IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'A' : NEW DELHI)
BEFORE SH. M. BALAGANESH , ACCOUNTANT MEMBER
AND
SH.ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 5542/Del/2017, A.Y. 2013-14

Income Tax Officer, Ward-3(3), New Delhi PAN :	Vs.	M/s. ASB Developers Pvt. Ltd., Ritambhara, Tribhuvan Complex, 10 Milestone Mathura Road, Ishwar Nagar, New Delhi- 110065
Appellant		Respondent

Appellant by	Sh. Sidant Arora, CA
Respondent by	Sh. Kanv Bali, Sr. DR

Date of hearing:	25.07.2023
Date of Pronouncement:	31.07.2023

ORDER

Per Anubhav Sharma, JM :

The appeal has been preferred by the Revenue against the order dated 08.06.2017 of CIT(A)-1, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal no. 182/16-17 arising out of an appeal before it against the order dated 14.03.2016 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the ITO, Ward 3(3), New Delhi (hereinafter referred as the Ld. AO).

2. The brief facts of the case are the assessee company is engaged in the business of purchase and aggregation of land and obtaining necessary approvals. During the year, assessee also engaged in sale of one land parcel and earned profit there from. The assessee is a 100% Indian company as its

shareholders are two individuals resident in / citizens of India. Return of income was filed on 30.09.2013 declaring an income of Rs. 10,04,870/-. Assessment u/s 143(3) was made on 14.03.2016 determining total income at Rs. 3,01,59,810/-. In the assessment order, Assessing Officer disallowed the claim of 'surrender right fee' of Rs. 2,90,47,619/-. Ld. AO has held the expenditure claimed by the assessee is not allowable of the following counts : **first** that there is no obligation on the part of assessee to pay an amount of Rs. 2.9 crores and **secondly** the payment is prohibited by law as sharing of profits on sale of agricultural land is prohibited by law.

3. Ld. CIT(A) has deleted the addition with following relevant findings :

"Decision

I have carefully considered the submissions of the appellant and perused the material available on record. The contention of the appellant is that there was a contractual duty/ obligation incurred by it under the agreement dated 03.02.2006 to make available contiguous land, get the requisite approvals, obtain the zoning of land and to execute the sale deeds, etc. in favour of the buyer after undertaking the preceding activities.

It is seen that this payment of compensation and refund of advance was in consequence of the agreement entered between the appellant and Tricone Projects India Ltd. (TPI) on 03.02.2006 which is filed at page 50-68 of the paper book, wherein the appellant had agreed to make available 75 acres of land at Village Niharpur Mandi, District Indore @ Rs. 15,00,000/- per acre and 150 acres of land at Village Dattoda, Indore @ Rs.6.50 lakhs per acres to M/s Tricone Projects India Ltd. and has received advances as per the ledger account submitted as per Annexure 2 of the submission dated 19.05.2017. As per Article 2.1 and 3.1 of agreement dated 03.02.2006 between appellant and M/s Tricone Projects India Ltd., it was the duty of the appellant to get approvals from the appropriate authorities as required for converting the agricultural land into the residential land and the seller agrees to grant, convey and transfer to the buyer all rights, titles and interest in the land free of encumbrances for execution of sale deed. It was also provided in the Article 5.2 of the

said agreement that in the event of seller's failure to achieve approvals, parties shall mutually agree and arrive at such remedial measures for settlement. In pursuant to the said agreement, the appellant had sold 150 acres of land to M/s Tricone Projects India Ltd. in F.Y. 2006-07 and executed the sale deed on 06.09.2006. The appellant further sold 25.94 acres of land to M/s Tricone Projects India Ltd. vide sale deed dated 21.11.2007 and 6.07 acres vide sale deed dated 21.11.2007. However, appellant failed to get the aggregation of land and provide further contiguous land to the land sold earlier. Since there was considerable delay in getting the desired tasks done and the appellant was eventually not able to get the sale deed executed in favour of the purchaser i.e. M/s Tricone Projects India Ltd. of the remaining land and could not aggregate the land as agreed upon in the original agreement dated 03.02.2006, therefore, the said transaction was settled by way of payment of compensation for breach of contract / agreement to sell and release of title deeds of 2.5 acres of land in favour of appellant.

As per correspondence entered between the appellant and TPI dated 09.06.2012 and 15.06.2012 which were filed before the AO as well as before me, it is seen that both the parties have agreed for release of the title deeds of 2.5 acres in favour of the appellant in lieu of compensation (Rs.2,90,47,619/-) and repayment of advances (Rs.59,52,381/-). The copies of these letters / invoice are filed at page 69- 71 of the paper book. The title deeds of 2.5 acres of land was received back by the appellant and said land was sold by the appellant to Smt. Naina Lai Kidwai for Rs.3.75 crores vide agreement dated 16.07.2012. For release of the title deeds and for compensation of breach of contract, appellant has paid Rs. 2,90,47,619/- and also refunded Rs.59,52,381/- as advance received earlier. M/s Tricone Projects India Ltd. has raised a bill of Rs.2,90,47,619/- for surrender of right fees of 2.5 acres of land at Niharpur, Indore which is filed at page 70 of the paper book. As a result, the total payment was made to M/s Tricone Projects India Ltd. of Rs.3,50,00,000/- vide dated 12.07.2012 from appellant's bank account maintained with Induslnd Bank. It is also seen that in the very same bank, the sale proceeds of the 2.5 acres of land sold to Smt. Naina Lai Kidwai has been credited. The appellant has also filed confirmation of M/s Tricone Projects India Ltd. dated 19.01.2016 before the AO confirming the receipt of Rs.2,90,47,619/- in the F.Y. 2012-13 and same has been credited to their Profit & Loss A/c as evidenced from the balance sheet of M/s Tricone Projects India Ltd. for F.Y. 2012-13 filed at page 40 Of the paper book (Schedule 22) wherein the said amount of

Rs.2,90,47,619/- has been shown as 'revenue from renunciation from development rights'. The appellant has also filed copy of the income tax return filed by M/s Tricone Projects India Ltd. which is filed as Annexure A-5 of the submission dated 08.05.2017, wherein the above amount of Rs.2,90,47,619/- has been clubbed with sale of goods shown in Part A - P&L of the return of income of TPI. The gross amount tallies with Schedule 22 of the financial statements of TPI. In view of the facts stated above, it is held that the compensation paid by the appellant to TPI is wholly and exclusively for the business purposes and the same is for the commercial expediency of the appellant's business and is an allowable expenditure u/s 37 of the I.T. Act. It may also be mentioned here that the acres of land title deeds of which were released by TPI has been sold for Rs.3.75 crores thereby the appellant has earned a transactional profit of Rs.25 lakhs, therefore, the compensation payment and refund of the advance cannot be termed as a sharing of profit. Hence, the observation of the AO of diversion / sharing of profit of Rs.2,90,47,619/- was contrary to the facts available on record. In view of the above, it is held that the said amount was paid for breach of a contractual obligations (and is not in the nature of penalty of infraction of law) is allowable in view of the decision of P&H High Court in the case of CIT v. S.A. Builders [2008] 299 ITR 88 (P&H), which held as follows:

> *"Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of - Forfeiture of assessee's security deposits by way of compensation for not completing contract work within stipulated period specified in agreement, constituted an allowable commercial loss and deduction on that account could be not denied on ground that it amounted to payment of penalty*
>
> *Where the question for consideration was as to whether forfeiture of the assessee's security deposits by way of compensation for not completing the contract works within the stipulated period specified in the agreement, constituted an allowable commercial loss or could be disallowed on the ground that it was penalty:*
>
> *Held that in the present case, the compensation paid by the assessee was on account of breach of contract which does not fall in the category of payment of penalty for breach of any law but would be a compensation for*

breach of contractual obligations. Accordingly, it would fall in the category of allowable deduction. "

The facts of the appellant's case are identical with the above cited judicial pronouncement, therefore, the ratio of the said judgment is squarely applicable in the case of appellant. Hence, the compensation paid for breach of contractual obligation is an allowable expenditure and accordingly disallowance of Rs.2,90,47,619/- is deleted.

As regards the observation of the AO at page 5 of the assessment order that M/s Tricone Projects India Ltd. is 100% FDI company and they cannot enter into any such an agreement to create charge or to have right on profit on sale of such land, it is seen that the appellant had entered into an agreement with M/s Tricone Projects India Ltd. vide agreement dated 03.02.2006 whereby M/s Tricone Projects India Ltd. had agreed to buy 225 acres of approved land for development of township and in pursuant to the said agreement, appellant had agreed to provide approved and zoned land free from all encumbrances as per clause 2.1 and 3.1 of the agreement and had received advances in pursuant to said agreement. However, the appellant could provide 182 acres of land to M/s Tricone Projects India Ltd. till F.Y. 2012-13 and could not make available remaining land contagious. The appellant also could not aggregate the remaining land and therefore, it has received back title deeds of 2.5 acres of land from TPI by agreeing on the compensation and refund of advances. In this scheme of things, it cannot be said that M/s TPI has shared profit with appellant. The appellant has agreed to compensate TPI for not aggregating the requisite land, therefore, the observation of the AO that TPI cannot enter into this kind of agreement is not based on proper appreciation of facts and same is rejected."

4. The Revenue is in appeal raising following grounds :-

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the disallowance of Rs.2,90,47,619/- claimed by the assessee as 'surrender right fee' paid to Tricone Project India Ltd by holding the same as compensation paid for breach of contractual obligation, and therefore, it was wholly and exclusively for business purposes and allowable u/s 37 of the Income-tax Act, 1961.

2. On the facts and in the circumstances of the case, the Ld.CIT(A) has failed to appreciate the facts brought on record by the AO to justify the disallowance particularly the fact that there was no

clause for payment of any compensation in the event of sale of land to third party with the consent of Tricone Project India Ltd.

3. On the facts and in the circumstances of the case, the Ld.CIT(A) has failed to appreciate that sale of land to third party was a separate contract, and therefore, outside the scope of Article 5.2 of the agreement dated 03.02.2006, and so, compensation in the name of 'surrender right fee' on the impugned transfer of land was only diversion of income and not on account of breach of contractual obligation.

4. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."

5. Heard and perused the record.

6. Ld. DR submitted that there was no error in the findings of ld. AO and ld. AO has thoroughly examined the transaction. Taking Bench across various provisions of the agreement between the assessee and Tricone Project India Ltd. (TPI) it was submitted that there was no obligation on the assessee to make any payment to TPI. It was submitted by Ld. DR that there was a negotiated settlement which does not arise out of the clause 5.2 of the agreement. Ld. DR also submitted that the assessee has made payment out of the profits earned from the sale of the agricultural land under the garb of surrender right fee transferred it.

6.1 Ld. AR however, supported the findings of Ld. CIT(A).

7. Appreciating the matter on record, it can be observed that on 03.02.2006 agreement was entered between the assessee with TPI wherein assessee had agreed to sale 175 acres of land at Nihalpur Mundi, Indore at village Datora. Assessee had transferred 150 acres of land by 06.09.2006 and further 32.01 acres of land by 21.11.2007. However, the remaining land as per the agreement could not be aggregated and there was other issue involving necessary permissions with regard to land which assessee was not able to get. The assessee then sent a

proposal to TPI to take possession of the original title deeds of 2.5 acres of land which assessee had aggregated for transfer to TPI of which sale deed could not be executed in favour of the TPI for the reasons of non-compliance of the terms of agreement on 15.06.2012. TPI accepted the proposal of assessee to get Rs. 3.5 crores which included advance 59,52,381/- and accordingly assessee had made payment of Rs. 3.50 crores on 12.07.2012. This 2.5 acres land was subsequently, sold by assessee on 16.07.2012 to Smt. Naina Lal Kidvai for Rs. 3,75,00,000/-.

8. In the light of aforesaid sequence of events of transaction it becomes apparent that it was not a single transaction of sale and purchase of land with TPI but the assessee was into a long term association with TPI starting from Feb, 2006. It is also established that the assessee was handicapped in fulfilling the commitment towards TPI and at the same time was handicapped with regard to 2.5 acre land of which the original sale deeds were lying with TPI. Thus there was justification on the part of assessee, to have made a proposal to the TPI in response to which TPI had replied on 15.06.2012. Thus, Ld. CIT(A) was not in error to allow the payment as one u/s 37 having commercial expediency.

9. It further comes up as admitted state of affairs that TPI has shown the amount receipt from assessee as revenue from renunciation from development rights.

10. There is no substance in the observation of AO of diversion of sharing of profits with TPI as admittedly the amount was paid to TPI prior to the sale of 2.5 acre lands to Smt. Naina Lal Kidvai on 16.07.2012.

11. The Ld. DR has relied the various provisions of the agreement to contend that there was no obligation under the agreement to make disputed payment as contractual liability but same is also meted out from the fact that clause 2.2 of the agreement provided right to TPI to terminate the agreement, in case, the assessee was not able to get necessary approvals and clause 3.4 provided that

upon termination of the agreement as a result of failure to receipt approvals all advances granted by buyer to seller have to be returned in 30 days.

11.1 Then Clause 5.2, which has been heavily relied, infact shows that the parties had been fair to accept that there can be 'reasonable cause' for not getting the approvals and if approvals are not received in whole or part, parties shall mutually agree and arrive at such remedially measures and accounting settlement as they may be proper in the circumstances. Ld. AO has considered this clause to rebut the argument that there was a charge created in favour of TPI without appreciating that this clause was to remedy the situation where parties believed that for all good reasons beyond the control of parties the approvals were not received and parties had to settle their account. This very much allowed parties to settle for an agreement which concluded with the letter dated 15.06.2012 by which TPI accepted the offer of Assessee to be compensated in lieu of release of sale deeds of 2.5 Acre land held by TPI.

12. Thus, the findings of Ld. CIT(A) on a whole have no error. The grounds are decided against the Revenue**. Consequently, the appeal of Revenue is dismissed.**

Order pronounced in the open court on 31st July, 2023.

Sd/- **(M.BALAGANESH)** **ACCOUNTANT MEMBER**	Sd/- **(ANUBHAV SHARMA)** **JUDICIAL MEMBER**

Date:-31st.07.2023

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI