

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF NOVEMBER 2016

PRESENT

THE HON'BLE MR.JUSTICE JAYANT PATEL

AND

THE HON'BLE MR.JUSTICE P S DINESH KUMAR

ITA NO.29 OF 2013

BETWEEN:

1. COMMISSIONER OF INCOME – TAX
BANGALORE
2. DEPUTY COMMISSIONER
OF INCOME – TAX, CIRCLE – 11(2)
BANGALORE

...APPELLANTS

(BY SRI.K.V.ARAVIND, ADVOCATE)

AND:

M/S. GOLF VIEW HOMES LTD
NO.73-01, SHERIFF CENTRE
ST.MARK'S ROAD
BANGALORE

...RESPONDENT

(BY SRI.A.SHANKAR & SRI.M.LAVA, ADVOCATES)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 26.08.2005 PASSED IN ITA NO.939/BANG/2003, FOR THE ASSESSMENT YEAR 1999-2000, PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO FORMULATE THE

SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN AND ETC.

THIS ITA COMING ON FOR ORDERS THIS DAY, **JAYANT PATEL J.**, DELIEVERED THE FOLLOWING:

JUDGMENT

We may at the out set record that since the delay was a very long delay of 2586 days, we found it appropriate to consider the merits of the appeal simultaneously.

2. The revenue has preferred this appeal by raising four substantial questions of law but in our view only first question would arise for consideration and subsequent questions are only the consequential aspects. Hence, we find that the main question which arise for consideration is as under:-

- i) *Whether the Tribunal was correct in holding that the interest deduction claimed by the assessee is an allowable deduction without taking into account the fact that the assessee had not utilized the loan amount in the course of business activity and the same had been utilized*

by its sister concern and consequently recorded a perverse finding?

3. The short facts of the case appear to be that the assessee is in the business of real estate viz., construction of building, leasing of building, acquiring of properties, etc. For the assessment year 1999-2000, assessee claimed a deduction of interest out of the amount paid towards interest to the Banks from which the assessee had taken loan. There were also other deductions claimed from the assessee but in the present appeal, we are not required to examine the said aspect and therefore, we find that the discussion in that regard is not required. The Assessing Officer assessed the return and so far as the allowance of the interest on the amount paid to the Diamond District and Platinum City, which were sister concerns of the assessee as per the assessee, the Assessing Officer disallowed the interest over the amount of loan utilized for giving advance to the Diamond District and Platinum City. The matter

was carried in appeal before the Commissioner (Appeals) and the Commissioner (Appeals) concurred with the view of the Assessing Officer. However, the Commissioner (Appeals) when considered other aspects of dealing with the income from house property, found that the assessee is in the business of construction of one building after another including acquiring property rights in Diamond District, Platinum City and India Builder Association. However, so far as the interest over the amount of loan utilized for giving advance to the aforesaid two sister concerns viz., Diamond District and Platinum City, the Commissioner (Appeals) found no proof was produced and therefore, he dismissed the appeal of the assessee to the said extent. The matter was further carried in appeal before the Tribunal and the Tribunal ultimately at Para 5.2 has observed thus:

“5.2. The CIT(A) has recorded the following finding at para 5.3 (page 31) of the appellate order.

“Moreover the appellant company has continued to construct one building after another and also acquiring property rights in M/s.Diamond District, M/s.Platinum City and M/s.India Builders Association. So the appellant’s activity as a developer and contractor is well organized and continuous.”

Similar findings are also recorded at pages 31/32 and 33 of the appellate order. Before us, the department has not disputed the above finding of fact recorded by CIT(A). Therefore, it is an undisputed fact that the payments made by the assessee to its sister concerns are only to acquire property rights. It is also an admitted fact that the assessee is in real estate business and acquiring property rights is a part of its business. Thus, the payments made by the assessee to its sister concerns ought not have been held by the lower authorities as diversion

of funds for non business purposes. In the light of the above, it is not possible for us to agree with the learned CIT(A) that the assessee should have produced independent evidence in support of an undisputed fact. It is trite that evidence is required to be let in only on disputed facts and no evidence is required to support an admitted fact. Consequently, we hold that the payment made by the assessee to its sister concerns is for the purpose of its business. As a result, interest is required to be allowed u/s 36 of the Act. We make it clear that out of the total interest paid by the assessee, a part will be allowed u/s 24 and the balance of interest which does not qualify for deduction u/s 24, will have to be allowed u/s 36. Accordingly, we direct the Assessing Officer to allow the interest paid by the assessee to Corporation Bank and to Jammu and Kashmir Bank, like any other business expenditure, and the resultant loss, if any, to be set off against property income in terms of Section 71 of the Act.”

Under the circumstances, the present appeal by the revenue before this Court.

4 We have heard Sri.Aravind, learned counsel appearing for the appellant-revenue and also Sri.Shankar, learned counsel appearing for the assessee on merits of the appeal.

5. The contention raised on behalf of the appellant-revenue was that the finding recorded by the Tribunal about the activity of the assessee is perverse in as much as the extract of Para 5.3 from the order of CIT(Appeals) is wrongly construed and interpreted by the Tribunal. He submitted that the Tribunal ought to have undertaken its scrutiny for disallowance of claim of interest by considering the finding of CIT (Appeals) that no proof was produced. So far as the other discussion made by the CIT (Appeals), it was pertaining to the income from house property and it cannot be mixed up with the issue for disallowance of interest of the advances given to the sister concerns viz., Diamond District and Platinum City. He therefore submitted that

the Tribunal has committed a serious error and in any case the finding of the Tribunal is perverse and hence this Court may set aside the order of the Tribunal to that extent and allow the appeal of the revenue.

6. Whereas the counsel appearing for the respondent-assessee supported the finding recorded by the Tribunal and contended that the finding is based on 'a finding of fact' recorded by CIT (Appeals) coupled with the aspect that the department had not disputed the above finding recorded by the CIT (Appeals). He submitted that if the advances were given to sister concerns for acquiring proprietary rights viz., Diamond District and Platinum City, the interest is allowable as deduction under Section 36 of the Act. He submitted that the appeal of the revenue be dismissed.

7. As we have already re-produced the observations of the Tribunal, we need not repeat the same but the additional aspect is that in the above

observation of the Tribunal, there is also reference to similar finding recorded by CIT (Appeals) on Pages 32 and 33. As the said finding is not reproduced by the Tribunal in its order, we find it appropriate to reproduce the same.

8. When CIT (Appeals) was considering the applicability of the decision in the case of **CIT VS. VEERABHADRA INDUSTRIES** reported in **240 ITR 5 (AP)** while distinguishing the said decision, it has been interalia recorded as under:

“Similarly its reliance on the judgment in the case of CIT vs. Veerabhadra Industries reported in 240 ITR 5 (AP) is also misplaced in that rental income in that case was held as assessable as income from house property in as much as there was only single act of construction of godown and letting it out as against the systematic activity of construction of one building after another and also acquiring property rights in Diamond District

and Platinum City.”

(emphasis supplied)

9. It is *inter alia* observed by CIT (Appeals) while considering the judgment in the case of **CIT VS. R.M.M MEENAKSHI SUNDARAM** reported in **212 ITR 221**, as under:-

“In the present case, the construction of one building after another and acquiring property rights in Diamond District and Platinum City is nothing but business and letting out the building till sale takes place with an option to the lessee to purchase and letting being one of the incidental or ancillary objects (No.15) to attain the main objects of development and construction satisfies these conditions.”

(emphasis supplied)

10. In our considered view, the finding which is already recorded by CIT (Appeals) and re-produced by the Tribunal in the above referred paragraph at 5.2 as

well as the above referred reference by CIT (Appeals), makes it clear that CIT (Appeals) was satisfied about the activity of the assessee as of construction of one building after another and acquiring of property rights in Diamond District and Platinum City.

11. If such was the finding that the activity of the assessee was also of acquiring property rights in M/s.Diamond District and M/s.Platinum City, any advance given by the assessee to M/s.Diamond District and M/s.Platinum City is to be treated for acquiring property rights and once it is treated as for acquiring property rights may be of a sister concern, it would be an allowable deduction under Section 36 of the Income Tax Act, since it is for the business activity.

12. The aforesaid fact is coupled with the aspect that in the very observation of the Tribunal, it has been recorded as under:-

“Before us, the department has not disputed the above finding of fact recorded by CIT (Appeals).”

Meaning thereby, the aforesaid finding was not even disputed by the department before the Tribunal.

13. The attempt on the part of the revenue to contend that the finding arrived at by the Tribunal is perverse by misconstruing the order of CIT (Appeals) cannot be countenanced for three fold reasons:

One is that the department itself before the Tribunal did not dispute the aforesaid finding of fact recorded by CIT (Appeals).

The second is that it is not only at one place the aforesaid finding of fact is recorded but subsequently as observed earlier at two places similar factum is also recorded.

The third is that when such finding of fact was not disputed and was also reiterated by the

Commissioner (Appeals) and the said reiteration was also not disputed and the Tribunal has relied upon the same and has proceeded as an undisputed fact, such a view on the part of the Tribunal cannot be said to be perverse view.

14. When one talks about perversity, the test would be that no reasonable person would take such view. But if the view taken by the Tribunal is a possible reasonable view, such view cannot said to be perverse. If the perversity is tested from the material on record, then also, we cannot accept the contention that the finding of fact so recorded by the Tribunal is perverse or without there being any material on record.

15. Further attempt made by the learned counsel for the appellant that it is misunderstanding of the order of the Tribunal or the Tribunal has wrongly

interpreted the observations made by the CIT (Appeals) also cannot be accepted for two reasons:

One is that had such being the position, nothing prevented the department from raising the dispute for applicability of such finding when the aspect for allowance of the interest under Section 36 of the Act was to be considered.

Another is that, if on one part CIT (Appeals) which allows the claim on the ground that no evidence was produced to show the nexus and on the other part, if CIT (Appeals) does find the activity of the assessee *inter alia* for acquiring property rights in M/s. Diamond District and M/s. Platinum City, which are sister concerns coupled with the aspect of such reiteration, further at two places, the earlier observations made that there is no independent evidence produced before him would not only

result into contradiction in finding but it would also lose its efficacy. In any case, even if two views are possible, the interpretation would lean in favour of the assessee that too when the judicial review is limited to question of law and limited to perversity in any finding of fact. Under such circumstances, the contention raised on behalf of revenue fails.

16. In view of the aforesaid observations and discussion, we find that the question which is raised by the revenue in the present appeal deserves to be answered in negative, against the revenue and in favour of the assessee by holding that the finding of the Tribunal cannot be said to be perverse.

17. We find that there is no perversity in the finding of the Tribunal in allowing the appeal of the assessee so far as the deduction of the interest on the loan taken which is utilized for giving advances to the

sister concerns i.e., M/s.Diamond District and M/s.Platinum City.

18. In view of the aforesaid observations and discussion, we find that when the appeal is without any merit and even if too lenient view is taken on the aspect of delay, though it is strongly resisted by the learned counsel for the assessee to condone such long delay of more than 2500 days, delay is condoned but as the main appeal as per reasons recorded by us is meritless, the same is dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

Prs*