

**IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI**

**SHRI AMARJIT SINGH, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 1863/MUM/2022
(Assessment Year: 2014-15)**

**Macrotech Developers Ltd.,
(Successor to Lodha Impression Real
Estate Private Limited),**

412, Floor-4, 17G Vardhaman Chamber,
Cawasji Patel Road, Horniman Circle,
Fort, Mumbai - 400001
[PAN: AAACL1490J]

..... **Appellant**

**Deputy Commissioner of Income Tax,
Central Circle 7(3), Mumbai,**

Room No. 655, 6th Floor,
Aayakar Bhavan, Maharishi Karve Road,
Mumbai - 400020

Vs

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri Niraj Sheth
For the Respondent/Department : Smt. Mahita Nair, Shri Anil Sant

Date

Conclusion of hearing : 21.04.2023
Pronouncement of order : 30.06.2023

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant has challenged the order, dated 29/06/2023, passed by the Ld. Commissioner of Income Tax (Appeals)-49, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2014-15, whereby the Ld. CIT(A) had partly allowed the appeal of the Assessee against the Assessment Order, dated 23/12/2016 passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The Appellant has raised following grounds of appeal:

- "1) *On the facts and circumstances of the case and in law, the Hon'ble Commissioner of Income Tax (Appeals)-49 [CIT(A)-49] erred in upholding disallowance of Rs.1,96,87,750 u/s 37 of the Income tax Act, 1961 in respect of payment of regularisation fees to Brihanmumbai Mahanagar Palika ignoring the fact that the expense was incurred for business purpose only.*
- 2) *On the facts and circumstances of the case and in law, the Hon'ble CIT(A)-49 erred in holding that the appellant has violated provisions of any regulations / laws, without appreciating the fact that the Hon'ble ITAT, Mumbai vide its order dated 12.05.2022 in appellant's sister concerns has held that such payment to Brihanmumbai Mahanagar Palika. are compensatory in nature and such expenditure is deductible u/s 37(1) of the Act.*

3. The basic facts as emerging from record are that the Appellant is engaged in the real estate construction and development. During the relevant previous year, the Appellant undertook development/construction activity falling within the jurisdiction of Brihanmumbai Municipal Corporation (BMC)'. As per the applicable development/construction laws, the Appellant is permitted to carry out development/construction only after obtaining necessary approval from BMC. However, BMC generally provides approval only for construction of few floors at a time. In order to meet construction deadlines with the object of handing over finished units to the customers on time the Appellant carries on with the development/construction work avoid delay in the projects, the Appellant carried on with the development/construction before obtaining the approval. In such case, BMC grants post-facto approval and charges regularization fees in order to regularize the construction which commenced before the approval. Thus, the Appellant obtains post-facto approval and therefore, according to the Appellant there is only a technical breach of procedure by the Appellant as the construction/development done by the Appellant

confirms to the approval obtained. During the relevant previous year the Appellant claimed deduction for INR 1,96,87,750/- under Section 37(1) of the Act for the payments made to BMC for regularization of the aforesaid construction/development. The Assessing Officer, vide Assessment Order, dated 23/12/2016 denied the deduction under Section 37(1) holding that the payment was made on account of infraction of law.

4. In appeal CIT(A) also declined to grant any relief on this issue and dismissed the appeal vide order dated 29/06/2022.
5. The Appellant, being aggrieved, has carried the issue in appeal before us.
6. The Learned Authorised Representative for the Appellant submitted that the payment of INR 1,96,87,750/- was in the nature of 'fine' and in this regard he relied upon the receipts issued by BMC placed at page 1 to 3 of the paper-book. He further submitted that the Explanation 1 to Section 37(1) of the Act disallows deduction for expenditure incurred for any purpose which is an offence or prohibited by law. It is not the case of the Revenue that payments made to BMC are for a purpose which is offence. Further, in case of prohibition the Appellant would have been barred from carrying out development/construction activity. However, BMC has prescribed guidelines according to which the post-facto approvals are being given on regular basis. Therefore, it cannot even be said that the payment to BMC was for the purpose which was prohibited under law. Thus, the payment made to the BMC would not fall within the ambit of Explanation 1 to Section 37(1) of the Act. In this regard, he relied upon Circular No. CHE/2052/DP/GEN dated 04/02/2011 issued by BMC. He submitted that in a number of cases payments

made for regularization of construction have been allowed as deduction and relied upon judicial precedents forming part of the paper-book.

7. Per contra, the Learned Departmental Representative supported the order passed by the Assessing Officer and the CIT(A). She relied upon the judicial precedents cited by the Assessing Officer while making the disallowance. The Ld. Departmental Representative submitted that the payments made to BMC were clearly on account of infraction of law and therefore, the Assessing Officer was justified in making the additions. The Ld. Departmental Representative relied upon the judicial precedents cited by the CIT(A) in paragraph 7.3.3 of the order impugned including the decision of Hon'ble Punjab & Haryana High Court in the case of Nahar Shipping Mills Ltd. Vs. Commissioner of Income Tax, Ludhiana: [2014] 49 taxman.com 565 and the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Lokenath & Co [1984] 147 ITR 624.
8. In rejoinder, the Ld. Authorised Representative for the Appellant submitted that the payment made in the present case was fine. Further, there was no deviation in the sanctioned plant and the constructed building. Therefore, the judgment on which reliance was placed by the Ld. Departmental Representative were not applicable to the facts of the present case.
9. We have considered the rival submissions, and perused the material on record including the judicial precedents cited by both the sides. There is no dispute regarding the facts. The Appellant had carried out development/construction without obtaining approval from BMC. However, subsequently, the Appellant obtained approval from BMC after submitting application for regularization of construction and on

payment of the requisite amount. The building constructed confirmed to the approval thus obtained. The Appellant claimed deduction for the amount paid to BMC which was disallowed by the Assessing Officer. The Appellant asserts that the amount paid is in the nature of 'fine' paid for procedural violations and is, therefore, allowable as normal business expenditure under Section 37(1) of the Act. On the other hand the Revenue contends that the same is in the nature of compounding fee/penalty for infraction of law and therefore, no allowable as deduction in terms of Explanation to Section 37(1) of the Act.

10. Both, the Learned Authorised Representative for Appellant and the Learned Departmental Representative have relied upon judicial precedents in support of their respective contentions. Ld. Departmental Representative has relied upon the judgment of the Hon'ble Punjab High Court in the case of Nahar Shipping Mills Ltd. (supra) wherein it was held that payment of compounding fee to Municipal Corporation, Ludhiana for condoning deviation from original sanction was payment for infraction of law and therefore, not allowable under Section 37 of the Act. The Ld. Departmental Representative also placed reliance on the decision of Hon'ble Delhi High Court where after examining provisions of the applicable statute, it was held by the Hon'ble Delhi High Court that payments made to New Delhi Municipal Corporation were penal in nature and therefore, no allowable as deduction under Section 37(1) of the Act. On the other hand the Appellant has placed reliance on the decision of the Tribunal in the case of its sister concern dated 11.05.2022 passed in ITA No. 2349 & 2148/Mum/2018 wherein disallowance of regularization fee paid to Thane Municipal Corporation was deleted by the Tribunal. However, there is nothing on record to show that the judgments are applicable to the facts of the present case. The

development/construction in the present case as well as the amount charged by the BMC for granting post-facto approval would be governed by the provision of the applicable state laws [including Maharashtra Regional & Town Planning Act, 1966 and the corresponding Development Control Rules]. The judgments relied upon by both the sides have been rendered in the context of the relevant state legislations and regulations. There is nothing on record to show that the legislation/regulations under which Municipal Corporation, Ludhiana Bangalore Mahanagar Palika, Thane Municipal Corporation Or New Delhi Municipal Corporation function are identical to those under which BMC functions. Therefore, we are unable to apply the aforesaid judicial precedents to the facts of the present case.

11. We note that the Assessing Officer has, while making disallowance, has proceeded only on the basis of the fact that the Appellant had stated that the payments under consideration were made for procedural lapse without enquiry into the nature of payment. Further, the Assessing Officer has also failed to point out either the offence committed by the Appellant or the provision of law that was violated by the Appellant. The Appellant has placed reliance on the decisions in the case of Oberoi Constructions Ltd. Vs. ACIT, CC-23 (ITA No. 1010/Mum/2013, dated 04/11/2015) and in the case of Oberoi Reality Ltd. Vs. ACIT, CC-23 (ITA No. 1050/Mum/2013, dated 04/11/2015) wherein, in the identical facts and circumstances, the payments made by another assessee engaged in identical business to BMC as regularization charges were allowed by the Tribunal as deduction under Section 37(1) of the Act. Since no statutory provisions, rules or regulations have been brought cited by the Assessing Officer which show that construction without obtaining prior approval was an offence or to show that charges

paid to BMC were penal in nature, the disallowance made by the Assessing Officer cannot be sustained in view of the aforesaid decision of the Tribunal. Accordingly, Ground No.1 raised by the Appellant is allowed. While Ground No. 2 raised by the Appellant is disposed off as being infructuous.

12. In result, the present appeal preferred by the Assessee is allowed.

Order pronounced on 30.06.2023.

Sd/-
(Amarjit Singh)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 30.06.2023
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai