INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR US, JUDICIAL MEMBER

ITA No. 563/Del/2020
(Assessment Year: 2014-15)

ITO, Ward-7(1), New Delhi (Appellant) **PAN:AALCS4525J**	Vs.	Devika Gold Homz Pvt. Ltd, Stilt Floor, Devika Tower, New Delhi (Respondent)

Assessee by :	Shri Somil Agarwal, Adv Shri Deepesh Garg, Adv
Revenue by:	Shri Vivek Kumar Upadhyay, Sr. DR
Date of Hearing	18/12/2023
Date of pronouncement	12/03/2024

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No.563/Del/2020 for AY 2015-16, arises out of the order of the Commissioner of Income Tax (Appeals)-3, New Delhi [hereinafter referred to as 'ld. CIT(A)', in short] in Appeal No. 3/10469/2016-17 dated 26.11.2019 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 30.12.2016 by the Assessing Officer, DCIT, Circle-7(1), New Delhi (hereinafter referred to as 'ld. AO').

2. Ground No. 1 of the revenue is challenging the deletion of addition of Rs. 3,26,00,000/- made by the AO on account of revenue recognition following percentage of completion method (POCM).

3. We have heard the rival submissions and perused the material available on record. The assessee company is a promoter and builder constructing a residential group housing project namely Devika Gold Homz in Greater Noida during the year under consideration. The ld AO observed that the assessee had

incurred substantial expenses on construction but the revenue had not been recognized on the basis of percentage of completion method. Accordingly, the ld AO sought for complete details of the project, details of agreement entered into till 31.03.2014 customer wise together with amounts received thereon. The entire details called for by the AO were furnished by the assessee. The ld AO observed that the assessee has shown total saleable area of 1173937 sq. ft. in this year and 662925 sq. ft. in subsequent years for the said housing project. The assessee explained that originally the entire project consisted of construction of 10 towers but since the market continuously was not good, the project was restricted to 6 towers in FY 2014-15 and therefore, the total saleable area was reduced to 662925 sq. ft. in subsequent years as against 1173937 sq ft which was proposed originally. It was contended that keeping in view the total saleable area 1173937 sq ft in this year, the percentage of construction cost to the total construction cost was less than 25% and therefore, the revenue was not required to be recognized on the basis of POCM. The ld AO observed in respect of the 4 towers for which construction plan was dropped, not even a single brick was laid. Accordingly, the ld AO considered the total saleable construction cost up to 31.03.2014 as 58.49% and accordingly, held that revenue was required to be recognized on the basis of POCM. The ld AO accordingly computed profit of Rs. 3.26 crores on the basis of POCM and made addition thereon.

4. Before the ld CIT(A), the assessee reiterated its submission by stating that it had obtained necessary approval for construction of 10 towers for total construction area of 1173937 sq ft. Necessary attention was drawn to the approved building plan together with the fee paid challan thereon. It was submitted that even marketing brochure released for marketing of the project reflected that 10 towers were offered for sale which also contained technical specification of all the flats for 10 towers. The assessee submitted that booking for sale of flats started for all the 10 towers. In support of this, copies of the ledger, booking agreement were enclosed to prove that flats in towers 8 to 10 which were either cancelled by the customer or refunded by the company due to its subsequent decision of not to construct 4 towers i.e. DG-8, DG-9, DG-10, DG-

11. The assessee submitted that the detailed circumstances leading to delay in construction i.e. court stay due to agitation by farmers, adverse economic conditions, excess supply of similar projects in surrounding areas etc. which resulted in sharp decline of the demand and pricing. It was submitted all these factors collectively contributed to the decision to restrict the area of the project to 6 towers in FY 2014-15 relevant to AY 2015-16. It was also submitted that due recognition of revenue had indeed been made and income offered by the assessee on POCM in subsequent years i.e. AY 2015-16 to 2019-20. The details of income offered by the assessee for taxation are as under:-

Fin. Year	***Revenue Sale - POCM***	***Status of Assessment***
FY 2013-14	*Nil*	*Present case In Appeal*
FY 2014-15	*854008243*	*Assessed*
FY 2015-16	*258842969*	*Assessed*
FY 2016-17	*129965707*	*Assessed u/s 143 (1)*
FY 2017-18	*156829839.9*	*Assessed u/s 143 (1)*
FY 2018-19	*91946287*	*IT filed*
Total Sales Declared so far	***1491593046***	
Sale Executed - (Flats Booked/	*1512392835*	
%age of Sales already declared	***98.62%***	***Remaining Revenue to be declared at the time of completion of Project***

5. The assessee also placed reliance on the decision of the Hon'ble Supreme Court in the case of Excel Industries Ltd reported in 358 ITR 295(SC) wherein, it was held that if the income has already been taxed in the subsequent years, revenue has not been deprived of any tax and the rate of tax in both the years is same then the addition made by the ld AO deserves to be deleted as the entire adjudication of the issue becomes academic in nature. The assessee also placed reliance on the decision Hon'ble Jurisdictional High Court in the case CIT Vs. Shri Ram Piston reported in 220 CTR 404 (Del) in support of its contentions and another decision in the case of CIT Vs. Vishnu Industrial Pvt. Ltd in ITA No. 229/1998 dated 06.05.2008 of Hon'ble Jurisdictional High Court. The assessee also pointed out calculation error in the percentage of completion arrived by the ld AO @58.49% as against the correct percentage of 43.26% even if the total

saleable area is considered at 662925 sq ft. It was also pointed out that the ld. AO failed to allow deduction of deferred revenue expenses in respect of selling and marketing expenditure of Rs. 4,16,36,627/- having recognized income under POCM. The assessee also submitted that percentage of completion method is not applicable to real estate developers.

6. The ld CIT(A) duly appreciated the contentions of the assessee and deleted the addition of Rs. 3.26 lakhs by observing as under:-

> *"4.3 I have considered the facts of the case and the submission made by the AR. It has been contended that originally the entire project consisted of construction of 10 towers but since the market conditions were not good, the project was restricted to 6 towers in FY 2014-15 and therefore, the total saleable area was reduced to 6,62,925 in subsequent years. It was further contended that keeping in view the total saleable area of 11,73,937 sq. feet in this year, the percentage of construction cost to the total construction cost was less than 25% and therefore, revenue was not recognized on the basis of percentage of completion method (POCM). In support of this argument, the AR has furnished the copy of marketing brochure and the approved plan of the project which shows that the complete project consisted of construction of ten towers. The AR has further submitted that bookings were sought in all the ten towers and after the plan was restricted to construction of six towers, the customers who had booked the flats in the balance four towers were allotted flats in the six towers being constructed or money was refunded to the customers. In this context, the AR has furnished the copies of ledger accounts and booking agreements to show that bookings were made in the four towers which were later decided not to be constructed. The AR has also explained the reasons for change in plan from constructing ten towers to six towers by stating that this was done due to adverse economic conditions and recession in the real estate market which had resulted in fall in prices of flats. It is further contended that in subsequent years, the revenue was booked keeping in view the total project of six towers only whereas in the current year, the plan was to construct ten towers and therefore, revenue was booked keeping in view the total project of ten towers.*
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> *4.3.1 In addition to this, the AR has argued that the appellant has already shown 98.62% of the total revenue in the ITRs filed for AY 2015-16 to 2019-20 and the balance revenue is likely to be declared at the time of completion of the project consisting of six towers and in case revenue is recognized in the current year as contended by the AO, the total revenue already declared would exceed the total projected revenue and actual sale consideration by 43.97% i.e. the total revenue declared in the ITRs filed for AYs upto 2019-20 would be 143.97% of the total actual revenue. It is also submitted by the AR that the appellant has already shown the revenue from the project in subsequent years on the basis of POCM and therefore, no addition is called for in the year under consideration.*
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> *4.3.2. Without prejudice to all the above arguments, the AR has submitted that even if POCM is applied I the case of the appellant, the AO has wrongly computed the profit as the AO has made the mistake in taking total cost of land of ten*

towers instead of taking proportionate cost of land corresponding to six towers. It has been submitted that if proportionate land cost is taken, the percentage of completion of the project comes to 43.26% instead of 58.49% and from the profit so computed, the benefit of deferred revenue expenses of Rs. 4,16,36,627/- in respect of selling and marketing expenses also needs to be allowed.

4.3.3 On perusal of all the above facts and the detailed arguments raised by the AR during the course of appellate proceedings, it is observed that there is sufficient reason to believe that the project was planned and approved for ten towers and it was subsequently restricted to six towers due to various reasons as explained by the AR and the appellant was bonafide in taking the total project cost of ten towers in order to compute the profit based on POCM method as per which the percentage of completion of the project was below 25% and therefore, revenue was not recognized during the year. Moreover, it is observed that the appellant has shown the revenue in accordance with POCM method in subsequent years. this regard, the AR has relied upon various decisions. The contentions of the AR have been found to be correct and it is seen that the appellant has already declared the revenue from the project in subsequent years to the extent of 98.62%. In case revenue is recognized in the current year also as done by the AO, the total revenue recognized would exceed the total actual/projected revenue and the computation of profits from the project would be required to be re-computed in all the subsequent years also leading to avoidable complications and without any benefit to the revenue. Keeping in view all these facts, the addition made by the AO is deleted and the grounds of appeal are allowed.)

7. We find that none of the aforesaid factual observations made by the ld CIT(A) were controverted by the revenue by bringing in contrary materials before us. Further, we find the rate of tax in AY 2014-15 and 2015-16 remains the same. It is a fact that the assessee had indeed started offering income from the project under POCM commencing from AY 2015-16 onwards which is evident from table reproduced supra. Hence, the entire exercise of the revenue in trying to shift the year of taxability to the year under consideration is purely academic in nature. In this regard, the decision of Hon'ble Punjab and Haryana High Court in the case of CIT Vs. Vee Gee Industrial Enterprises in Income Tax Appeal No. 187/2014 dated 28.07.2015 comes to the rescue of the assessee wherein, it was held as under:-

"3. For the purpose of this appeal, we will assume as correct the the finding of fact by the Assessing Officer and the Commissioner of Income Tax that the amount of ₹ 31,10,000/- pertained to the assessment year 2005-06 and not the assessment year 2007-08. On 16.1.2007, the search was conducted under Section 132 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). It is undisputed that the respondent/assessee surrendered the tax amounting to 84.20 lacs. It is also admitted that the amount was brought to tax by the department for the assessment year 2007-08. The only contention raised by the department is that the amount ought to be brought to tax for the assessment year 2005-06.

4 Even assuming that the department's contention is correct, it would make no difference in view of the judgments of the Hon'ble Supreme Court, the Bombay High Court and the Delhi High Court.

5. In Commissioner of Income-Tax, Delhi, Ajmer, Rajasthan and Madhya Bharat v. Nagri Mills Co. Ltd. (1958) ITR 681, the Bombay High Court held:-

> *"We have often wondered why the Income-tax authorities, in a matter such as this where the deduction is obviously a permissible deduction under the Income-Tax Act, raise disputes as to the year in which the deduction should be allowed. The question as to the year in which a deduction is allowable may be material when the rate of tax chargeable on the assessee in two different years is different; but in the case of income of a company, tax is attracted at a uniform rate, and whether the deduction in respect of bonus was granted in the assessment year 1952-53 or in the assessment year corresponding to the accounting year 1952, that is in the assessment year 1953-54, should be a matter of no consequence to the Department; and one should have thought that the Department would not fritter away its energies in fighting matters of this kind. But, obviously, judging from the references that come up to us every now and then, the Department appears to delight in raising points of this character which do not affect the taxability of the assessee or the tax that the Department is likely to collect from him whether in one year or the other."*

6. This judgment was followed by the Delhi High Court in Commissioner of income-Tax and Another v. Dinesh Kumar Goel (2011) 333 ITR 10 (Delhi). The Delhi High Court, after quoting the above observations, observed as under:-

> *"26. Though our discussion on the issue is complete the parting comments need to be made. The receipts relate to the unexecuted packages, which are not shown in the instant year would be shown in the succeeding year. Rate of tax in respect of companies remains the same in all these years. Therefore, the Revenue does not lose anything, as it would receive the tax on this income in the succeeding year. Still issues are raised and much outcry is made for nothing"*
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> *XXX XXX XXX XXX XXX XXX XX*
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> *28. In this Court, in its decision dt. 6 May. 2008 IT Ref. No. 229 of 1988 entitled CIT vs. Vishnu Industrial Gases (P) Ltd had quoted the aforesaid passage and thereafter remarked that the situation does not seem to have changed over the last fifty years and the Revenue continues to agitate the question whether tax is leviable in a particular year or in some other year. Alas! The aforesaid words of wisdom of Bombay High Court reminded to the Revenue authorities more than two years ago again have not made any dent on the psyche of the Revenue,"*

7. The matter, in any event, stands concluded by the judgment of the Hon'ble Supreme Court in Commissioner of Income Tax v. Excel Industries Limited (2013) 358 ITR 295 (SC). The Hon'ble Supreme Court held:-

> *"32. Thirdly, the real question concerning us is the year in which the assessee is required to pay tax. There is no dispute that in the subsequent accounting year, the assessee did make imports and did derive benefits under the advance licence and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers."*
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> *8. It was conceded that even in the present case, the rate of tax remained the same in both the assessment years i.e. 2005-06 and 2007-08. Following the above judgment of the Hon'ble Supreme Court, it must be held that the dispute raised by the revenue is essentially academic. The issue may have some tax effect in that if the department is correct and the amount ought to have been brought to tax two years earlier, there would be loss of interest for two years on the amount of 31,10,000/-. The department has not raised the claim in that regard. We do not wish to express any opinion as to the right of the department to claim interest.*
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> *9. In the circumstances, the questions of law, therefore, are decided in favour of the assessee. The appeal, is, therefore, dismissed."*

8. This decision has duly considered the decision of the Hon'ble Jurisdictional High Court in the case of Dinesh Kumar Goel reported in 331 ITR 10 (Del) and decision of Hon'ble Supreme Court in the case of CIT Vs. Excel Industries Ltd reported in 358 ITR 295 (SC).

9. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we find no infirmity in the order of the ld CIT(A) and accordingly, ground 1 raised by the revenue is dismissed.

10. The ground No. 2 raised by the revenue is challenging the deletion of disallowance u/s 14A of the Act where there is no exempt income. This issue is no longer res integra in view of the recent decision of Hon'ble Jurisdictional High Court in the case of PCIT Vs. Era Infrastructure Ltd reported in 448 ITR 674 (Del) wherein, it was held categorically that if there is no exempt income earned by the

assessee, disallowance u/s 14A of the Act cannot be pressed into service. Respectfully following the same, ground No. 2 raised by the revenue is dismissed.

11. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 12/03/2024.

-Sd/-	-Sd/-
(YOGESH KUMAR US)	**(M. BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 12/03/2024
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi