

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 220/Ind/2022
Assessment Year: 2015-16

ACIT (Central)-2, Bhopal	<u>बनाम/</u> Vs.	Rishi Construction, F-11, Mansarovar Complex, Hoshangabad Road, Bhopal
(Revenue / Appellant)		(Assessee / Respondent)

ITA No. 88/Ind/2023
Assessment Year: 2015-16

Rishi Construction, F-11, Mansarovar Complex, Hoshangabad Road, Bhopal	<u>बनाम/</u> Vs.	ITO, 1(2), Bhopal
(Assessee / Appellant)		(Revenue / Respondent)
PAN: AADFR7872A		
Assessee by	Shri Sumit Nema, Sr. Adv., and Shri Gagan Tiwari, Adv	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	20.06.2024	
Date of Pronouncement	27.06.2024	

आदेश / ORDER

Per B.M. Biyani, A.M.:

These are the re-called matters. Originally, these appeals were decided by order dated 26.09.2023 of this Bench. Thereafter, the assessee filed Misc. Application ["M/A"] No. 32/Ind/2024 seeking re-call of order on certain grounds. The M/A was accepted and matters were re-called, accordingly these matters have again come before us for hearing.

2. At first, we may take note of the background of case. These matters arose from appeal-order dated 29.06.2022 passed by learned Commissioner of Income-tax (Appeals)-3, Bhopal ["CIT(A)"] which in turn arose out of assessment-order dated 26.12.2017 passed by ITO, 1(2), Bhopal ["AO"] u/s 143(3) of Income-tax Act, 1961 ["the Act"]. While passing the said assessment-order u/s 143(3), the AO observed that the assessee sold a land/plot to M/s Swami Vivekanand Institute of Neurology Neurosurgery & Spine and M/s Sagauya Mediservices Pvt. Ltd. ["M/s Swami"] for Rs. 4,70,06,136/- but the assessee declared turnover of Rs. 1,20,00,000/- only and not Rs. 4,70,06,136/-. The AO confronted the assessee *qua* this difference. In reply, the assessee claimed to have sold the impugned land to M/s Shri Govind Reality Pvt. Ltd. ["M/s Govind"] through an unregistered agreement dated 26.02.2011 for Rs. 1,20,00,000/- but received a part consideration only. Ultimately, the assessee sold land on 19.03.2015 to M/s Swami for Rs. 4,70,06,136/- but since the assessee was registered-owner of land, the sale-deed was executed directly by assessee in favour of M/s Swami in terms of Clause No. 12 of aforesaid agreement dated 26.02.2011 entered with M/s Govind. Further, the assessee directly received

consideration of Rs. 4,70,06,136/- from M/s Swami, retained its own share of Rs. 1,20,00,000/- and passed excess consideration of Rs. 3,50,06,136/- to M/s Govind. The AO, however, observed that the assessee has shared an income of Rs. 3,50,06,136/- with M/s Govind under the aforesaid agreement dated 26.02.2011 which was unregistered and thereby declared lesser taxable income, accordingly the AO made an addition of Rs. 3,50,06,136/-. The assessee carried matter in first-appeal whereupon the CIT(A) deleted the addition made by AO. On further appeal by revenue, the ITAT reversed CIT(A)'s order and upheld the addition made by AO.

2.1 Thereafter, in the aforesaid M/A, the assessee submitted that during assessment-proceeding, the assessee raised two claims before AO for non-taxability of the impugned sum of Rs. 3,50,06,136/- in assessee's hands, namely (A) the amount was shared with or paid to M/s Govind in terms of agreement dated 26.02.2011 and therefore it did not belong to assessee, and (B) the amount shared with or paid to M/s Govind was a cost/expenditure of business and hence allowable as deduction. The claim (B) was submitted by assessee to AO through a separate letter dated 01.12.2017, copy at Page No. 73-75 of the Paper-Book. However, during first-appeal, the CIT(A) granted relief to assessee on the basis of (A) itself and therefore did not make any adjudication of (B), although the CIT(A) has re-produced assessee's aforesaid letter dated 01.12.2017 at Page 11-12 of his order. Thereafter, before ITAT, it was revenue's appeal challenging the order of CIT(A) in which only (A) point was deliberated by both sides and accordingly,

the ITAT considered (A) only and reversed the order passed by CIT(A) without considering (B). This happened because the assessee's counsel argued for defending claim (A) only because it was revenue's appeal and the revenue was making pleading against acceptance of claim (A) by CIT(A). Therefore, the assessee's counsel could not develop or canvas the assessee's claim (B), although claim (B) was equally substantial in accordance with the provisions of Income-tax Act, 1961. Therefore, due to non-consideration of (B), a mistake apparent from record had occurred in the order of ITAT which ought to be rectified. After due consideration of arguments of both sides and having regard to judicial rulings, this Bench accepted the claim of assessee and allowed M/A by passing following order:

"8. We have considered rival contentions of both sides. After a careful consideration, we find that there is a letter dated 01.12.2017 filed by assessee to AO, the same letter is also re-produced by CIT(A) in his order and the letter is also filed before ITAT in Paper-Book at Page No. 73-75. Thus, the letter is certainly a part of record before ITAT. The claim (B) of assessee hinges on this very letter. But the letter was not deliberated during hearing of the original appeal because as submitted by assessee, it was revenue's appeal and the assessee's counsel confined to giving replies to revenue's pleadings and defending the order of CIT(A) only, which involved claim (A) but not claim (B). Therefore, a meritorious claim (B) of assessee remained untouched. In the light of various decisions relied by Ld. AR as narrated in para 4, we agree that there is a mistake apparent from record due to non-consideration of assessee's claim (B). So far as the contention of Ld. DR that the counsel's lapse cannot give rise to an apparent mistake rectifiable u/s 254(2), we find that Hon'ble Delhi High Court has held that the power of Tribunal u/s 254(2) is not limited to a mistake committed by the Tribunal, the amendment to the order of Tribunal can also be made if it is triggered on account of a mistake of counsel. In our view, the principle accepted by Hon'ble Court can be perfectly applied in present case of assessee because the claim (B) could not presented by assessee's counsel as the appeal was from revenue's side and the order of CIT(A) as well as revenue's pleadings before ITAT confined to (A) only. Therefore, present case is peculiar warranting such a view to be taken by us. But had there been an opposite case like claim (B) would have been a ground/issue of deliberation before ITAT and the counsel would have either consciously withdrawn the same or not represented well, we would have not treated it as a case of apparent mistake. Therefore, considering the special circumstance of present case which prevented assessee's counsel to present

*claim (B) of assessee, we find that it would be certainly judicious to re-call the impugned order passed by ITAT in **ITA No. 220/Ind/2022** for the limited purpose of deciding claim (B) of assessee and we do so."*

3. Thus, in terms of our aforesaid order in M/A, we are now required to decide a specific issue i.e. the claim (B) of assessee that the amount shared with or paid to M/s Govind was a cost/expenditure of business and allowable as deduction to assessee.

4. Ld. AR for assessee has moved an application raising following additional ground under Rule 11 of Income-tax (Appellate Tribunal) Rules, 1963:

"Whether if the sale of land was to be treated as income of the assessee even then the amount transferred to the agreement holder would be allowed as deduction u/s 37(1) of the Income-tax Act, 1961."

5. Ld. AR submitted that the purpose of raising this additional ground is only to formalise the issue which is already flowing ITAT's order in M/A and not to expand the scope of assessee's case. Ld. DR for revenue, though objected to admission of additional ground in present-proceeding, yet agreed to the submission of Ld. AR that by raising additional ground, the assessee is not expanding the scope of adjudication in present case. We also agree in principle that the present proceeding is confined to what was ordered in M/A and therefore additional ground cannot be raised. At the same time we also find that the issue raised in additional ground is not a newer issue, it is already open before us for adjudication flowing from our order in M/A and therefore we can proceed to adjudicate the same irrespective of whether additional ground filed by assessee in the application is taken into account

or not. Therefore, we reject the application filed by assessee in order to uphold the legal principle and yet proceed to adjudicate the issue.

6. Learned Representatives of both sides have made extensive arguments qua the issue and we have heard them peacefully and considered their submissions as also the documents held in Paper-Books.

7. We first adjudicate the Revenue's **ITA No. 220/Ind/2022**. During hearing, Ld. AR for assessee's endeavour is to plead that the amount shared with or paid to M/s Govind was an "expenditure incurred wholly and exclusively for the purpose of business" and therefore allowable u/s 37(1) of the Act. To show this, Ld. AR submitted that in terms of pre-existing agreement dated 26.02.2011, though unregistered, M/s Govind had a vested right in the land sold by assessee. Therefore, when the assessee ultimately sold land to M/s Swami vide registered-deed 19.03.2015, the assessee had to obtain consent from M/s Govind and M/s Govind joined in the registered-deed as a "consenting party" and for that reason, the assessee had to pass a sum of Rs. 3,50,06,136/- to M/s Govind after retaining his own share of Rs. 1,20,00,000/-. Thereafter, while preparing financial statements, the assessee credited net proceed of Rs. 1,20,00,000/- in P&L A/c which generated controversy. However, during the course of assessment-proceeding, the assessee filed an alternative P&L A/c to the AO reflecting full sale-proceed of Rs. 4,70,06,136 (-) Rs. 3,50,06,136 with the caption "*cost of relinquishment of right on sale by Shri Govind Reality*" in an attempt to claim before AO that the payment of Rs. 3,50,06,136/- made to M/s

Govind was a cost of relinquishment of right and therefore allowable as deduction u/s 37(1). This claim was made through a separate letter dated 01.12.2017, copy at Page 73-75 of the Paper-Book, filed by assessee to the AO which includes the alternative P&L A/c also. Ld. AR very strongly contended that the impugned payment to M/s Govind was definitely allowable as deduction u/s 37(1) for these reasons:

- (i) M/s Govind was having a pre-existing right in the property by virtue of agreement dated 26.02.2011 and the assessee had to make payment to M/s Govind to discharge such right. Had the assessee not made payment to M/s Govind, the assessee could not have sold the impugned property to any other person due to pre-existing right of M/s Govind.
- (ii) Even if the assessee would have ventured to sell property without taking consent, M/s Govind could very well sue the assessee for specific performance of contract or recovery of the impugned sum in terms of Proviso to section 49 of the Registration Act as held by ***Hon'ble Supreme Court in judgement dated 10.04.2023 in R. Hemlatha Vs. Kashthuri, Civil Appeal No. 2535/2023 (SLP (C) No. 14884/2022).***
- (iii) In several judicial decisions, it has been vehemently held that any payment made for clearing encumbrance is allowed as deduction u/s 48(i) of the Act while computing capital gain. Section 48(i) allows deduction of *"expenditure incurred wholly and exclusively in connection*

with such transfer". While section 48(i) is relevant for computation of "Income from Capital Gain" head, in present case the assessee would be eligible to get deduction u/s 37(1) which allows deduction of "*expenditure laid out or expended wholly and exclusively for the purposes of the business or profession*" because assessee's income was taxable under "Income from Business or Profession" head. Ld. AR submitted that the verdict of section 37(1) giving deduction to assessee is *pari materia* same, rather much wider, than section 48(i) and therefore the assessee is very much entitled to deduction. The judicial decisions relied by Ld. AR are as follows:

- (i) Mahesh Pratapsingh Asher Vs. ACIT (2022) 135 Taxmann.com 74 (Mumbai – ITAT)
- (ii) CIT Vs. Smt. Shakuntala Kantilal (1991) 190 ITR 56 (Bombay)
- (iii) CIT Vs. Abrar Alvi (2001) 117 Taxman 95 (Bombay)
- (iv) CIT Vs. Abrar Alvi (2002) ITR (St.) 80 (SC)

8. Ld. DR for revenue referred following paras of assessment-order and submitted that the AO has considered the assessee's submissions and only thereafter made addition in assessment-order, therefore the AO's order is perfect and must be upheld:

✓ 10. Further in para 6 of the assessee on the similar date has also submitted that **Shri Govind Reality Pvt. Ltd. consented to such sale of plot with a condition that M/s. Rishi Construction shall pay the balance amount of sale price i.e.(Rs. 3,50,06,136/-) after retaining of Rs. 1,20,00,000/- to Shri Govind Reality Pvt. Ltd out of sale proceeds as they have consented for such sale as per agreement dated 26.02.2011.** Furthermore, the assessee has also pointed para 16 of sale deed entered between the assessee and Swami Vivekanand Institute of Neurology Nurosurgery & Spine and Sagauya Mediservices and Private Ltd which specifically mentions consent of Shri Govind Reality Pvt. Ltd. for sale of land under consideration . The assessee has even produced an affidavit dated 23.10.2014 to justify his contention and to infer that Shri Govind Reality Pvt. Ltd had its express consent for sale of such property and to contend that the sum of Rs. 3,50,06,136/- was the income of the Shri Govind Reality Pvt. Ltd. and which was shown as income in the books of accounts and offered the tax for F.Y. 2014-15 relevant to A.Y. 2015-16.

11. The aforesaid facts narrated by the assessee supra has been scrupulously analysed and corroborated with that of agreement dated 28.02.2011. On perusal of the said agreement, it is found that there is indeed an agreement dated 28.02.2011 which reads that there was deal of land admeasuring 34832 sq.ft. amounting to Rs. 1,20,00,000/- for construction of a proposed hospital between the assessee and Shri Govind Reality Pvt. Ltd in which initial amount of Rs. 10,00,000/- was paid to the assessee vide cheque No. 616557 dated 21.02.2011 as soon as the agreement was executed and the balance amount of Rs.

10,00,000/- was to be paid after attaining the permission to build a hospital or within 40 months from the date of agreement or if it gets delayed further by extended time, interest of 12% was to be paid by the buyer to the seller and subsequently still the buyer fails to pay the balance amount, the agreement will stand cancelled.

12. Hence, on the aforesaid facts and plethora of justification submitted by the assessee, the striking point is that there is not even a single mention in the whole agreement dated 28.02.2011 that goes off to bolster assessee's contention that the balance amount of Rs. 3,50,06,136(4,70,06,136 -12,000,000)out of sale proceeds was payable to Shri Govind Reality Pvt. Ltd by the assessee.

13. Further, it is not out of place to mention that mere documentation of agreement and affidavit, cannot become the ground for the assessee to prove that Rs. 3,50,06,136/- belonged to Shri Govind Reality Pvt Ltd when actually no transaction of sale deed existed nor executed between the assessee and Shri Govind Reality for the relevant year. It is also not justified on the part of the assessee to present the issue on a unrealistic platform that income has been shown in the books of accounts of Shri Govind Reality Pvt. Ltd. for the relevant year does not hold water when sale deed has been executed between the assessee and Swami Vivekanand Institute of Neurology Nurosurgery & Spine and Sagauya Mediservices and Private Limited for an amount of Rs. 4,70,06,136/- and credit of TDS u/s. 194IA has been claimed by the assessee.

14. Thus the assessee's contention and the matter deliberated on the foregoing paras clearly reflects that the assessee was trying to swindle the amount of Rs. 3,50,06,136/-as income of Shri Govind Reality and eventually trying to evade the tax net by presenting an unrealistic

picture of financial accounting. Hence, on the facts and circumstances of the case, I have no alternative, but to add the difference of Rs. 3,50,06,136 (4,70,06,136 – 1,20,00,000) as business income of the assessee. Penalty proceedings u/s 271(1)(c) is being separately initiated."

9. In rejoinder, Ld. AR submitted that in Para 11-12 of assessment-order as re-produced above, the AO has only discussed about unregistered agreement dated 28.02.2011 but nowhere considered the registered-deed dated 19.03.2015 and the affidavit dated 23.10.2014 of director of M/s Govind which were important documents favouring assessee's case in the sense there were clearly showing *inter alia* (i) that M/s Govind joined as consenting-party and (ii) that M/s Govind had given consent to assessee to sell the property on condition of passing of consideration over and above Rs. 1,20,00,000/-. Further, in Para 13-14, the AO is talking against sharing of income but not talking of allowability of deduction u/s 37(1) to assessee.

10. We have considered rival submissions of both sides. After a careful consideration, we find that during assessment-proceeding, the assessee has filed a letter dated 01.12.2017 to the AO in which an alternative P&L A/c showing deduction of Rs. 3,50,06,136/- on account of "*cost of relinquishment of right on sale by Shri Govind Reality*" is mentioned/claimed. We re-produce below the said letter of assessee for an immediate reference:

Assessment reply

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To,
ITO-1(2)
Bhopal

Date:- 01.12.2017

Ref:- Additional queries raised in matter of M/s Rishi Construction during assessment proceeding for A.Y. 2015-16.

Subject:- Our reply to your additional queries.

Sir,

In reference to your query about the sale of property shown in 26AS for a value of Rs 4,70,06,136/- to Swami Vivekanand Institute of Neurology Neurosurgery & Spine and Suganya Mediservices Private Ltd. We hereby submit that the sale deed of property was executed in favour of these two parties for a sum of Rs 4,70,06,136/- by the assessee but the revenue recognized in profit and loss account is Rs 1,20,00,000/- only.

Kindly refer to our earlier submission in which we have explained that M/s Shri Govind Reality Pvt Ltd has entered into an agreement for purchase of same property on 26.02.2011. But Shri Govind Reality Pvt Ltd did not pay full amount of Rs 1,20,00,000/- but only paid an advance of Rs 10,00,000/-. Since, Shri Govind Reality Pvt Ltd had contracted lien on that property by virtue of agreement, it could not have been sold to any other person unless consented by Shri Govind Reality Pvt Ltd. The Shri Govind Reality Pvt Ltd consented for sale of such plot by assessee on a condition that any sum above 1,20,00,000/- shall be paid to Shri Govind Reality Pvt Ltd as a consideration for relinquishing its right on such plot. Now the assessee had only option to retain Rs 1,20,00,000/- and pay Rs 3,50,06,136/- to Shri Govind reality Pvt Ltd.

The assessee in his presentation of its profit and loss account has taken Rs 1,20,00,000/- as income from sale of land and remaining amount of Rs 3,50,06,136/- was shown by directly crediting it to the account of Shri Govind Reality Pvt Ltd

In the present case two types of presentation for profit and loss account are possible which are as follows:-

(74) (84)

Profit and Loss account as Presented

TRADING & PROFIT AND LOSS ACCOUNT FOR THE YEAR ENDING 31ST MARCH, 2015

PARTICULARS	AMOUNT	PARTICULARS	AMOUNT
OPENING STOCK OF LAND	156,013,968.00	SALES	12,000,000.00
OPENING STOCK OF LAND(SHOP)	743,000.00	CLOSING STOCK OF LAND	150,661,968.00
OPENING WIP	32,054,762.20	CLOSING STOCK OF LAND(SHOP)	743000
		CLOSING WIP	33029662.2
DIRECT EXPENSES	2,405,394.00		
INDIRECT EXPENSES	2,479,615.04	INDIRECT INCOME	964560.86
NET PROFIT T/F TO CAPITAL A/C	3,702,451.82		
TOTAL	197,399,191.06	TOTAL	197,399,191.06

Profit and Loss account as could have been Presented

TRADING & PROFIT AND LOSS ACCOUNT FOR THE YEAR ENDING 31ST MARCH, 2015

PARTICULARS	AMOUNT	PARTICULARS	AMOUNT
OPENING STOCK OF LAND	156,013,968.00	SALES	47,006,136.00
		(-) COST OF RELINQUISHMENT OF RIGHT ON SALE BY SHRI GOVIND REALITY	<u>35,006,136.00</u>
OPENING STOCK OF LAND(SHOP)	743,000.00	CLOSING STOCK OF LAND	150,661,968.00
OPENING WIP	32,054,762.20	CLOSING STOCK OF LAND(SHOP)	743000
		CLOSING WIP	33029662.2
DIRECT EXPENSES	2,405,394.00		
INDIRECT EXPENSES	2,479,615.04	INDIRECT INCOME	964560.86
NET PROFIT T/F TO CAPITAL A/C	3,702,451.82		
TOTAL	197,399,191.06	TOTAL	197,399,191.06

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It is apparent from above presentation that in either of the cases net profit remains the same. The variation in presentation is on account of different accounting practice followed by assessee. It is apparent from second presentation that ultimate income to assessee remains the same. //

Therefore, claim of TDS against the income of Rs 47,006,136.00 is also correct because ultimate sale is same, only sale it has been accounted for by reducing cost of relinquishment of rights paid to Shri Goyind Reality Pvt Ltd. Therefore, the ultimate income and claim of TDS is correct and net taxable income is not affected by variation and presentation of accounting. //

Thanking You

Yours Faithfully

For M/s Rishi Construction


CA M.K. Sharma
(A.R.)

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However, the AO has not considered assessee's claim that the impugned payment being a cost/expenditure incurred wholly and exclusively for the purpose of business was allowable as deduction u/s 37(1). Therefore, the claim of assessee needs to be re-visited by AO from this angle. In that view of matter, we feel it more appropriate to remit this particular issue for consideration by AO. Needless to mention that the AO shall give proper opportunities to the assessee and also consider assessee's submissions including the arguments and decisions narrated before us as discussed by us in foregoing paras.

11. Now, we take up Assessee's **ITA No. 88/Ind/2023**. This appeal was also re-called by our following order in aforesaid M/A:

*"9. Although the present M/A by assessee has been filed in the matter of revenue's **ITA No. 220/Ind/2022** only, yet we find that by the impugned order, assessee's cross-appeal being **ITA No. 88/Ind/2023** was also decided wherein an addition of Rs. 6,40,109/- made by CIT(A) on account of enhancement u/s 251 was deleted. The ITAT deleted this addition treating the same as off-shoot of the ground/issue involved in revenue's **ITA No. 220/Ind/2022**. Since we are re-calling the order of ITAT in **ITA No. 220/Ind/2022** for adjudication as mentioned in preceding para, there would be a necessity to re-call our order in **ITA No. 88/Ind/2023** as well. Therefore, we also re-call our order in **ITA No. 88/Ind/2023**."*

12. Precisely stated, the objection of assessee in this appeal is against the action of CIT(A) in making an enhancement of Rs. 6,40,109/- on account of interest income from M/s Govind. The exact facts are such that the CIT(A), during first-appeal, deleted the addition of Rs. 3,50,06,136/- made by AO on the basis that he treated M/s Govind as owner of land from agreement dated 26.02.2011. Simultaneously, the CIT(A) made enhancement u/s 251 on the

basis that in terms of clause No. 2 of agreement, the assessee had not charged interest from M/s Govind for non-payment of consideration in time. Thus, the impugned enhancement of Rs. 6,40,109/- on account of interest income was an off-shoot of the acceptance of agreement dated 26.02.2011 by CIT(A). Since we have already remitted the Revenue's appeal to AO in preceding para, we are remanding this issue also to AO for consideration afresh.

13. Resultantly, both of these appeals are allowed for statistical purposes.

Order pronounced in the open court on 27.06.2024

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक/ Dated : 27.06.2024
CPU/Sr. PS

Copies to:

- (1) *The appellant*
- (2) *The respondent*
- (3) *CIT*
- (4) *CIT(A)*
- (5) *Departmental Representative*
- (6) *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore