

Om Builders (P) Ltd. Vs. Acit

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Dec-02-2003

Reported in : (2004)88TTJ(Mum.)198

Appellant : Om Builders (P) Ltd.

Respondent : Acit

Judgement :

Bench : These are appeals relating to the A.Y. s 84-85 to 87-88. For the A.Y. 84-85, there is only one appeal, which is by the assessee. For all the other A.Y.s, the appeals are cross appeals. Since all the appeals involve certain common issues, and since they were also heard together, they are disposed of by a single order for the sake of convenience.

The assessee is a private limited company, engaged in the construction and sale of flats. The relevant previous year is the year ending 30-6-1983.

The first ground is directed against the decision of the CIT(A) in respect of the addition of Rs. 47,68,599, being alleged payment of 'on money' by the assessee for purchase of a property. The addition itself has been deleted by the CIT(A). The assessee's grievance is however directed against the observation of the CIT(A) that the addition may be considered in the assessment of O.P. Navani (individual). It is the assessee's contention that the profit or loss in respect of Om Niketan, Andheri has to be accounted for by it only and none else, that there was no 'on money' involved and if for any reason there has to be any addition for undisclosed

investment, it would relate only to the A.Y.81-82. It is contended that instead of fully accepting these claims of the assessee, the CIT(A) merely made an observation that there should be no addition in the hands of the assessee in this year and that the addition should be made in the hands of O.P. Navani (individual) in the relevant year. At the time of the hearing, it was pointed out on behalf of the assessee that against the decision of the CIT(A) deleting the addition of Rs. 47,68,599, the department had filed an appeal to the Tribunal in ITA No. 4232/Bom/93 and by order dated 24-2-2003, passed ex-parte qua the assessee, the Tribunal has set aside the order of the CIT(A) on this point and restored the matter back to his file with a direction that the same shall be re-decided in accordance with law after giving proper opportunity to both the parties.

It has been observed by the Tribunal that the CIT(A) had deleted the addition summarily without going into the full facts of the case. It is stated on behalf of the assessee that this order of the Tribunal has been accepted by the assessee. In this view of the matter, we hold that no further directions can be given in the assessee's appeal with regard to the entity in whose hands the alleged 'on money' payment can be assessed. Since the order of the CIT(A) has been set aside by the Tribunal, the observations of the CIT(A) have no legs to stand. The matter is now before the CIT(A). Accordingly, nothing can be decided with reference to the first ground taken before us. In effect, the ground has become infructuous. The only direction which we can give, even if it is considered to be redundant in the light of the order of the Tribunal cited above is that the assessee is free to raise all contentions relating to the addition before the CIT(A). With this direction, the ground is dismissed.

The second ground relates to the disallowance of the provision of Rs. 66,500 made in respect of machine hire charges. It appears that during the relevant year, the assessee started a video game division called Wonder World. In the accounts, the provision was made for payment of machine hire charges for Rs. 66,500. The assessing officer, in the original assessment proceedings, allowed Rs. 32,000 only as it was supported by bill and disallowed Rs. 34,500 for want of evidence. On appeal, the assessee would appear to have furnished full particulars before the CIT(A), who directed the assessing officer "to verify the particulars and allow entire

machine hire charges of Rs. 66,500 as evidence is now available for the liability incurred". When the assessing officer took up the matter under section 143(3) read with section 251 (impugned proceedings), the assessing officer called upon the assessee to produce the evidence. The assessee was unable to do so.

In these circumstances, the assessing officer disallowed the entire provision of Rs. 66,500. The disallowance was confirmed by the CIT(A).

The assessee is in further appeal. On a careful consideration of the matter, we are of the view that in any case the disallowance made by the assessing officer cannot exceed the disallowance made by him in the original assessment made on 26-3-1987. Admittedly, the assessee has not been able to furnish the evidence before the assessing officer when he took up the assessment pursuant to the directions of the CIT(A). The learned Representative for the assessee stated that the original evidence had been filed before the CIT(A) in the course of the appeal filed against the original assessment and the assessee did not have copies thereof so that they could be filed before the assessing officer when the matter was taken up again. His contention, however, was that when the CIT(A) has recorded a clear finding in his order dated 25-3-1988 that the assessee has furnished all the evidence, the assessing officer was not justified in disallowing the provision while giving effect to the decision of the CIT(A). The contention cannot be accepted. It was for the assessee to have preserved the evidence for being shown to the assessing officer, especially when it was the assessee which courted and obtained such a direction from the CIT(A).

However, the alternative plea to the effect that the disallowance cannot exceed the amount of Rs. 34,500, disallowed in the original assessment, has force. The power of the assessing officer is derived from the order of the CIT(A). The order of the CIT(A) is confined to only Rs. 34,500 which was disallowed. Even the assessing officer had allowed Rs. 32,000 originally as it was supported by evidence. What was allowed originally cannot be disallowed in the subsequent proceedings.

That will be without authority. Therefore, we hold that the provision can be disallowed only to the extent of Rs. 34,500 which was disallowed in the original assessment proceedings. The disallowance of Rs. 32,000, over and above the

same is deleted The ground is partly allowed.

The last ground is directed against the disallowance of Rs. 15,590, being 1/3rd expenses on motor car. The disallowance has been made on account of the fact that one of the directors had used the car for his personal purposes. The contention before us is that this cannot be construed as personal use by the company, because the company is not a human being, but is a corporate entity. It is further contended that at best the amount can only be considered as perquisite in the hands of the director but no disallowance can be made in the company's assessment. We are unable to give effect to this argument. It is admitted before us that the director was not authorised under the terms of his appointment, to use the car for his personal purposes. Had he been so authorised, the amount would be liable to be allowed as part of his salary package. Apparently, the assessing officer has invoked section 38(2), considering the use of the car by the director for his personal purposes as non-business use. The section authorizes the same.

Accordingly, we uphold the disallowance, which we also consider to be fair and reasonable. The disallowance is accordingly upheld and the ground is dismissed.

The only ground in this appeal is that the CIT(A) erred in confirming the disallowance of the loss of Rs. 20,650 incurred in the Wonder World division. At the time of the hearing, it was stated on behalf of the assessee that the ground should read that the CIT(A) erred in confirming the disallowance of Rs. 1,14,000 being provision made for machinery hire charges. It was clarified that the loss of Rs. 20,650 in the Wonder World division is made up of several expenses of which the machinery hire charges were part and the ground is confined to the machinery hire charges only.

The assessing officer disallowed the provision on various grounds. The first ground was that the assessee could not produce any evidence to show that the liability had arisen in the relevant accounting year. The second ground was that no evidence could be produced by the assessee to its auditors who had made an observation to that effect in the accounts. He, therefore, disallowed and added back the provision. The disallowance was confirmed by the CIT(A). Before us, it is admitted on behalf of the assessee that the relevant bills received from Bush India

Ltd., from whom the assessee hired the machinery, were not produced before the departmental authorities. It was also admitted that there was no agreement in writing with M/s. Bush India Ltd. However, it is pleaded that a broader view should be taken with regard to the allowance of the provision keeping in view the fact that the assessee has disclosed income from the Wonder World division, which would not have been possible without the working of the video machinery. In this connection, our attention was drawn to page 11 of the assessment order for the A.Y. 86-87, wherein there is reference to Bush India Ltd. having produced its accounts to show that certain bills were raised on the assessee company for machine hire charges. On this basis, it is contended that the provision should be allowed for the year under consideration.

On behalf of the department, it was submitted that the absence of any agreement in writing in connection with the hire of machinery and the relevant bills for the year under consideration throws considerable doubt on the genuineness of the provision itself and that in the absence of any evidence, a mere provision cannot be allowed. Attention is drawn to the judgement of the Hon'ble Bombay High Court in *Ramanand Sagar v. DCIT & Ors.* - 256 ITR 134.

On a careful consideration, we are of the view that there is no basis upon which the provision can be allowed as a deduction. It is no doubt true that in the case of an assessee following the mercantile system of accounting a provision for liability, which is an ascertained liability and not a contingent liability, can be allowed provided the liability has arisen in the relevant accounting year. There is nothing to show that the liability arose in the relevant year, for payment of hire charges. Admittedly, there was no agreement in writing with Bush India Ltd., which could have thrown light in the matter. The bills were also admittedly not produced before the assessing officer to show that they were received during the relevant accounting year and hence the provision was justified. In the total absence of any evidence, the provision made for the liability cannot be allowed. The accrual of the liability has not been proved. The fact that in the assessment year 86-87 Bush India Ltd. was able to produce its accounts to show that bills were raised on the assessee for that year cannot help the assessee's claim for the year under consideration. Even in that year, the assessee had claimed Rs. 1,20,000 as hire

charges for machinery, out of which Bush India Ltd. could support the claim by showing bills raised only to the extent of Rs. 60,000. It was submitted before us that the assessee has not preserved the bills and due to search the records were in disarray. Whatever may be the reason for the nonproduction of the evidence in support of the provision, the fact remains that the provision is total unsupported. Accordingly, we see no reason to interfere with the view taken by the departmental authorities. The assessee's plea that the Tribunal should take a broader view of the matter than what was taken by the departmental authorities cannot be accepted in the absence of any evidence. The ground is dismissed as also the appeal.

The only ground taken is that the CIT(A) erred in deleting the addition of Rs. 3,80,000 made on account of undisclosed sale receipts by the assessee in respect of flats sold. It is stated that the conduct of the assessee is not above board and therefore the CIT(A) ought to have upheld the addition.

During the year the assessee sold five flats the details of which have been given in page 2 of the order of the CIT(A). The sale price ranged from Rs. 391.06 per Sq.ft. to Rs. 443.21 per sq. ft. The assessing officer took the comparative instances of certain sales made by other builders in the nearby locality. These details are also given in the same page of the order of the CIT(A). These sales show a sale price of Rs. 471 per sq. ft to 526 per sq. ft. The assessing officer took the highest sale instance of Rs. 526 per sq. ft. in respect of the sale made in December 1984 and concluded that the assessee company has suppressed the sale price in respect of the sale of the five flats. He applied the difference to the flats sold by the assessee and made an addition of Rs. 3,80,000.

On appeal, various contentions were taken before the CIT(A). The CIT(A) also noted that the order of the assessing officer is based on the valuation report of the DVO (District Valuation Officer). He examined the comparative cases relied on by the DVO and making suitable adjustments, found that the difference between the comparative instances and the assessee's prices was barely 2%. He further found that there was no evidence of understatement of the prices of the flats sold by the assessee in spite of the search carried out in the assessee's case. He observed

that the conclusion of the assessing officer was based on general observation and cannot stand in the light of the judgment of the Supreme Court in the case of K.P. Verghese - 131 ITR 597. Accordingly, he deleted the addition.

The department is in appeal and reliance is placed on the assessment order. The assessee has relied on the finding of the CIT(A) to the effect that there is no evidence of under-statement of sale prices, unearthed during the search and the further fact that the sales were made after obtaining the clearance of the Income-tax authorities by filing Form No. 37E. Reliance is also placed on the judgment of Hon'ble Bombay High Court in the case of CIT v. Smt. Archana R. Dhanwatay - 147 ITR 21.

On a careful consideration of the matter, we are of the view that no case has been made out by the department for making the addition which has been rightly deleted by the CIT(A). There is no evidence of under-statement of the sale price of the flats which has been unearthed during the search. The addition is based merely on comparative sales and the order of the DVO. On these facts, the judgment of Supreme Court in the case of K.P. Verghese (supra) has been rightly relied on by the CIT(A) to delete the addition. The judgment of the Hon'ble Bombay High Court cited by the assessee also fully applies. Further, the sales have been accepted by the IT authorities in acquisition proceedings on the basis of Form No. 37E filed by the assessee. In these circumstances, the addition was rightly deleted by the CIT(A). We confirm his decision and dismiss the appeal.

The first ground relates to the disallowance of Rs. 93,774, being the loss in the Wonder World division. At the time of the hearing, it was clarified on behalf of the assessee that the amount has been wrongly mentioned and that the real grievance is that the CIT(A) erred in confirming the disallowance of the machinery hire charges of Rs. 60,000 and electricity charges of Rs. 30,000. It is further clarified that both these amounts represent provisions made by the assessee in its accounts.

In respect of the machinery hire charges, the total provision made in the accounts is Rs. 1,20,000. Out of this the supplier of the machinery viz. Bush India Ltd. was able to confirm issue of bills to the extent of Rs. 60,000. For the balance of Rs.

60,000 there was no evidence.

Even in the seized material, no bills or other evidence could be found.

Accordingly, the assessing officer disallowed Rs, 60,000, which was confirmed by the CIT(A).

We have considered the matter. In the earlier two years, we have held that in the absence of any evidence, the provision cannot be allowed as a deduction. The same decision holds good for the year under appeal also, since the claim is the same. Therefore, in line with our earlier decision, we confirm the disallowance of Rs. 60,000.

As regards the electricity expenses of Rs. 30,000, the position is the same. The provision could not be supported with reference to the bills from BEST. The statutory auditor has also made a remark that the bills for the electricity charges are not available. This factual position has not been controverted before us on behalf of the assessee.

Therefore, in the absence of any evidence whatsoever, the provision cannot be allowed as a deduction. Therefore, the disallowance is confirmed. The ground is, thus, dismissed.

The second ground is directed against the disallowance of Rs. 12,500 out of miscellaneous expenses. The expenditure has been incurred on the presentation of silver coins to the assessee's clients. This appears to us to be routine business expenditure incurred wholly and exclusively for the purposes of the business. Accordingly, the disallowance is deleted and the ground is allowed.

The first ground is that the CIT(A) erred in deleting the addition of Rs. 12,49,800 made on account of undisclosed sale receipts in respect of the flats sold by the assessee during the year. The ground is identical to ground taken by the department in the A.Y. 85-86. For this year also, the basis of the addition is the same namely the comparative sales and the report of the DVO based on such sales. The CIT(A) has noted the relevant facts in paragraph 4 of his order and has held that since the facts are the same as in the A.Y. 85-86, the addition is deleted.

The revenue does not dispute this position nor does it dispute that there is no direct evidence to show 'on money' receipt by the assessee in respect of the 8 flats sold during the year. There is also no dispute that the assessee filed Form 37 EE and obtained clearance from the appropriate authority in respect of the sales. In these circumstances and in line with our decision for the A.Y. 85-86, in the appeal filed by the department, we confirm the decision of the CIT(A) and dismiss the ground.

The second ground is directed against the deletion of Rs. 40 lakhs added by the assessing officer. A perusal of the assessment order shows that a property was sold by the assessee to M/s. S.K. Trust for Rs. 40 lakh. This was in the previous year relevant to the A.Y. 86-87. S.K.Trust sold the property to Bombay Mercantile bank for Rs. 90.28 lakhs in the previous year relevant to the A.Y. 88-89. In the assessment of the assessee for the year under appeal, the assessing officer added the amount of Rs. 40 lakhs on protective basis. Though the addition was not made in the assessment order itself, an order was later passed under section 154 adding the amount on protective basis. The assessee's appeal against the order under section 154 was dismissed by the CIT(A) and no further appeal was taken to the Tribunal. As regards the merits of the addition, the CIT(A) held that the DC, Central Range IV has confirmed that in the case of S.K. Trust, the property has been held to be belonging to it and the income on the sale of the property was treated as the income of the Trust to be taxed in the hands of the beneficiaries. The CIT(A) referred to the order passed by the DC on 31-12-1992 in the case of S.K. Trust where this position has been confirmed. The CIT(A) further held that this order passed in the case of S.K. Trust also showed that the Trust was not a bogus entity and that it had actually purchased the ground floor of the building Om Niketan and subsequently sold it to Bombay Mercantile Bank. Thus, the assessing officer has accepted that the sale of the property by the assessee to the Trust is genuine. He, therefore, held that a separate addition on account of this sale in the year under appeal, either on substantive basis or on protective basis is uncalled for, for the simple reason that the assessing officer has not made out a case that the assessee has not accounted for the receipt in its books. He, therefore, deleted the addition of Rs. 40 lakhs made on protective basis.

The department is in appeal. We have heard the rival contentions. There is no dispute with regard to the facts. A copy of the order passed on 31-12-1992 in the case of S.K. Trust for the A.Y. 88 89 has been filed before us. From this order, we find that the short-term capital gain of Rs. 50,28,340 has been assessed by deducting the purchase price of Rs. 40 lakhs paid by the S.K. Trust to the assessee from the sale price of Rs. 90.28 lakhs received from Bombay Mercantile Bank. In other words, the property has been held to belong to S.K. Trust itself. In that case, there is no question of adding the amount of Rs. 40 lakhs on protective basis in the hands of the assessee. This is what the CIT(A) held and we find no reason to depart from the same. We may add that the learned representative for the assessee has made a statement before us that the order passed on 31-12-1992 in the case of S.K. Trust for the A.Y. 88-89 has been accepted by S.K. Trust. We record the statement The ground is dismissed.

The first ground is directed against the disallowance of the provision of Rs. 1,34,000 This consists of the provision of Rs 1,14,000 on account of machinery hire charges and the provision of Rs. 20,000 for electricity charges, both in the Wonder World division of the assessee.

The facts and circumstances relating to this ground are identical to those for the earlier years where this issue has been decided against the assessee. Therefore, following the view taken by us in those years, we confirm the disallowance and dismiss the ground.

Second ground is directed against the decision of the CIT(A) with reference to the addition of Rs. 5,23,600 made by the assessing officer on account of alleged 'on money' received by the assessee on sale of flats. The main contention of the assessee before the CIT(A) was that there is no 'on money' received by the assessee. Two alternative contentions were also taken., The first is that if at all any addition for 'on money' is to be made, it should relate back to the A.Y. 83-84, which is the year in which the agreement was finalised, and not for the A.Y. 87-88, because it is well known that 'on money' payments are made when the agreements were finalised. The second alternative plea was that in any event, the assessee having followed the project completion method, any addition for alleged

'on money' should be considered only in the year in which the profits from the project are brought to tax.

The CIT(A), following the view taken by him in other group cases, accepted the second alternative plea and restored the matter to the file of the assessing officer to consider the 'on money' receipts in the year in which the profits from the project are brought to tax.

While doing so, he also held that the "assessee will be free to raise all the arguments on merits of the addition before the assessing officer in that year." The assessee contended before us that the CIT(A) should have given a finding firstly that that no 'on money' was involved in the transaction and secondly that even if 'on moneys' were to be considered that can be done only in the A.Y. 83-84 in view of the fact that the only transaction of sale took place in the previous year relevant to the A.Y. 83-84. On behalf of the department, it is pointed out that no such directions need be given since the CIT(A) himself has permitted the assessee to raise all arguments before the assessing officer when he seeks to tax the alleged 'on money' receipts in the year of completion of the project.

On a careful consideration of the matter, we are of the view that since the matter has been restored to the assessing officer with liberty to the assessee to raise all the arguments on merits of the addition, it may strictly be not necessary to give any further direction. At the same time, the first alternative plea raised by the assessee before the CIT(A) viz. the addition for 'on money', if at all, can be made only in the A.Y. 83-84, the year of agreement, has not been adjudicated upon by him. It may even be stated that since the CIT(A) has accepted the second alternative plea of the assessee, the first alternative plea impliedly stood rejected by him. That is why, perhaps, he has given liberty to the assessee to raise all arguments on merits of the addition. We may clarify that it would be open to assessee to raise all arguments before the assessing officer, including the argument that the addition should not be made in the year of completion of the project and may be made, if otherwise justified, only in the A.Y. 83-84, the year in which the transaction took place. Directed accordingly.

The only ground taken is that the CIT(A) erred in directing that the 'on money' on the sale of flats should be considered in the year in which the income from the project is brought to tax. It is contended that he ought to have held that the amount should be taxed in the A.Y.83-84, the date of agreement being 12-3-1982.

While deciding the assessee's ground no 2 in its appeal, we have held that it would be open to the assessee to contend before the assessing officer, when he considers the alleged 'on money' receipts in the A.Y.87-88, that the addition should be made only in the A.Y. 83-84. The ground taken by the department seems to agree with the claim made by the assessee. But, since we have given liberty to the assessee to raise such a claim before the assessing officer, it is now not necessary or proper to decide the question whether the assessee's claim is correct or not. It would be for the assessing officer to examine the correctness of the assessee's claim and take a decision in accordance with law. We, therefore, dismiss the ground as premature, having regard to our decision in the assessee's appeal. The appeal is, thus, dismissed.

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