehabilitation costs, registration charges, stamp duty, brokerage costs and incidental expenses.

(b) Borrowing Costs - In accordance with Accounting Standard (AS) 16, Borrowing Costs which are incurred directly in relation to a project or which are apportioned to a project.

(c) Construction and development costs - These would include costs that relate directly to the specific project and costs that may be attributable to project activity in general and can be allocated to the project.

2.3 Construction costs and development costs that relate directly to a specific project include:

(a) land conversion costs, betterment charges, municipal sanction fee and other charges for obtaining building permissions;

(b) site labour costs, including site supervision;

(c) costs of materials used in construction or development of property;

(d) depreciation of plant and equipment used for the project;

(e) costs of moving plant, equipment and materials to and from the project site;

(f) costs of hiring plant and equipment:

(g) costs of design and technical assistance that is directly related to the project;

(h) estimated costs of rectification and guarantee work, including expected warranty costs; and

(i) claims from third parties.

2.4 The following costs should not be considered part of construction costs and development costs if they are material:

(a) General administration costs;

(b) selling costs:

- (c) *research and development costs;*
- (d) *depreciation of idle plant and equipment;*
- (e) *cost of unconsumed or uninstalled material delivered at site;
and*
- (f) *payments made to sub-contractors in advance of work
performed.*

2.5 *Costs that may be attributable to project activity in general and can be allocated to specific projects include:*

- (a) *insurance;*
- (b) *costs of design and technical assistance that is not directly related to a specific project; and*
- (c) *construction or development overheads; and*
- (d) *borrowing costs.*

Such costs are allocated using methods that are systematic and rational and are applied consistently to all costs having similar characteristics. The allocation is based on the normal level of project activity. Construction overheads include costs such as the preparation and processing of construction personnel payroll."

4.7. We find that the Id. CIT(A) had duly appreciated the treatment to be given for the selling and marketing expenses as suggested by the Guidance Note issued by ICAI referred supra and granted relief to the assessee in the instant case. For the sake of convenience, the relevant operative portion of the order of Id. CIT(A) in this regard is reproduced hereunder:-

"8. I have gone through the appellant's submission and considered the facts and evidences on record. The issue requires to be adjudicated as whether the action of AO to disallow the expenses incurred on publicity, advertisements and sales promotion etc. amounting to Rs. 3,57,78,862/- which is claimed as revenue expenditure and directed by AO to be capitalized as work in progress is correct in a scenario where no income from such construction project has been disclosed, following the Percentage of Completion Method (POCM), adopted by the appellant.

8.1 During the year, the appellant has not disclosed any income from its business activity of real estate however claimed expenditure amounting to Rs.8,12,79,019/-. It is a fact that the appellant is following Percentage of Completion Method to recognize its income, which the AO has also not disputed. This method is applied by the appellant as per the guidance note on accounting for real estate transactions, issued by ICAI. Being a registered company, it is necessary for the appellant to prepare its books of accounts and other financial statements, pursuant to Accounting Standards issued by the Institute of Chartered Accountants of India (ICAI). Accordingly, the AO cannot re draw the audited accounts or change the formats, which are drawn pursuant to Companies Act. However working of income can be differed on the basis of the provisions of IT Act, which is not the case in present issue of appeal.

8.2 As discussed in details by the appellant, the expenditure is in respect of the business carried out by the appellant. The conditions mentioned u/s 37(1) of the Act are satisfied to show that it is an allowable expenditure. It is true that no income has been disclosed by the appellant however it has shown to have received a sum of Rs. 3,97,41,443/- as booking advance from its customers. Therefore, it cannot be said that the appellant has not received any money. However, due to following the Accounting Standards, no income has been shown by the appellant. Therefore, to say that the expenditure incurred on business promotion and advertisements etc. is not related to the income earned by the appellant for the year under consideration is factually incorrect.

8.3 Further, the AO has not questioned about the eligibility of claim of this expenditure however disallowed it and stated that this should be taken into work in progress. The AO was unable to establish that it is a capital expenditure related to the project cost, whereas, as per the Accounting Standards, the expenditure of this nature cannot be taken into work in progress but has to be claimed and allowed as revenue expenditure, in view of the provisions of Section 37(1) of the Act. As stated earlier, the conditions embedded in the provisions of Section 37(1) are satisfied.

8.4 Further, it is a trite law that the AO cannot guide or question the manner of the execution of the business by the assessee regarding necessity or otherwise of incurring any expenditure in the interest of its business. It is not upto the revenue authority to dictate the assessee as to how he should conduct his business and what expenditure should be incurred by the assessee, irrespective of the profitability or considering future prospects. Reliance is placed in the case of S.A. Builders Vs CIT (2006) (289 ITR 26), where the Hon'ble Supreme Court has held that "the revenue cannot justifiably claim to place itself in the arm chair of businessman, or in the position of the Board of Directors and assume the role to decide how much

the expenditure is reasonable having regard to the circumstances of the case."

8.5 Keeping the above judicial decisions in mind and also as discussed in details in the foregoing paragraphs and considering the submissions by the appellant as well as the facts and the circumstances of the case and law, it is held that since the appellant is following POCM for recognizing its revenue, though it has received advances for the booking, therefore as per para 2.4 of "Guidance Note on Accounting for Real Estate Transactions", issued by ICAI, "selling and marketing expenses" are not the part of the direct cost of construction activity, ergo, the AO's action in capitalizing these expenses is not on a sound footing and hence the disallowance made, treating it to be taken as work in progress, deserves to be deleted.

8.6 . However, on going through the details of the expenditure claimed for the purpose of publicity, advertisement and sales promotion etc. amounting to Rs. 3,57,78,862/-, as mentioned in detail in the Assessment Order, it is seen that as per serial no. 7, Rs. 13,23,600/- has been incurred on 02.03.2010, on account of bill of Result Services Pvt. Ltd. towards advance payable for waterfront lunch. Since, this is an advance payment and the expenditure appeared to have not been crystallized for the year under consideration therefore the same cannot be treated to have been incurred for the relevant previous year and cannot be allowed as expenditure within the meaning of provisions of Section 37(1) of the Act. Hence, the addition to the extent of Rs. 13,23,600/- is sustained.

8.7 Thus the balance amount of Rs.3,44,55,262/- (Rs.3,57,78,862/-- Rs. 13,23,600/-) is allowed as revenue expenditure for the year under consideration.

8.8 However, while allowing such expenditure the AO should verify whether the appellant has complied with the provisions of TDS, as applicable, in all such expenditure to satisfy that provisions of Section 40(a)(ia) is not applicable. In case proper compliance related to the provision of TDS has not been made by the appellant, adequate action may be initiated, as per law.

8.9 In the result, the appeal is partly allowed on this ground."

4.8. We find that the fact of assessee not recognizing any income from sale of flats in accordance with the Guidance Note issued by ICAI while following 'Percentage of Completion' Method , is not disputed by the Id. AO in the instant case. We find that the Id. AO had not doubted the incurrence of selling and

marketing expenses for business purposes ; the Id. AO had not stated that the same are personal in nature ; the Id. AO had not stated that the same are capital in nature and the Id. AO had not stated that the same were incurred in violation of Explanation 1 to Section 37(1) of the Act. The only dispute before us is whether the selling and marketing expenses could be claimed as revenue expenditure independently by not including the same by capitalizing to Project Costs. We find as per the Guidance Note issued by ICAI on 'Accounting for Real Estate Transactions', the selling and marketing expenses had to be charged off to revenue in the year of incurrance and not to be included in the project costs, which has been factually done by the assessee in the instant case. This fact is duly appreciated by the Id. CIT(A) in the instant case while granting relief to the assessee, subject to assessee complying with the provisions of section 40(a)(ia) of the Act. Hence we do not find any infirmity in the order of the Id. CIT(A) in this regard. Accordingly, the grounds raised by the revenue are dismissed.

5. The Id. AR before us submitted that the Cross Objections preferred by the assessee are only supportive of the order of Id. CIT(A).

6. In the result, the appeal of the revenue in ITA No. 2849/Del/2016 for A.Y. 2010-11 is dismissed and cross objection of the assessee in CO No. 235/Del/2016 is also dismissed as infructuous.

ITA No. 2850/Del/2016 – Asst Year 2011-12 – Revenue Appeal

7. The Ground Nos. 1 & 2 raised by the revenue herein are identical to Ground Nos. 1 & 2 raised by the revenue for the A.Y. 2010-11. Hence the decision rendered in A.Y. 2010-11 shall apply mutatis mutandis to A.Y. 2011-12 also , in view of identical facts, except with variance in figures. Accordingly, the Ground Nos. 1 & 2 raised by the revenue are dismissed.

8. The Ground No. 3 raised by the revenue is challenging the deletion of disallowance of expenditure incurred on gifts amounting to Rs. 10,16,616/-.

8.1. We have heard the rival submissions and perused the materials available on record. We find that the assessee had incurred the following expenses :-

a) 8.10.2010 – Purchase of two omega watches given as gift to Jamna Dass Nikkamal Jain Saraf P Ltd amounting to Rs 1,06,000/-

b) 1.11.2010 – Purchase of silver articles for Diwali gifts given to Frazer and Haws amounting to Rs 9,10,616/-.

8.2. The Id. AO had disallowed the same as not meant for business purposes of the assessee by stating that the assessee failed to produce the details of persons along with reasons and confirmations to whom the expensive gifts were distributed. It is not in dispute that the aforesaid gifts were given by the assessee to its land aggregators who were identifying and brokering the land deals on behalf of the assessee company and to brokers who were effecting bulk sales for the assessee company, on the occasion of Diwali. The assessee had stated before the Id. CIT(A) that no details were ever called for by the Id. AO regarding this expenditure and the assessee came to know of this only from the assessment order. It is not in dispute that the assessee is in the real estate business wherein purchase of land and sale of projects is the most critical and commercially important activity and hence it was very important for the assessee to keep land aggregators and brokers in good humor. The assessee had submitted that it had purchased land parcels worth Rs 399 crores till the year end. It is customary to incur these expenses on various auspicious occasions especially festivals like Diwali to be given to brokers, persons who work on behalf of the assessee company, customers and suppliers of the assessee, in order to keep them in good humor. It is a fact that by incurrance of these expenditure at

the proper time like Diwali occasion would certainly strengthen the relationship of the assessee with the persons who work for the assessee company, customers and suppliers which in turn would enable the company to have continued relationship with the parties. Hence we hold that the said expenditure is held for the purpose of business as per the principle of commercial expediency.

8.3. In view of the aforesaid observations, we direct the Id. AO to delete the disallowance made on account of gifts in the sum of Rs 10,16,616/-. Accordingly, the Ground No. 3 raised by the revenue is dismissed.

9. The Id. AR before us submitted that the Cross Objections preferred by the assessee are only supportive of the order of Id. CIT(A).

10. In the result, the appeal of the revenue in ITA No. 2850/Del/2016 for A.Y. 2011-12 is dismissed and cross objection of the assessee in CO No. 236/Del/2016 is also dismissed as infructuous.

11. We find that the grounds raised by the revenue for the A.Ys. 2010-11 and 2011-12 in the case of Ireo Pvt Ltd are exactly identical to the facts and grounds raised by the revenue in the case of Ireo Waterfront Pvt Ltd, save that in the case of Ireo Pvt Ltd, the project was carried out in Gurgaon instead of Ludhiana. All the facts and circumstances are identical except with variance in figures. Hence the decision rendered in the appeals of the revenue for A.Y. 2010-11 and 2011-12 supra in the case of Ireo Waterfront Pvt Ltd shall apply mutatis mutandis to Ireo Pvt Ltd also. Accordingly, the grounds raised by the revenue in the case of Ireo Pvt Ltd for A.Ys. 2010-11 and 2011-12 are hereby dismissed.

12. The Id. AR before us submitted that the Cross Objections preferred by the assessee are only supportive of the order of Id. CIT(A) for both the Assessment Years.

13. To sum up, all the appeals of the revenue are dismissed and all the cross objections of the assessee are dismissed in both the cases for both the assessment years.

Order pronounced in the open court on 16.05.2023.

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 16th May, 2023.

dk

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

Asstt. Registrar, ITAT, New Delhi