IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI R. K. PANDA, VICE PRESIDENT
AND
SHRI VINAY BHAMORE, JUDICIAL MEMBER

ITA No.704/PUN/2024
Assessment Year : 2014-15

M/s. Kolte Patil Developers Ltd. (erstwhile Bellflower Properties Pvt. Ltd. merged with Kolte Patil Developers Ltd.) 2nd Floor, City Point, Dhole Patil Road, Pune – 411001	**Vs.**	DCIT, Circle 7, Pune
PAN: AAACK7310G		
(Appellant)		**(Respondent)**

Assessee by	:	Shri Nikhil S Pathak
Department by	:	Shri Ramnath P Murkende
Date of hearing	:	06-08-2024
Date of pronouncement	:	12-08-2024

ORDER

PER R. K. PANDA, VP :

This appeal filed by the assessee is directed against the order dated 12.02.2024 of the CIT(A) / NFAC, Delhi relating to assessment year 2014-15.

2. The grounds raised by the assessee are as under:

The following grounds are taken without prejudice to each other -

On facts and in law,

1] The learned CIT(A) erred in confirming the addition of Rs.14,70,250/- u/s 43CA of the Act on the ground that the said consideration was lesser than the ready reckoner rate in respect of the said of a few flats.

2] The learned CIT(A) erred in not appreciating that the ready reckoner value of the flats in which the said flats were registered was adopted without appreciating that the ready reckoner value of the year of booking of the flats was to be considered and since the agreement value was more than the ready reckoner value as on the date of booking, no addition u/s 43CAwas warranted.

3] The learned CIT(A) erred in confirming the disallowance of Rs.9,27,000/- on the ground that the assessee had failed to deduct the TDS on the said payment and hence, disallowance u/s 40(a)(ia) was warranted.

4] The learned CIT(A) failed to appreciate that the amount of Rs.9,27,000/- paid to Dipps Hospitality Pvt. Ltd was not in the nature of interest and it was in the nature of compensation and hence, no TDS was required to be deducted on the said amount.

5] The learned CIT(A) failed to appreciate that the assessee company was not required to deduct TDS on the compensation paid to Dipps Hospitality Pvt. Ltd. and hence, the disallowance made u/s 40(a)(ia) was not warranted.

6] Without prejudice the assessee submits that if any disallowance is warranted u/s 40(a)(ia), the same should be restricted to 30% of the expenditure claimed and the action of the A.O. in disallowing entire expenditure is not justified.

3. The first issue raised in the grounds of appeal No.1 and 2 relates to the order of the CIT(A) / NFAC in confirming the addition of Rs.14,70,250/- out of the addition of Rs.25,02,250/- made by the Assessing Officer u/s 43CA of the Act.

4. Facts of the case, in brief, are that the assessee is a company engaged in the business of developer and builder. It filed its return of income on 26.11.2014 declaring total income of Rs.25,43,27,395/-. The case was selected for scrutiny and statutory notices u/s 143(2) and 142(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') were issued and served on the assessee to which the AR of the assessee appeared before the Assessing Officer from time to time and filed the requisite details.

5. During the course of assessment proceedings the Assessing Officer noted that the assessee has booked its sales at Rs.2,48,13,900/- in its books of account on

the basis of agreement value, whereas the market value of these flats was Rs.2,73,16,150/-. Thus, there is a difference of Rs.25,02,250/-. In absence of any satisfactory explanation given by the assessee, the Assessing Officer, invoking the provisions of section 43CA of the Act made addition of Rs.25,02,250/-, the details of which are as under:

Agreement registration date	*Unit No*	*Name of the Holder*	*Agreement value*	*Ready Recknor Value AY 2013-14*	*Difference in Ready Recknor (AY 2013-14) – Agreement Value*
04/04/2013	*B3/501*	*Hakim Aziz*	*28,44,000*	*33,71,150*	*5,27,150*
15/05/2013	*B5/704*	*Ebrahim Fakhruddin Simalwada*	*31,27,500*	*33,33,000*	*2,05,500*
08/07/2013	*B2/702*	*Anum Tariq Kalokha*	*33,92,000*	*40,17,300*	*6,25,300*
26/07/2013	*B6/504*	*Mustafa Abbas Bagdadi*	*31,27,500*	*33,35,800*	*2,08,300*
25/04/2013	*B4/402*	*Ibahim F Siddhpuri*	*27,98,000*	*31,15,800*	*3,17,800*
13/09/2013	*B6/901*	*Salim Hatim Ali*	*30,79,700*	*33,71,500*	*2,91,800*
13/09/2013	*B6/902*	*Salim Hatim Ali*	*30,79,700*	*33,71,500*	*2,91,800*
05/02/2014	*B5/402*	*Ahmadi Saifuddin Sher*	*33,65,500*	*34,00,100*	*34,600*
		Total	*2,48,13,900*	*2,73,16,150*	*25,02,250*

6. In appeal, the CIT(A) / NFAC following the decision of the Pune Bench of the Tribunal in the case of Rahul Constructions Vs. DIT, where it was held that difference upto 10% can be ignored, deleted the addition in respect of serial Nos.2, 4, 6, 7 and 8 above but sustained the addition to the extent of Rs.14,70,250/- in respect of serial Nos.1, 3 and 5.

7. Aggrieved with such order of CIT(A) / NFAC, the assessee is in appeal before the Tribunal.

8. The Ld. Counsel for the assessee drew the attention of the Bench to the copy of the agreements entered into with the third parties and submitted that the assessee has already received booking advance by cheque as per agreement and the registration has been made accordingly at a later date. Referring to the provisions of sub-clauses (3) and (4) of section 43CA of the Act, he submitted that where the amount of consideration or a part thereof has been received by way of an account payee cheque or an account payee bank draft on or before the date of agreement for transfer of the asset, no addition can be made u/s 43CA of the Act merely because the registered value is higher than the agreed value.

9. Referring to page 49 of the paper book, he submitted that an amount of Rs.1,00,000/- was received from Shri Hakimuddin Aziz on 27.11.2009 vide cheque No.436924 which was deposited into the IDBI Bank account maintained by the assessee towards booking advance. Referring to the copy of the sale deed placed at pages 2 to 16 of the paper book, he drew the attention of the Bench to page 8 of the paper book and submitted that the total consideration includes the amount of Rs.1,00,000/- received vide cheque dated 26.11.2009.

10. Similarly, in case of Tariq Abdul Majid, the Ld. Counsel for the assessee drew the attention of the Bench to page 50 of the paper book and submitted that an amount of Rs.5,00,000/- was received by cheque dated 20.11.2009 towards booking advance which was deposited in the IDBI Bank account maintained by the assessee. Referring to page 59 of the paper book, the Ld. Counsel for the assessee

submitted that the sale consideration includes the amount of Rs.5,00,000/- received by the assessee as advance.

11. Similarly, in respect of Ibahim F Siddhpuri, he submitted that an amount of Rs.1,00,000/- was received on 11.01.2010 and another amount of Rs.3,20,000/- was received on 03.03.2010, both totaling to Rs.4,20,000/- which find a place in the final sale deed dated 25.04.2013. He accordingly submitted that in all the three cases, part of the amounts were received as per the agreement much prior to the date of sale and further, in view of the provisions of sub-clauses (3) and (4) of section 43CA, no addition is called for.

12. The Ld. DR on the other hand heavily relied on the orders of the Assessing Officer and the CIT(A) / NFAC.

13. We have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer and Ld. CIT(A) / NFAC and the paper book filed by both the sides. We find the Assessing Officer in the instant case made addition of Rs.25,02,250/- in respect of 8 flats on the ground that the market value of these flats was Rs.2,73,16,150/- whereas the assessee company has registered the flats for a consideration of Rs.2,48,13,900/- on the basis of agreement value and therefore, the provisions of section 43CA of the Act are applicable. We find the CIT(A) / NFAC, relying on the decision of the Pune Bench of the Tribunal in the case of Rahul Constructions Vs. DIT (supra), deleted the addition in respect of

certain flats where the difference is less than 10%. He, however, sustained the addition in respect of remaining flats where the difference is more than 10% between the agreement value and the market price. It is the submission of the Ld. Counsel for the assessee that since the assessee had received part of the consideration in cheque as per agreement much prior to the date of sale, therefore, such agreement value has to be considered for the purpose of provisions of section 43CA of the Act and no addition is called for. We find some force in the above argument of the Ld. Counsel for the assessee. Sub-clauses (3) and (4) of section 43CA of the Act are as under:

> *"43CA (1)....*
> *(2).....*
> *(3) Where the date of agreement fixing the value of consideration for transfer of the asset and the date of registration of such transfer of asset are not the same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement.*
> *(4) The provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account [or through such other electronic mode as may be prescribed on or before the date of agreement for transfer of the asset."*

14. A perusal of the details filed by the assessee in the paper book reveals that the assessee has received advances by cheque in respect of those three flats as per agreement and the sale deeds were executed subsequently where the market price is more than the agreement value. Since the assessee has received a part of the consideration as advance as per agreement and the sale deeds were made on the basis of the agreement value, although the market price gone by that time,

therefore, in view of the provisions of sub-clauses (3) and (4) of section 43CA of the Act, no addition is called for since a part of the consideration has been received by cheque on the basis of agreement and the sale deeds were registered on the basis of value mentioned in the agreement. We, therefore, set aside the order of the CIT(A) / NFAC and direct the Assessing Officer to delete the addition of Rs.14,70,250/-. The first issue raised by the assessee is accordingly allowed.

15. So far as the second issue is concerned, the same relates to the order of the CIT(A) / NFAC in sustaining the addition of Rs.9,27,000/- made by the Assessing Officer by invoking the provisions of section 40(a)(ia) of the Act (grounds of appeal No.3 to 6).

16. Facts of the case, in brief, are that the Assessing Officer during the course of assessment proceedings noted that the assessee has paid compensation of Rs.9,27,000/- to Dipps Hospitality Pvt. Ltd. for surrender of rights. According to the Assessing Officer, this amount is nothing but interest and therefore, the assessee was liable to deduct TDS. Since the assessee has not deducted any TDS, the Assessing Officer rejected the explanation given by the assessee and made the addition of the same by invoking the provisions of section 40(a)(ia) of the Act.

17. In appeal, the CIT(A) / NFAC sustained the addition by observing as under:

> *"7.3 I have gone through the grounds of appeal, assessment order and the submissions of the appellant. The CBDT circular No. 2/2018 (F. No.370142/15/2017-TPL) wherein the CBDT has given explanatory notes to provisions of Finance Act, 2017 vide order dated 15 February 2018 as item No. 17*

> *in respect of notional income for house property. Therefore, it is amply clear the provisions of sec.23(5) are prospective in nature and cannot be applied to assessment years prior to A.Y. 2018-19. In the case of Sheth Developers P Ltd. Vs DCIT, the Hon'ble ITAT vide appeal No ITA No. 1953/Mum/2020 did 27.6.2022 held that the provisions of sec.23(5) of the Act had been introduced in the statute for taxability of notional rent in respect of properties held as stock in trade has been introduced only from A.Y. 2018-19 onwards. Hence the said provisions cannot be made applicable upto A.Y. 2017-18. Relief on the decision of the Hon'ble Tribunal, the AO is directed to delete the addition made in respect of deemed rent. Hence, the ground No.4 to 9 of the appeal are allowed."*

18. The Ld. Counsel for the assessee at the outset referring to the decision of the Hon'ble High Court of Kerala in the case of Beacon Projects (P.) Ltd. vs. CIT (2015) 62 taxmann.com 177 (Ker) submitted that the excess payment made on cancellation of booking of apartment could not be qualified to be interest as defined u/s 2(28A) of the Act and therefore, the payer / builder will not have any TDS obligation. Relying on various other decisions, he submitted that the amount of Rs.9,27,000/- paid by the assessee to the purchaser on cancellation is nothing but compensation and cannot be characterized as interest and therefore, the assessee is not liable for deduction of any TDS.

19. The Ld. DR on the other hand heavily relied on the orders of Assessing Officer and CIT(A) / NFAC.

20. We have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer and Ld. CIT(A) / NFAC and the paper book filed by both the sides. We find the Assessing Officer in the instant case made addition of Rs.9,27,000/- being the compensation paid by the assessee to Dipps Hospitality

Pvt. Ltd. for surrender of rights treating the same as interest on which the assessee has not deducted any TDS and therefore, the provisions of section 40(a)(ia) of the Act are applicable. We find the CIT(A) / NFAC sustained the addition made by the Assessing Officer, the reasons of which are already reproduced in the preceding paragraphs.

21. We find the issue stands decided in favour of the assessee by the decision of Hon'ble High Court of Kerala in Beacon Projects (P.) Ltd. vs. CIT (supra) where it has been held that the excess payment made to the purchaser on cancellation of booking of apartment could not be qualified to be interest as defined u/s 2(28A) of the Act and therefore, the builder would not have any TDS obligation. The relevant observations of the Hon'ble High Court of Kerala in Beacon Projects (P.) Ltd. vs. CIT (supra) read as under:

> *"6. As stated earlier, the issue that arises for consideration is whether the amount debited in the P&L account of the appellant company under the head 'indirect expenses' being excess payments refunded is interest as provided under section 2(28A) of the Act.*
>
> *7. Section 2(28A) of the Act defines 'interest' and this section reads thus:*
>
> > *"(28A): "interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;"*
>
> *8. While understanding the scope of this provision, it is important to remember the principle laid down by the Apex Court in Polestar Electronic (Pvt.) Ltd. v. Addl. CST [(1978) 41 STC 409] that 'if there is one principle of interpretation more well settled than any other, it is that statutory enactment must ordinarily be construed according to the plain natural meaning of its language and that no words should be added, altered or modified unless it is plainly necessary to do so in order to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the*

statute' is to be considered. If this is the principle to be borne in mind, the term 'interest' as defined in section 2(28A) of the Act has to be construed strictly. On such literal construction, it can be seen that before any amount paid is construed as interest, what is required to be established is that the sum paid is in respect of any money borrowed or debt incurred and that there is debtor-creditor relationship between the parties. These are the necessary ingredients of section 2 (28A).

9. The scope of this provision came up for consideration before various High Courts as well as the Apex Court. In Bikram Singh v. Land Acquisition Collector [224 ITR 551(SC)], in the context of interest paid on delayed payment of compensation due under the Land Acquisition Act, the Apex Court held that such payment is a revenue receipt and that section 194A of the Income Tax Act has no application. Commissioner of Income-tax v. Sahib Chits (Delhi) (Pvt.) Ltd. [(2010) 328 ITR 342 Delhi] is a case where the question considered was whether section 2(28A) was attracted in the case of surplus on discount of chit funds. In that judgment, the Delhi High court referred to the judgment of this Court in Janardhana Mallan v. Gangadharan [AIR 1983 Ker 178] which was approved by the Apex Court in Shriram Chits & Investments (P) Ltd. v. Union of India [AIR 1993 SC 2063], where, it was held that on entering into a chit agreement, a debt for the amount of future instalments is not incurred by the subscriber and that in respect of such amount, there is no debtorcreditor relationship. On that basis, the Delhi High Court held that when the amount contributed every month is given back to the chit subscribers themselves in the manner as agreed, the amount contributed cannot be treated as deposit with the company, much less money borrowed by the company. Accordingly, the Delhi High Court held that the payment made cannot be treated as interest as provided under section 2(28A), attracting the provisions of section 194A of the Act.

10. Commissioner of Income-tax v. Cargill Global Trading P. Ltd. [2011 335 ITR 94] is another judgment of the Delhi High Court where the question considered was whether discounting charges can be treated as interest and this was answered in the negative by holding that before any amount paid is construed as interest, it has to be established that the same is payable in respect of any money borrowed or debt incurred. Commissioner of Income-tax, Shimla v. M/s.HP Housing Board, Shimla [(2012) 340 ITR 388] is a case where the question considered was whether interest paid/credited by the Housing Board on the amount deposited by the allottees on account of delayed allotment of flats is covered by section 2 (28A). This again was answered by the Himachal Pradesh High Court following the Apex Court judgment in Bikram Singh (supra). Commissioner of Income Tax, Kolkata v. M/s.MKJ Enterprises Limited [2014 (12) TMI 682] is a judgment of the Division Bench of the Calcutta High Court which also considered the question whether section 2(28A) is attracted to discounting charges of bill of exchange or factoring charges of sale. That was also answered in the negative, holding that interest is a term relating to a pre-existing debt which implies a debtor-creditor relationship.

11. From the principles laid down in the decisions referred to above, it is obvious that section 2(28A) is not attracted to every payment made and that the

provision can be attracted only in cases where there is debtor-creditor relationship and that payments are made in discharge of a pre-existing obligation.

12. In so far as these cases are concerned, facts stated by us itself would show that the purchaser had paid certain amounts to the appellant. At a later point of time, the purchaser opted out of the agreement and the appellant entered into fresh agreements with new buyers for prices that are higher than what was agreed with the purchasers. Out of the receipts from the new buyers, the appellant refunded to the purchasers the amount paid by them and a portion of the excess amount received. The amount thus refunded to the purchasers represents the consideration the purchasers paid towards the undivided shares in the property agreed to be purchased and also the cost of construction of the apartment, which work was entrusted to the appellant, being the builder. Such a relationship does not spell out a debtor-creditor relationship nor is the payment made by the appellant to the purchaser one in discharge of any pre-existing obligation to be termed as interest as defined in section 2(28A).

13. Further, there is no finding in the assessment order or in the order of the Tribunal that the amount paid by the purchasers, which was refunded, was accounted as deposit or advance received from them or that there is any debtor-creditor relationship between the parties, obliging the appellant to pay the amount to the purchasers. There is also no case for the revenue that the excess amount paid by the appellant was based on any agreement between them or that it was quantified at rates that were already agreed between the parties. In such circumstances, the payments made do not qualify to be interest as defined in section 2(28A) of the Act and the appellant did not have the obligation to deduct tax at source as provided under section 194A nor can they be proceeded against under section 201A, treating them as an assessee in default.

For the aforesaid reasons, we are unable to sustain the order of the Tribunal which is impugned in these appeals. The order of the Tribunal is, therefore, set aside. Appeals are allowed."

22. Respectfully following the decision of the Hon'ble High Court of Kerala in Beacon Projects (P.) Ltd. vs. CIT (supra), we hold that the amount of Rs.9,27,000/- paid by the assessee to Dipps Hospitality Pvt. Ltd. for surrender of rights which has been treated as compensation cannot be treated as interest and therefore, the assessee has no TDS obligation and therefore, section 40(a)(ia) of the Act cannot be applied. We, therefore, set aside the order of the CIT(A) / NFAC and direct the

Assessing Officer to delete the addition. The second issue raised by the assessee is accordingly allowed.

23. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 12th August, 2024.

Sd/-
(VINAY BHAMORE)
JUDICIAL MEMBER

Sd/-
(R. K. PANDA)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 12th August, 2024
GCVSR

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent
3. The concerned Pr.CIT, Pune
4. DR, ITAT, 'A' Bench, Pune
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे
/ ITAT, Pune

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	06.08.2024		Sr. PS/PS
2	Draft placed before author	08.08.2024		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement on			Sr. PS/PS
7	Date of uploading of Order			Sr. PS/PS
8	File sent to Bench Clerk			Sr. PS/PS
9	Date on which the file goes to the Head Clerk			
10	Date on which file goes to the A.R.			
11	Date of Dispatch of order			