

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'A' : NEW DELHI)**

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

**ITA No.195/Del./2020
(ASSESSMENT YEAR : 2016-17)**

Bharti Land Limited, vs. ACIT, Circle 4 (2),
3rd Floor, Worldmark 2, Asset No.8, New Delhi.
Aerocity, NH – 8,
New Delhi – 110 037.
(PAN : AAGCN1520K)

**ITA No.608/Del./2020
(ASSESSMENT YEAR : 2016-17)**

ACIT, Circle 4 (2), vs. Bharti Land Limited,
New Delhi. 3rd Floor, Worldmark 2, Asset No.8,
Aerocity, NH – 8,
New Delhi – 110 037.
(PAN : AAGCN1520K)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Anil Bhalla, CA
REVENUE BY : Shri P. Praveen Sidharth, CIT DR

Date of Hearing : 21.03.2023
Date of Order : 24.03.2023

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

These appeals by the assessee and Revenue are arising out of the order of Id. CIT (A)-2, New Delhi pertaining to AY 2016-17.

ASSESSEE'S APPEAL (ITA NO.195/DEL/2020)

2. The grounds of appeal taken by the assessee read as under :-

“1. The learned Commissioner of Income Tax (Appeals) has erred both on facts and in law in confirming the action of learned Assessing Officer in disallowing business loss of Rs.4,58,06,150/- alleging that appellant has not undertaken any business activity during the year under consideration and thereby not considering that the appellant had set up its business by putting up a administrative infrastructure for acting as "Development Manager" of Real estate Management Project at Sector 65 Gurgaon.

1.1 The Learned Commissioner of Income Tax (Appeals) has erred both on facts and in law in by not considering the fact that the business of the appellant company was setup in the Financial Year 2015-16 when the appellant had entered into a collaboration agreement to develop land in Faridabad and had also entered into agreement for acting as "Development Manager" of Real Estate Management Project at Sector 65 Gurgaon.”

3. In this case, AO noted that assessee company was incorporated on 12.01.2015 for the purpose of acquiring, constructing, developing and leasing/sale of real estate properties in India or abroad. AO noted that the year under consideration, is almost the first year of business of the assessee company; during the year under consideration, the assessee has not received any revenue from the business activity of the assessee company but claimed expenditure related to business i.e. Employee Benefits Expenses of Rs.2,06,95,136/-, Finance Cost of Rs.46,713/-, depreciation of Rs.33,43,023/- & Other Expense of Rs.2,77,93,814/- and claiming, business loss of Rs.4,06,96,408/-; that here is no direct nexus

between income and expenditure of the assessee during the year under consideration; that vide note-sheet dated 11.12.2018, the assessee company was asked since no revenue is earned/accrued by the assessee company, why the business loss of Rs.4,06,96,408/- should not be capitalized.

4. In response, the assessee responded as under :-

“4. As regards your query that since no revenue is earned/accrued, why business loss of Rs.4,06,96,408/- should not be capitalized we submit as under:

Bharti Land Limited (the assessee) was incorporated all 12.01.2015 to pursue the business of real estate and infrastructure.

During the year under consideration the assessee had two main project/ activities.

4.1. The assessee entered into a collaboration agreement with M/ s. Ajay Enterprises Ltd., to develop a Group Housing Colony Oil Land measuring 66.375 acres falling in the limits of Municipal Corporation in residential Sector -43, Faridabad.

4.2. Real Estate Management, at Project World Mark, Sector - 65, Gurgaon. This was a new business set up. The Company put up an administrative infrastructure for acting as "Development Manager" for a building project which was to include conceptualization, construction and leasing/licensing of the said Project in accordance with the Business Plan.

4.2.1. It may be noted that once the business is set up, it is not a requirement that there should be income. Proposition for setting up and case laws are given in para - 5.

4.2.2. Proposition that no income is necessary and case laws are given in para - 6.

4.3. Further the assessee has appointed staff and incurred legal expenses for agreements and marketing expenses. The detail of Salary and Bonus expenses as allocated to Profit & Loss Account and Capitalized to inventory is enclosed at Page 15.

Salary & Bonus pertaining to Faridabad Land Project has been Capitalized as cost of inventory.

4.4. The detail of Legal & Professional expenses, Advertisement expenses and Business support expenses are enclosed at Page 16 to 18. The same are allowable as revenue expenditure as business of the assessee company was set up.”

5. However, the AO was not satisfied. Since no income was earned during that year the business loss for that year was disallowed.

6. Upon assessee's appeal, ld. CIT (A) confirmed the AO's action by noting that assessee has not undertaken any business activity.

7. Against this order, assessee is in appeal before us. We have heard both the parties and perused the records.

8. Ld. Counsel of the assessee submitted that during the year under consideration, assessee company had two main project activities and the details of which were duly given to the AO. However, AO ignored the same. He further submitted that in subsequent year, assessee did generate sufficient income. Hence, he submitted that expenditure is allowable as business was set up. He submitted that there is a distinction of setting up a business or commencement of commercial operations and it cannot be said that the business is said to be set up only when commercial

operations is started. For this, he placed reliance on several case laws.

He inter alia referred to following judicial precedents :-

“ Jurisdictional High Court in the case of Maruti Insurance broking Private Limited 127 taxmann.com 685 (Del) (PB 180-185) Held, yes - Whether business does not conform to 'cold start' doctrine and in most cases, there is gap between time a person or entity is ready to do business and when business is conducted and during this period, expenses are incurred towards keeping business primed up and these expenses cannot be capitalized - Held, yes -Whether therefore, expenditure incurred between setting up and commencement of business could not have been capitalized and was to be allowed as business expenditure -Held, yes [Paras 6 to 9][In favour of assessee].

Jurisdictional High Court in the case of Whirlpool India Ltd - 318 ITR 347 (Del) held that the company was a financial enterprise and the business is set up when the directors and staff are appointed and their salaries paid, computer acquired and installed. Hence, expenditure under section 37(1) is allowable.

Jurisdictional High Court in the case of CIT v. Hughes Escorts Communications (165 Taxman 318) held that the assessee correctly claimed that date on which purchase order was placed should be reckoned as the date on which its business was set up and expenditure incurred by it after such date could not be capitalized but was to be treated as revenue expenditure.

Jurisdictional High Court in the case of Samsung India Electronics [2013] 37 taxmann.com 239 held that for manufacturing, several activities in order to bring or produce finished products have to be undertaken, but business commences when the first of such activities is taken. Thus, the claim of assessee was to be allowed as business expenditure.”

8.1 He further placed reliance upon case laws for the proposition that income is not must for allowing an expenditure for a particular year. For this also, he referred to several case laws :-

“E. Funds International India -162 Taxman 1 (Del) (No Income)

The company was in the business of developing software and amongst other things it had employed as many as 30 to 40 persons in relevant previous year who were required to provide the necessary input for developing software and acquired premises and utilities. It was noted that the company was in business of software development which is not an overnight exercise. The business was held to be set up and expenses thereafter to be allowed.

Dhoomketu Builders & Development (P) Ltd. 34 taxmann.com 18 (Del HC)

IT : Acts of applying for participation in tender, borrowing of fund on interest from holding company and deposit of borrowed monies on the same day as earnest money clearly establish that business had been set-up by assessee in relevant year.”

8.2 He further submitted that expenditure incurred was wholly and exclusively for the purpose of business, hence no disallowance should have been done. He submitted that assessee had incurred various expenses relating to business operations i.e. the activities related to the two projects viz. TDR Project and REAM Project. He submitted that assessee company had appointed staff, incurred legal expenses, marketing expenses, legal & professional expenses etc. all related to the setting up and commencement of the projects.

9. Per contra, ld. DR of the Revenue relied upon the orders of authorities below.

10. Upon careful consideration, we note that AO has duly accepted that this is almost the first year of the assessee company. AO was duly informed about the fact that assessee has undertaken two main projects activities and the details of which has been reproduced herein above. Despite that, authorities below have disallowed the assessee's expenditure/business loss during the year on the ground that no income has been earned during the year. In this regard, Hon'ble jurisdictional High Court in the case of Maruti Insurance Broking Private Limited 127 taxmann.com 685 (Del.) has duly held as under:-

“Held, yes - Whether business does not conform to 'cold start' doctrine and in most cases, there is gap between time a person or entity is ready to do business and when business is conducted and during this period, expenses are incurred towards keeping business primed up and these expenses cannot be capitalized - Held, yes -Whether therefore, expenditure incurred between setting up and commencement of business could not have been capitalized and was to be allowed as business expenditure - Held, yes [Paras 6 to 9][In favour of assessee].”

11. Similar proposition has been canvassed in various other decisions. In assessee's own group concern case in Hike Private Limited in ITA No.4313/Del/2019 & 4314/Del/2019 order dated 22.09.2022 for AYs 2013-14 & 2014-15, ITAT had noted the proposition that earning of income is not necessary for allowing of expenditure.

12. Furthermore, assessee has started earning revenue from the next year which has been duly submitted before us in the form of paper book.

13. In the background of aforesaid discussions and judicial precedents, we are of the opinion that the authorities below have erred in disallowing the assessee's business loss and the same needs to be allowed. We order accordingly.

REVENUE'S APPEAL (ITA NO.608/DEL/2020)

14. The Revenue has taken the following grounds of appeal :-

“1. On the facts and circumstances of the case, whether the Ld. CIT (A) was correct in deleting the addition u/s 40(a)(ia) while the payment to the HUDA has been added in the inventory which is part of closing stock only and Roctal through Profit & Loss account.

2. On the facts and circumstances of the case, whether the ld. CIT (A) was correct in allowing the appeal of the assessee when it has been established that payment made by the assessee company HUDA squarely falls within the definition of Chapter XVII-B of the IT Act, 1961.”

15. Brief facts of the case are that this ground is directed against addition of Rs.1,32,792,000/- u/s 40(a)(ia) being 30% of Rs.44,26,40,000/- paid to HUDA Government of Haryana as External Development Charges (EDC); that when show caused by the AO, the assessee replied that the payment was statutory charges made to HUDA for granting license by Directorate of Town and Country Planning, Haryana and was exempt from TDS u/s 196 and further submitted that this payment is not covered under any section of TDS and that there was no contract between the Authority and the assessee; that further, it is

contended that the payment has not been debited in the P&L account; that the payment was directly taken to the balance sheet and shown as asset; that therefore, it is not hit by provisions of TDS and cannot be added back to income; that the AO did not accept the logic of statutory payment made to HUDA as local authority; that the AO relied on judgment of the Hon'ble Supreme Court in the case of Noida vs CIT, civil appeal no. 15613 of 2017 order dated 02.07.2018 in which it was held that the development authorities are not classified as 'local authorities' under section 10 (20) of the Act; that further, the AO has quoted CBDT OM dated 23.12.2017 in which it is clearly mentioned that the developer making the payment of EDC to HUDA is subject to TDS provisions; that the OM also mentions that HUDA may resort to the provision for exemption from TDS as mentioned in exceptions of section 194 of the IT Act. After the conclusion, AO made the addition.

16. However, the Id. CIT (A) allowed the assessee's appeal by holding as under :-

“ From the order and submission of the appellant, it is clear that no such exemption has been claimed by the Authority. As far as nature of charges is concerned, these charges are paid by a builder to the authority for maintenance and the charges are passed on to the buyers in proportion to the built-up area of the property. As such, the charges paid are included in the cost of assets.

6.5 However, Sec.40(a)(ia) applies to expenses claimed in P&L account. In view of the appellant's claim that the said

expenses were not debited to P&L account and, therefore, there is no question of disallowance of the expenses, the AO is directed to revisit the issue and verify the expenditure in P&L account and if not debited, the addition will be deleted. This ground is allowed for statistical purposes.”

17. Against this order, Revenue is in appeal before us and assessee has filed an application under Rule 27 of the Income Tax Rules which reads as under :-

“Rule 27 of ITAT Rules

"Respondent may support or grounds decided against him

The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him. "

As a first proposition before CIT(A)

In the present case assessee had argued before CIT(A) that provisions of Section 201 of the Act does not apply to External development charges (statutory dues) paid to HUDA now know as HSVP. Therefore, the provisions of Section 40(a)(ia) of the Act do not apply in the instant case.

As a second proposition before CIT(A)

Alternatively, it was argued in the second proposition that disallowance u/ s 40(a)(ia) of the Act can only be applied to an expense claimed during the year. As External development charges were not debited to Profit & Loss Account and thus not claimed as expense, disallowance u/ s 40(a)(ia) of the Act could not be applied and no disallowance could be made.

Learned CIT(A) decided the ground in assessee's favour but on the basis of alternate second proposition that as the impugned amount was not claimed as an expense the provision of Section 40(a)(ia) of the Act do not apply.

Learned CIT(A) should have also adjudicated on the first proposition that the provisions of Section 201 of the Act do not apply to payment of External development charges paid to HUDA now known as HSVP.

We therefore plead that the assessee company be allowed to put forth its submissions on the first proposition under Rule 27 of the ITAT rules.”

18. We have heard both the parties and perused the records. We note that the ld. CIT (A) has already allowed the assessee's appeal on the reasoning mentioned herein above. We refer to Hon'ble jurisdictional High Court decision in the case of BPTP Ltd. vs. PCIT 113 taxmann.com 587 wherein it is held that EDC are in the nature of statutory fees. Apart from that, ld. Counsel of the assessee has placed reliance on the following case laws :-

- (i) M/s. Perfect Constech Pvt. Ltd. v. Addnl. CIT (ITA No.6907/Del/2019) PB 134 to 137 (136) Para 5.0
- (ii) Spaze Tower Pvt. Ltd. v. JCIT (ITA No.5842/Del/2019) PB 138 to 143 (140-141) (Letter from Director Town & Country Planning considered)
- (iii) M/s. Sarv Estate Pvt. Ltd. v. JCIT (ITA No.5337 & 5338/Del/2019) PB 116 to 128 (123)
- (iv) Satya Developers Pvt. Ltd. v. JCIT (ITA Nos. 6301 & 6302/Del/2019) PB 144 to 148 (148) (Letter from Director Town & Country Planning considered)
- (v) Shiv Sai Infrastructure (P) Ltd. v. ACIT (ITA No. 5713/Del/2019) PB 110 to 115 (110, 115)
- (vi) Signature Builders Pvt. Ltd. v. Add. CIT (ITA Nos.5735/Del/2019) PB 129 to 133 (132, 133)
- (vii) Tulip Infratech Private Limited v. Addl. CIT (ITA No.6734/Del/2019) PB 98 to 109 (103-104)

5.3. Though these cases dealt with penalty u/s 271 C for not deducting tax on payments to HUDA, same principles will apply to penal consequences u/s 40(a)(ia) of the Act. The sum and substance of the aforesaid decisions of the co-ordinate benches is that the payment to HUDA is, in effect, payment to State Government as the payment of EDC is not for carrying out any specific work to be done by HUDA for and on behalf of the appellant company but rather DTCP which is a Government Department which levies these charges for carrying out external development and engages the services of HUDA for execution of the work.

Therefore, such payment is exempt from obligations to deduct TDS as the nature of payment is statutory fees.”

19. We note that Id. CIT (A) has already granted relief to the assessee on the ground that section 40(a)(ia) applies to expenses claimed in P&L account. Since the assessee’s claim that expenses were not debited to P&L account is correct, Id. CIT (A) held that there is no question of disallowance of expenses. We find that other case laws in this regard relied upon by the assessee also support the proposition that no TDS is required to be deducted on payments made to HUDA for EDC. Hence, in the background of the facts and judicial precedents, we do not find any infirmity in the order of the Id. CIT (A) and accordingly we uphold the same.

20. In the result, assessee’s appeal is allowed and the Revenue’s appeal stands dismissed.

Order pronounced in the open court on this 24th day of March, 2023.

Sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER

sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Dated the 24th day of March, 2023
TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)-2, New Delhi.
- 5.CIT(ITAT), New Delhi.

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