

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'B' BENCH,
NEW DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER, AND
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No. 6399/DEL/2019[A.Y 2011-12]

Candor Gurgaon One Realty Projects Pvt Ltd [Formerly known as Unitech Realty Projects Pvt Ltd and earlier known As Unitech Realty Projects Ltd, F - 83, Profit Centre, Gate No. 1, Mahveer Nagar, Near Pizza Hut, Kandivali West Mumbai	Vs.	The Dy. C.I.T Circle 18(1) New Delhi
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PAN: AAACU 8046 K

(Applicant)

(Respondent)

Assessee By : Shri K.M. Gupta, Adv
Ms. Shruti Khimta, AR
Shri Jas Karan Sarkaria, CA

Department By : Shri Krishana Ramavat, Sr. DR

Date of Hearing : 10.09.2024

Date of Pronouncement : 26.11.2024

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the
ld. CIT(A), New Delhi dated 24.09.2018 pertaining to A.Y 2011-12.

2. The grievances of the assessee read as under:

"1. On the facts and in the circumstance of the case, and in law, the Commissioner of Income-tax (Appeals) ['CIT (Appeals)'] has erred in:

1.1 confirming the action of the Deputy Commissioner of Income-tax ('AO') in disallowing an additional amount of INR 3,39,834 out of the total expenditure of INR 5,32,513 under section 14A of the Income-tax Act, 1961 ('the Act') read with rule 8D of the Income-tax Rules, 1962 ('the Rules') by holding it as an expense incurred towards earning exempt income; and

1.2 confirming the action of AO in disallowing an amount of INR 3,39,834 under section 14A of the Act ignoring the fact that appellant suo-moto disallowed INR 1,92,679 and in mechanically applying rule 8D of the Rules.

2. On the facts and in the circumstances of the case, and in law, the CIT (Appeals) has erred in:

2.1 confirming the action of the AO by adding to the returned income a notional interest receivable amounting to INR 2,34,01,358 on share application money; and

2.2 ----

3. On the facts and circumstances of the case, and in law, the AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act. The appellant prays that the penalty proceedings, initiated under section 271(1)(c) of the Act be dropped.”

3. Representatives of both the sides were heard at length. Case records carefully perused. Relevant documentary evidence brought on record duly considered in light of Rule 18(6) of the ITAT Rules.

4. Ground No. 2.2 has not been pressed by the ld. counsel for the assessee. The same is dismissed as not pressed.

5. Ground No. 1.1 and 1.2 is with regard to disallowance u/s 14A r.w.r 18D of the Rules.

6. Briefly stated, the assessee is in the business of Real Estate Development and has developed a SEZ in Gurgaon. During the year under consideration, the assessee earned income from interest on FD, ICD and dividend on non trade investments. The assessee electronically filed its Return of Income on 26.09.2011 declaring an income of Rs. 34,00,720/-.

7. Briefly, during the year, the assessee was in receipt of dividend of Rs. 2,92,26,436/-. The only expense the assessee had debited in its P&L a/c was Rs 5,32,513/ on account of legal and professional fees and Audit fees. As the assessee had an exempt income in the form of dividend, it suo motto disallowed an expense of Rs 1,92,679/- u/s 14A r.w.r 8D of the Rules.

8. The Assessing Officer, relying upon the decision of the Mumbai Tribunal in the case of Daga Capital Management Pvt Ltd in ITA No. 8057/Mum/2003 dated 20.09.2008, invoked the provisions of section 14A r.w.r 8D of the Act, and after deducting suo moto disallowance by the assessee, disallowed a further amount of Rs. 3,39,834/-.

10. The assessee challenged the addition before the Id. CIT(A) who confirmed the action of the Assessing Officer in computing the addition at Rs. 3,39,834/- by relying upon the decision in the case of Maxopp Investment Ltd 91 Taxmann.com 154 [Supreme Court] and Joint Investments Pvt Ltd 372 ITR 694.

12. Now the assessee is further aggrieved and has come in appeal before us.

13. Before us, the ld. counsel for the assessee vehemently stated that the assessee has made a suo motu disallowance of Rs. 1,92,679/- u/s 14A of the Act. However, the Assessing Officer has failed to consider the same and without recording any satisfaction, has made an additional disallowance by mechanically applying Rule 8D of the Rules. The ld AR relied upon the decision of the co-ordinate bench of the Tribunal in the case of *M/s Unitech Developers & Projects Ltd* ITA No. 4032/DEL/2015 and *Maxopp Investment Ltd* [supra].

14. Per contra, the ld. DR strongly supported the findings of the Assessing Officer and placed reliance on the decision of the Hon'ble Supreme Court in the case of *Maxopp Investment Limited* 402 ITR 640.

15. We have heard the rival submissions and have perused the relevant material on record. We find that during the year under consideration, the assessee's only expenditure is on account of audit fees and legal fees and the assessee has received dividend income on which it has voluntarily disallowed expenditure on proportionate basis in accordance with the fixed asset under section 14A r.w Rule 8D. The Assessing Officer however, disallowed expenditure u/s 14A to the extent of total expenditure.

16. We also find from the perusal of the assessment order that the Assessing Officer has not recorded satisfaction as to how the assessee's voluntary disallowance u/s 14A is incorrect or wrong, with respect to the examination of the books of account. There is not even a whisper of examination of books of account of the assessee to verify the correctness of the claim of the assessee that no expenditure was incurred for earning exempt income.

17. In that view of the matter, we are of the considered view that the disallowance made by the Assessing Officer without recording satisfaction and confirmed by the Id. CIT(A) is legally flawed and deserves to be deleted. We are supported in our decision by the judgement of the Hon'ble Supreme Court in the case of **Maxopp Investment Limited** (supra) which mandated as follows:

"41. Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, suo moto disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this

effect. Further, while recording such a satisfaction, nature of loan taken by the by the AO. for purchasing the shares/making the investment in shares is to be examined.”

Ground No.1 with its sub-grounds raised on this count is allowed.

18. Ground No. 2.1 pertains to confirmation of action of the Assessing Officer by adding to the returned income a notional interest receivable amounting to Rs. 2,34,01,358/-.

19. Brief facts are that in the instant case, notional interest has been imputed by the Assessing Officer @ 12% on funds given by the assessee to its group entitiesnamely, Sea View Developers Limited and Shantiniketan Properties, as share application money. The Assessing Officer held that the funds have been diverted to the group entities in the garb of share application money is only for the purpose of avoiding tax on interest. The Assessing Officer held that the amount of interest foregone ought to be added to the assessee's income as notional income and added a sum of Rs. 2,34,01,358/- to the income of the assessee.

20. When the matter reached the CIT(A), he upheld the action of the Assessing Officer stating that the term 'share application money' is actually a disguise for 'Loan and Advance' to escape the provision of section 2(22)(e). The ld. CIT(A) also referred to the Companies Act provisions which stipulates payment of interest where shares are not allotted within 60 days.

21. The ld. counsel for the assessee before us argued that in the previous years, no such interest has been charged by the assessee on similar advances i.e share application money furnished to its group companies and the same has not been questioned by the Assessing Officer and no notional interest has been imputed on the same. The ld. counsel for the assessee further submitted that there is no specific concept provision has been created for charging notional interest. Only real income which has accrued or received is to be taxed in the hands of the assessee. The ld. counsel for the assessee relied upon the decision of the Hon'ble Jurisdictional High Court in the case of *Shivnandan Buildcon (P) Ltd* 60 Taxmann.com 347.

22. The ld. counsel for the assessee vehemently argued with respect to invocation of the Companies Act by the AO, that the Companies Act

only obligates the recipient of share application money to return the share application money with interest where shares are not allotted within three months. It is the say of Id AR that the Companies Act doesn't bestow a right to the share applicant to receive interest on the share application money. The Id. counsel for the assessee also pointed out from the balance sheet and contended that the assessee has sufficient reserve and surplus and the fund received from its sister concern as share application money to apply for shares application of its sister concern.

23. Per contra, the Id. DR relied upon the orders of the authorities below. On the issue of notional interest, the Id. DR vehemently stated that the share application money given by the assessee to its group concerns did not yield any shares as no shares were allotted at future dates and share application money was returned as it is. It was, therefore, merely a conduit to finance its sister concerns for which notional interest was charged by the Assessing Officer.

24. We have heard the rival submissions and have perused the relevant material on record. After careful consideration of the facts and circumstances and the submissions of both the rival

representatives, we find that the assessee's balance sheet shows that there is sufficient fund to the extent of Rs 184 crore available with the assessee in the form of share capital reserve surplus and share application money. The assessee has merely invested Rs 27.50 crore in share application money out of these funds. The revenue's allegation, therefore that there is diversion of funds for avoiding tax is not justified. We also note that the revenue has not controverted the fact of not charging any notional interest in the previous year on identical facts.

25. We are further of the considered opinion that the provisions of Companies Act fastens a liability on the recipient of share application money, to return the share application money with interest in the event the shares are not allotted. We are of the considered opinion that neither the share applicant gets a right to receive interest on share application money nor the notional interest accrues to it. Any actual interest received, if any, will be taxable in the year of receipt.

26. We are also inclined to agree with the arguments of the Id. counsel for the assessee that the Income tax Act does not provide for taxing the notional income. We find support from the decision of the

Hon'ble Jurisdictional High Court in the case of *Shivnandan Buildcon Pvt Ltd* [supra] wherein it has been held as under:

"In the absence of any specific provision under which the so called notional income on advances, could be brought to tax, we do not see as to how the impugned orders passed by the Commissioner of Income Tax can be sustained.

8. Consequently, we allow these writ petitions. The impugned orders are set aside. The addition on account of a notional income on advances is deleted. These writ petitions have been decided only in respect of the respective assessment orders for the assessment year 2009-10 and will not have any bearing on the other assessment years, the facts of which we have not examined."

27. In that view of the matter, we are of the considered view that addition of notional interest made by the Assessing Officer deserves to be deleted. Following the decision of the Hon'ble Jurisdictional High Court in the case of *Shivnandan Buildcon Pvt Ltd* (supra), we allow Ground No. 2.2 raised by the assessee.

28. In the result, the appeal of the assessee in ITA No. 6399/DEL/2019 is partly allowed.

The order is pronounced in the open court on 26.11.2024.

Sd/-

**[CHALLA NAGENDRA PRASAD]
JUDICIAL MEMBER**

Sd/-

**[NAVEEN CHANDRA]
ACCOUNTANT MEMBER**

Dated: 26th November, 2024.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	