

आयकर अपीलीय अधिकरण  
मुंबई पीठ "एच", मुंबई पीठ  
श्री विकास अवस्थी, न्यायिक सदस्य एवं  
श्री गगन गोयल, लेखाकार सदस्य के समक्ष  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "H", MUMBAI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER  
आअसं.1807/मुं/ 2022 एवं 1808/मुं/ 2022 (नि.व.2016-17 एवं 2017-18)  
ITA NO. 1807/MUM/2022 & 1808/MUM/2022(A.Y. 2016-17 & 2017-18)

DCIT Central Circle-2(4) Mumbai,  
Room No.802, 8<sup>th</sup> Floor, Prathistha Bhavan,  
M.K.Road, Churchgate,  
Mumbai – 400 020

..... अपीलार्थी /Appellant

बनाम Vs.

Keystone Realtors Private Limited,  
702, Natraj, M V Road Junction,  
W E Highways, Andheri(East),  
Mumbai – 400 069  
PAN: AAACK-2499-Q

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Smt. Madhumalti Ghosh, CIT DR

प्रतिवादी द्वारा/Respondent by : Shri Naresh Kumar

सुनवाई की तिथि/ Date of hearing : 25/04/2023

घोषणा की तिथि/ Date of pronouncement : 31/05/2023

**आदेश/ ORDER**

**PER VIKAS AWASTHY, JM:**

These two appeals by the Revenue for Assessment Year 2016-17 and 2017-18, respectively are directed against the order of Commissioner of Income Tax (Appeals)-48 Mumbai [in short 'the CIT(A)'] dated 11/05/2022, common for both the Assessment Years.

2. The issues germane to the grounds raised in both the appeals are identical and identical grounds have been raised by the Revenue in both the appeals, hence, these appeals are taken up together for adjudication and are decided by this common order.

**ITA No.1807/Mum/2022 -A.Y. 2016-17:**

3. The Revenue in appeal has assailed the findings of CIT(A) by raising following grounds:

*“1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the interest cost of Rs.11,68,78,927/- which was disallowed by the AO while holding that the finance cost is to be allowed as revenue expenditure only to the extent of attribution to the revenue offered.*

*2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the Commission and Brokerage cost of Rs.1,78,49,168/-.*

*3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.1,03,43,302/- made by the AO on account of deemed rent calculated @ 2% of the closing stock of unsold flats and shops where occupancy certificates were received.”*

4. Smt. Madhumalti Ghosh representing the Department submits that the CIT(A) while deciding ground No.1 and 2 of appeal has followed the decision of Hon'ble Jurisdictional High Court in the case of CIT vs. Lokhandwala Construction Industries Ltd., 260 ITR 579 (Bom). The assessment year relevant to the said case is assessment year 1987-88. The CIT(A) has failed to take into consideration a vital fact that the provisions of section 36(1)(iii) of the Income Tax Act, 1961 [in short 'the Act'] were amended by the Finance Act, 2003 w.e.f. 01/04/2004. The proviso was inserted by way of amendment, whereby interest on borrowed capital, starting from the date of borrowing for acquisition of asset till the date such asset is not put to use, shall not be allowed as deduction. The amendment has changed the entire legal matrix, hence, the ratio laid down in the case of CIT vs. Lokahndwala Construction

Industries Ltd. (supra) would not apply post amendment. The Id. Departmental Representative submits that assessee has itself admitted the fact that the land was acquired with borrowed funds and the land has been shown as inventory in the books. The assessee has not capitalized the borrowing cost on account of its claim that the land purchased by it is not a “qualifying asset” under AS-16. The CIT(A) while adjudicating the issue has failed to consider the proviso to section 36(1)(iii) of the Act.

4.1 In respect of ground No.2, the Id. Departmental Representative submits that Tribunal in assessee's own case in ITA No.3004/Mum/2019 for Assessment Year 2013-14 decided on 14/11/2022 has decided the issue against the assessee.

4.2 In respect of ground No.3 of appeal, the Id. Departmental Representative submits that the issue is squarely covered by the decision of Hon'ble Delhi High Court in the case of CIT vs. Ansal Housing and Construction, 389 ITR 373 and CIT vs. Ansal Housing Finance & Leasing Ltd., 354 ITR 180. She further submits that section 23 of the Act has been amended by the Finance Act, 2017 w.e.f. 01/04/2018, whereby sub-section(5) was inserted. As per the amended section relief from annual deemed rent in respect of closing stock of unsold flats where occupancy certificate is issued is only for a limited period of one year from the end of the Financial Year in which completion certificate is issued. Once the time period expires, annual value shall be determined in accordance with the provisions of section 23 of the Act.

5. Per contra, Shri Naresh Kumar appearing on behalf of the assessee vehemently defended the impugned order. In respect of ground No.1 of

appeal, the Id. Authorized Representative for the assessee submitted that assessee has been following percentage completion method. The assessee is giving consistently same treatment to interest on borrowed funds right from the beginning. In Assessment Year 2013-14 the Assessing Officer and the CIT(A) rejected the claim of assessee. The assessee carried the issue in appeal before the Tribunal in ITA No.3004/Mum/2019. The Tribunal after considering the provisions of the Act and the decision of Hon'ble Jurisdictional High Court in the case of Lokhandwala Construction and Industries Ltd.(supra) allowed assessee's claim. There has been no change in the facts in the impugned assessment year, hence, the issue is squarely covered by the order of Tribunal in assessee's own case.

5.1 In respect of ground No.2 of appeal, relating to allowability of commission and brokerage cost, the Id. Authorized Representative for the assessee fairly admitted that this issue has been decided against the assessee by the Tribunal in Assessment Year 2013-14. He submits that the assessee has filed Miscellaneous Application for recalling of the said order. The said application is pending for final disposal.

5.2 In respect of ground No.3 of appeal relating to deemed rent on closing stock of unsold flats, the Id. Authorized Representative for the assessee submits that the issue has already been considered by the Tribunal in various cases including assessee's own case in assessment year 2013-14 and has decided the same in favour of assessee. To support his argument he placed reliance on the following decisions:

(i) DCIT vs. M/s. Ganga Developers in ITA NO.2328/Mum/2021, A.Y. 2017-18 decided on 12/10/2022.

(ii) Seth Developers Pvt. Ltd. vs. DCIT in ITA No.1953/Mum/2020, A.Y. 2015-16 decided on 27/06/2022.

6. We have heard the submissions made by rival sides and have examined the orders of authorities below. We have also considered the decisions on which the rival sides have placed reliance to support their respective arguments.

7. The Revenue in ground No.1 of appeal has assailed the order of CIT(A) in allowing interest cost. The Assessing Officer had disallowed part of interest cost holding that finance cost is to be allowed as revenue expenditure only to the extent attributable to the Revenue offered. The assessee had claimed interest expenditure to the tune of Rs.47,91,39,620/-. The Assessing Officer disallowed Rs.11,68,78,927/- from the total claim of assessee. In first appeal, the CIT(A) allowed the claim of assessee in full. We find that in Assessment Year 2013-14 for identical reason the Assessing Officer and CIT(A) had rejected the assessee's claim qua interest cost on borrowed capital. The Co-ordinate Bench after examining the facts of case, provisions of section 36(1)(iii) and the decision in the case of Lokhandwala Construction and Industries Ltd. (supra) has held as under:-

*"19. In the present case, undisputedly funds were borrowed for the purpose of the projects undertaken by the assessee, and only based on accounting treatment, the claim of the assessee was denied. It is pertinent to note that the allowability of any deduction is to be decided based on the provisions of the Act. In the present case, since the funds were borrowed for the purpose of projects undertaken by the assessee, therefore, the interest paid on such borrowing is allowable under section 36(1)(iii) of the Act, in view of the aforesaid decision of Hon'ble jurisdictional High Court. Accordingly, the AO is directed to grant the deduction under section 36(1)(iii)*

*of the Act in respect of the interest expenditure claimed by the assessee. As a result, ground No. 2 raised in assessee's appeal is allowed."*

There has been no change in the facts in the impugned assessment year, hence, following the order of Co-ordinate Bench in assessee's own case in the preceding Assessment Year, ground No.1 of the Revenue's appeal is dismissed.

8. In ground No.2 of appeal, the Revenue has assailed findings of CIT(A) in allowing commission and brokerage cost. We find that identical issue was considered by the Co-ordinate Bench in assessee's own case in ITA NO.3004/Mum/2009 (supra). The Tribunal decided this issue against the assessee by observing as under:

*"25. Thus, as per para 20 of AS 7 if the cost which is directly related to the contract and is incurred for securing the contract is also included as part of the contract cost if they can be separately identified and measured reliably and there is a possibility that the contract will be obtained. From the perusal of pages 67 – 68 of the paper book, we find that assessee has provided the details of commission and brokerage expenses, which were paid to various brokers in respect of flats in its various projects. The said details were further confirmed vide written submission filed by the learned AR. Thus it is evident that in the present case the commission expense has been identified by the assessee not only in respect of each project undertaken by it but also in respect of each flat for which such commission expenses were incurred. Insofar as the decision of the coordinate bench of the Tribunal in Rustomjee Evershine Joint-Venture Private Ltd (supra), we find that in para 7 the coordinate bench after perusal of AS-7 noted that general administrative costs and selling costs are not considered as part of the contract cost unless they are contract specific. Since in the present case the commission expense incurred by the assessee is separately identifiable therefore we are of the considered view that commission expenditure should be allowed proportionally to the revenue offered. Thus we find no infirmity in the impugned order passed on this issue. As a result, ground No. 3 raised in assessee's appeal is dismissed."*

For parity of reasons ground No.2 raised in appeal by the Revenue is allowed.

9. In ground No.3 of appeal, the Revenue has assailed the findings of CIT(A) in deleting addition on account of deemed rent on unsold closing stock of

flats and shops where occupancy certificates were received. We find that in the case of Seth Developers Pvt. Ltd. (supra), the Co-ordinate Bench following the decision rendered in the case of Pegasus Properties Pvt. Ltd., 193 ITD 514 (Mum-Trib) deleted the addition towards deemed notional rent in respect of unsold flats held as stock in trade. The Co-ordinate Bench further considered the amendment introduced by the Finance Act, 2017 and held that the said amendment would be effective from Assessment Year 2018-19 onwards. The issue in present appeal is identical to the one decided by the Tribunal in the case of Seth Developers Pvt. Ltd. (supra). Respectfully following the decision of Co-ordinate Bench ground No.3 of appeal is dismissed.

10. In the result, appeal of the Revenue in ITA No.1807/Mum/2022 for Assessment Year 2016-17 is partly allowed.

**ITA NO.1808/MUM/2022, A.Y. 2017-18 :**

11. Both sides are unanimous in stating that the facts in the impugned assessment year are identical to the facts in Assessment Year 2016-17, therefore, the submissions made by respective sides for Assessment Year 2016-17 would hold good for Assessment Year 2017-18.

12. We find that the grounds raised by the Revenue in appeal are identical to the grounds raised in appeal for Assessment Year 2016-17. The facts also stated to be identical. The findings given while adjudicating appeal of Revenue for Assessment Year 2016-17 would *mutatis mutandis* apply to this appeal as well. For parity of reasons, appeal of the Revenue for Assessment Year 2017-18 is partly allowed.

13. To sum up, appeal of Revenue for assessment years 2016-17 and 2017-18 is partly allowed.

Order pronounced in the open court on Wednesday the 31<sup>st</sup> day of May, 2023.

Sd/-

(GAGAN GOYAL)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated /05/2023

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

**प्रतिलिपि अग्रेषितCopy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
- 4.. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar), ITAT, Mumbai