

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "B" KOLKATA*

Before **Shri Waseem Ahmed, Accountant Member** and
Shri K.Narsimha Chary, Judicial Member

ITA No.1074/Kol/2012
Assessment Years:2009-10

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| JCIT (OSD) Circle-4, P-7, Chowringhee Square, 8 th Floor, Kolkata-700 069 | बनाम / V/s. | M/s Monet Securities Pvt. Ltd., 7, Lyons Range, 3 rd Floor, Kolkata-01 [PAN No.AABCM 7058 A] |
| अपीलार्थी /Appellant | .. | प्रत्यर्थी /Respondent |

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| अपीलार्थी की ओर से/By Appellant | Shri Niraj Kumar, CIT-DR |
| प्रत्यर्थी की ओर से/By Respondent | Shri Nageswar Rao, Advocate |
| सुनवाई की तारीख/Date of Hearing | 15-09-2016 |
| घोषणा की तारीख/Date of Pronouncement | 21-10-2016 |

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue is against the order of Commissioner of Income Tax (Appeals)-IV, Kolkata dated 18.05.2012. Assessment was framed by JCIT(OSD) sCircle-4, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 30.12.2011 for assessment year 2009-10.

Shri Niraj Kumar, Ld. Departmental Representative appeared on behalf of Revenue and Shri Nageswar Rao, Ld. Advocate appeared on behalf of assessee.

2. Facts in brief are that assessee in the present case is a Private Limited Company and is a Non Banking Financial Corporation registered with Reserve Bank of India. The assessee, during the year under consideration has filed its return of income showing loss of ₹99,72,509/- comprising of loss under the head "business and

profession". Subsequently the case was selected under scrutiny through CASS module. Accordingly notices u/s 143(2) & 142(1) of the Act were issued to the assessee.

3. First issue raised by Revenue in this appeal is that Ld. CIT(A) erred in deleting the addition of ₹68,03,07,175/- on account of sale of property. For this, Revenue has raised following effective ground:-

"1. That on the facts and circumstances of the case, Ld. CIT(A) erred in law in deleting ₹68,03,07,175/- without considering the monetary involvement of the assessee company in the property deal confirmed by the Sub Registrar Office and the ITS details."

4. As per the information gathered by Income Tax Department through ITS on 06.09.2011, the assessee jointly with M/s Neptune Infrastructure (MNI for short) purchased a property on 26.09.2008 for a consideration of ₹111,43,65,000/- which was registered at Vadodara Sub-Registrar office. From the same details of ITS, it was found that assessee has sold the property on 21.10.2008 for a sum of ₹68,03,07,175/- which was also registered in Vadodara, Sub-Registrar office. The Assessing Officer, during the course of assessment proceedings found that details for the sale of property has not been shown in its books of account. On question by AO about the non disclosure of sale of property in the books of account, the assessee at the fag-end of the assessment submitted that no such property has been sold. However, AO disregarded the claim of assessee by observing that the sale transaction has not been shown in the books of account, accordingly, AO treated the sale transaction of ₹ 68 crores as undisclosed cash credit in the hands of assessee and added to the total income of assessee u/s. 68 of the Act.

5. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas assessee submitted that no such transaction for the sale of property on 21.10.2008 was made by assessee on that date, the property was sold by M/s Ambala Sarabhai Enterprises Ltd. (MASEL for short) of Vadodara to third party based in Pune. The assessee and its partners MNI were acting only as confirming party in the aforesaid transactions of such sale of the impugned property. Therefore such impugned transaction was not reflecting in assessee's books of account. The assessee in support of its claim has submitted the copy of sale deed for the aforesaid transaction. The assessee also

submitted that the provision of Sec. 68 of the Act are not applicable as it is applied to a case where any sum is found credited in the books of account and the AO found no such credit in the books of accounts. As such, in the instant case, there was no credit in assessee's books of account and accordingly there is no question of invoking the provision of Sec. 68 of the Act. A person cannot make a sale unless he makes the purchase for the same. Assessee has not shown any purchase of the impugned property in its books of account. In the instant case, the name of MASEL was appearing in the registered sale deed dated 21.10.2008 as the seller to the parties based in Pune. Considering this Ld. CIT(A) called for remand report from AO which stand as under:-

- 1) From the transaction of sale of the impugned property, the names of the following persons are appearing in the list of vendors.
 - a) Ambalal Sarabhai Enterprises Ltd. 28.73 crores
 - b) M/s Neptune Infrastructure 30.80 crores
 - c) Monet Security Pvt. Ltd. 8.50 crores
- 2) The buyers of the impugned property have made the payment to the above parties as stated supra.

The Assessing Officer to verify the veracity of such transactions requested the assessee to produce its books of account of MASEL along with bank statement but assessee failed to do so. The AO further submitted that assessee along with its associates MNI has entered into a Memorandum of Understanding (MoU for short) with MASEL for the purchase of impugned property as per the MoU. The assessee was to make the payment of ₹ 68.03 crores to MASEL. Out of the said sum, assessee along with its associates has made the payment of ₹39.30 crores. As per assessee, a sum of ₹8.05 crores was paid by it and balance of ₹30.08 crores was by MNI. From the above, AO submitted that there was a complete denial from the side of assessee for having transactions for sale of impugned property. Now from the above, MoU it is clear that the transaction between assessee and its associates has taken place and therefore the claim of assessee that it did not enter into any transaction is not tenable. The assessee in compliance to remand report submitted that it has not entered into any transactions of sale of impugned property. The assessee along with MNI has advanced

the money to MASEL for the purchase of impugned property and for the same, a MoU was made but that MoU does not amount to sale of the impugned property. All the necessary transactions for the payment made to MASEL have been duly disclosed in its respective books of account. Actually the sale was made by MASEL to the party based in Pune. Ld. CIT(A), accordingly, deleted the addition made by AO by observing as under:-

*“10. I have carefully considered the observations of the Assessing Officer and submissions of the appellant. The Assessing Officer received information through ITS on 06.09.2011. In the ITS details the name of the assessee company appeared as the sole transactor of a property for the amount of Rs. 68,03,07,175/- and the assessee company denied any knowledge of this during assessment proceedings though it was pointed out repeatedly to him during assessment proceedings as mentioned in the 'assessment order. The Assessing Officer asked 'assessee to furnished information regarding the same. The appellant attended the proceedings from time to time but the Assessing Officer did not get the full details regarding sale of property of Rs. 68 crores. The perusal of the documents submitted by the appellant shows that in the sale deed dated 21.09.2008 (**Annexure-'D' of appeal papers**) the appellant and M/s. Neptune are confirmatory parties to the sale of a property between M/s. Ambalal Sarabhai Enterprises Ltd., and M/s. Sri Rasiklal Manikchand Dhariwal for a consideration of Rs.68,03,07,175/- executed on 22.10.2008. The appellant and M/s. Neptune Infrastructures are not parties as seller but only as confirming parties in the said sale of property. The appellant and M/s. Neptune Infrastructure was confirmatory party because earlier this property was to be purchased by them from M/s. Ambalal Sarabhai Enterprises Ltd., and had paid money to M/s. Ambalal Sarabhai Enterprises Ltd. (ASCL) in assessment year 20.07.08 and also 2008-09. The appellant has given the source of investments to the Assessing Officer during the assessment proceedings for assessment year 2008-09 and the assessment was duly completed after scrutiny u/s 143(3). However, the appellant and M/s Neptune Infrastructure agreed to relinquish their rights on the condition that the appellant and M/s. Neptune Infrastructure will receive Rs.39.03 crores from the vendor i.e. M/s. ASCL, which was agreed upon by the seller and resulting thereby both the appellant as well as M/s. Neptune Infrastructure became confirming parties. The appellant has submitted that the information in ITS as seller is wrong and incorrect.*

11. There was no transaction of sale of any property by the appellant during the sale proceedings on 21.09.2008 except receiving of its investments amounting to RS.39.03 crores from the seller. The source of investments by the appellant have already been submitted to the Assessing Officer during the assessment proceedings in assessment year 2008-09 which have been duly verified. The appellant has duly accounted for the money received as confirming parties in the books of accounts and there is no dispute on the

same. Therefore, information in the ITS was wrong and incorrect by disclosing the sale of such property by the appellant and M/s. Neptune Infrastructure. It is held that the appellant is only a confirmatory party to the sale of said property and not a seller. The amount of Rs. 39.03 crores received as confirmatory party being the old advance given for purchase of said property has been duly accounted for in the books of accounts. Therefore, the addition of Rs.68,03,07,175/- made by the Assessing Officer is deleted. This ground of appeal is allowed.”

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

6. Before us Ld. DR submitted that as per ITS details, the name of assessee is reflecting as seller of the impugned property and therefore there is no doubt that assessee has made sale of impugned property. However, from the deed of sale of the impugned property, the name of assessee along with MNI is appearing as confirming party. Now the question arise that why the assessee will be a confirming party a transactions between MAESL vs. Pune based party. He vehemently relied on the order of AO. On the other hand, Ld. AR before us filed paper book which is running pages from 1 to 289 and submitted that assessee along with MNI were wishing to buy the impugned property from MAESL but same was cancelled on a later date. To buy a property, a sum of ₹39.30 crores was advanced by assessee along with MNI to MAESL, but the MOU got cancelled between assessee and MAESL. Accordingly, the party entered into another deed with the party based in Pune for the sale of such impugned property. The money which was advanced by assessee along with MNI to MAESL was returned. No consideration or profit was received by assessee along with MNI over and above, the amount advanced to MAESL. Ld. AR in support of assessee's claim has submitted the copy of Deed of conveyance which is placed on pages 90 to 114 of the paper book. The details of the money returned to assessee and its associates have been disclosed in the aforesaid deed of conveyance. Ld. AR further submitted that the necessary details were placed before AO as the assessee is based in West Bengal and the details was to be collected from the sub registry office of Vadodara. Therefore, there was a delay in collecting the desired report. Ld. AR further submitted that AO was empowered u/s 133(6) of the Act to collect the report from the office of sub registrar to ascertain actual transaction for the sale of impugned property.

But AO failed to do so. Ld. AR also drew our attention of pages 149 to 190 where the necessary details of MNI and MAESL were placed in relation to sale transaction of said impugned property. Ld. AR also submitted the details of the payment made by assessee and MNI to MAESL which is placed on page 270 of the paper book. Ld. AR further submitted that the same amount of money was returned by assessee and its associates MNI. Lastly, he relied on the order of Ld. CIT(A).

7. We have heard rival contentions of both the parties and perused the materials available on record. From the foregoing discussion, we find that AO has made the addition of ₹ 68 crores as undisclosed cash credit in the hands of assessee on the ground that assessee has made the sale of the impugned property without recording the same in its books of account. We find that assessee collected the details for the sale of impugned property on the basis of ITS received from Sub Registrar Office of Vadodhara. However, Ld. CIT(A) deleted the addition made by AO by observing that assessee in the instant case was a confirming party and it has not made any sale. The assessee initially advanced the money to MAESL which was returned back to assessee and MNI. Now the question before us arise so as to whether assessee has made any sale of the impugned property without recording the impugned sale in its books of account. From the facts, we find that provision of Sec. 68 of the Act are attracted only in a case where any credit entry found in the books of account of assessee which is not explained by assessee. In the instant case, no such entry was detected by AO. In our considered view, the provisions of Sec. 68 are not applicable in the present case. Similarly, from the details submitted by assessee, we find that assessee has given advanced money for the purchase of impugned property and same money was returned. In this point, Ld. DR has not brought anything on record to the finding of Ld. CIT(A). We also find that AO before making such addition on the basis of ITS information from the office of Sub Registrar should have issued a notice u/s. 133(6) of the Act. The AO has not exercised his power u/s. 133(6) of the Act. In this view of the matter, we find no reason to interfere with the findings arrived by the Ld. CIT(A). Under the circumstances, this issue of Revenue's appeal is dismissed.

8. Next issue raised by Revenue is that Ld. CIT(A) erred in deleting the addition made by AO u/s 36(1)(iii) of the Act. For this, Revenue has raised the following ground:-

“2. That on the facts and circumstances of the case, Ld. CIT(A) erred in law in deleting ₹2,47,91,689/- without considering the fact that the assessee admittedly deals in the business of trading in shares & securities and is not in the business of dealing in property transaction and also without considering the provision of Sec.36(1)(iii).”

9. The assessee has purchased the impugned property jointly with MNI for a consideration of ₹ 111 crores which was also financed out of the borrowed fund and assessee has incurred interest expenditure on the borrowed fund for a sum of ₹2,47,91,689/-. The assessee has shown the impugned property as stock-in-trade in its books of account. The AO during the course of assessment proceedings observed that the main business of assessee is trading of share and securities and therefore it has no experience in trading property business. On question by AO why the impugned property has been shown as stock-in-trade, assessee offered no explanation. Accordingly, Assessing Officer considering the size and magnitude of the property was of the opinion that it should have been reflected as “investment”. The AO further observed that assessee has not claimed depreciation on the said impugned property because it has not been put to use in the year under consideration. Considering the same, AO was of the opinion that the interest amount should have been capitalized as per the provision of Sec. 36(1)(iii) of the Act. The AO accordingly disallowed the interest expense of ₹2,47,91,689/- and added to the total income of assessee.

10. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas assessee submitted that it is intending to deal in the property business. Therefore the aforesaid impugned property was purchased which is located at a very prominent area of Vadodara and it has good commercial value if properly utilized. Therefore, the impugned property was purchased with a sole intention of carrying the business of real estate and same was shown as closing stock in its books of account. The assessee further submitted that it has earned business income of ₹40,500/- by way of storage charges and same was shown in its books of account under the head “*business and*

profession”. Accordingly, Ld. CIT(A) deleted the addition made by AO by observing as under:-

“15. I have carefully considered the observations of the Assessing Officer in the assessment order and submissions of the appellant. The appellant has bought the property jointly with M/s Neptune infrastructure for a consideration of Rs.111,43,65,000/- and the appellant’s share was Rs.39,33,71,283/-. This piece of land is situated in a prominent area at Vadodara as per the appellant and it has considerable commercial value. The appellant further submitted that it was with the sole intention of venturing into the real estate business that it has entered into the transaction of purchase of such huge plot of land and funded the same principally out of borrowed money. This purchase appears in the books of appellant at the end of the year as Closing Stock. The appellant’s intention of dealing in such large piece of land by way of business venture has been clearly spelt out by the appellant. The Assessing Officer observed that the appellant is doing the business of trading in shares and securities while this property has been disclosed as stock in trade and not as investment. The Assessing Officer however, observed that the appellant does not indulge in sale or purchase of property and specially it is a factory property which will be utilized by the appellant in future and therefore, subsequently it has to be treated as future investment purpose.

16. However, the appellant has submitted that it is a commercial property whose value will be exploited in near future. The sole intention of buying this property is to venture into real estate business also. The appellant has also submitted that it has used its borrowed fund for the same and it has been showing it as stock in trade till date. The appellant had also earned income of Rs.40,500/- by way of storage charges and the same has been accounted as his business income in the books of A/c. which has been accepted by the Assessing Officer during the assessment proceedings. The appellant has claimed deduction in response of interest of borrowed capital taken as loan for purchase of property and the said interest expenditure an amount of Rs.2,47,91,6889/- and is allowable as per his statement u/s. 36(1)(iii).

17. Looking into the facts and circumstances it is clear that the appellant has purchased this property jointly for exploiting it commercially in future and the property has been bought s stock in trade and not as investment. The Assessing Officer cannot substitute his own criteria to make it as investment when the appellant has bought it as stock in trade. Therefore, the appellant is fully entitled to treat it as stock in trade. Once the property is considered as stock in trade, the appellant is entitled for claiming of expenses incurred as interest in Profit & Loss Account. The said interest expenditure amounting to Rs.2,47,91,6889/- is held to be allowable u/s 36(1)(iii). In view of this, the addition made by the Assessing Officer amounting to Rs.2,47,91,689/- is hereby deleted. These grounds of appeal are allowed.”

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

11. Ld. DR before us vehemently relied on the order of AO and he left the issue to the discretion of the Bench. On the other hand, Ld. AR before us submitted that the impugned property was purchased with the sole intention to venture the real estate business. Ld. AR further submitted that the activity of the property business is duly covered in the main object of the assessee and in support of assessee's claim has submitted the copy of its Memorandum & Articles of Association and drew our attention to its clause (iv) which reads as under:-

“4. To carry on the business as dealers, owners and investors in land, building, factories for which purpose to acquire and purchase, take on lease, tenancy or n exchange, hire or by other means obtain ownership and/or options over any freehold or other property for the said estate or interest thereof any rights, privileges or easements over or in respect of any property, land or any building and to turn into account, develop the same and dispose of or maintain the same and to build townships markets or other buildings or conveniences and to equip the same or any part thereof with all or any amenities or conveniences, drainage facility, electric, air-conditioning, telegraphic, telephonic, television installations and to deal with the same in any manner whatsoever and to build, take on lease and/or on rent, purchase or acquire in any manner whatsoever any department houses, flats, rooms, floors, huts or other accommodation and let or dispose of the same on instalment basis, hire purchase basis or by outright sale whether by private treaty or by auction or in Assessment Year other mode of disposition all or any integral part thereof.”

Ld. AR further submitted that assessee has shown its business income of ₹40,500/- during the year under consideration and the same has been accepted by AO. Therefore interest expenditure has been incurred by assessee for the purpose of its business. Therefore, it should be allowed as an expenditure and he relied on the order of Ld. CIT(A).

12. We have heard rival contentions of both the parties and perused the materials available on record. From the foregoing discussion, we find that assessee in the instant case, has incurred interest expenditure on the money borrowed for an amount of ₹2,47,91,689/- and assessee claimed the interest expenditure as revenue expenditure. However, the AO disallowed the same by holding that assessee has no experience of property business, therefore, it should have been treated as investment in assessee's business. Therefore, the interest expenditure incurred on the borrowed fund utilized

for the purpose of investment cannot be allowed as deduction. However, Ld. CIT(A) deleted the addition made by AO by observing that assessee has treated the same as stock-in-trade in its books of account. Now the issue before us arise so as to whether the interest expenditure is business expenditure or part of investment. From the facts, we find that the activities for the property business are duly covered in the Memorandum & Articles of Association of the assessee in terms of its clause-4. Besides, we also find that assessee during the year has earned a sum of ₹40,500/- by way of storage charges which has been offered as income under the head “business & profession”. We further also find that assessee has shown the property as stock-in-trade in its books of account. From the facts, we find that assessee has shown the impugned property as stock-in-trade and AO cannot step in the shoes of assessee to decide whether it is capital asset or stock-in-trade. In the background of the above discussions we do not find any infirmity in the order of Ld. CIT(A) and accordingly we uphold the same. This ground of Revenue is dismissed.

13. In the result, Revenue’s appeal stands dismissed.

Order pronounced in open court on 21/10/2016

Sd/-
(K.Narsimha Chary)
Judicial Member

Sd/-
(Waseem Ahmed)
Accountant Member

*Dkp, Sr.P.S

दिनांक:- 21/10/2016 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

- 1.अपीलार्थी/Appellant-JCIT(OSD),Circle-4,P-7,ChowringheeSquare,8thFloor,Kolkata-69
2. प्रत्यर्थी/Respondent-M/s Monet Securities Pvt. Ltd.,7, Lyons Range, 3rd Fl, Kol-01
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता