आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCHE, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.384/Ind/2017
Assessment Year:2012-13**

Asstt. Commissioner of Income Tax , Circle 2(1), Indore	बनाम/ Vs.	M/s M.D.K. Realty Pvt. Ltd, 401 Princess Pride, 21/3 New Palasia, Indore
(Revenue)		(Respondent)
P.A. No.AAECM9755B		

Revenue by	Shri P.K.Mitra, Sr. DR
Respondent by	Shri Ajay Tulasiyan, CA
Date of Hearing:	**29.08.2018**
Date of Pronouncement:	**12.09.2018**

आदेश / O R D E R

PER MANISH BORAD, A.M:

This appeal filed at the instance of Revenue pertaining to A.Y. 2012-13 is directed against the order of Ld. Commissioner of Income Tax(Appeals)-I, Indore, (in short 'CIT(A)'), vide appeal No. IT-07/2015-16 order dated 27.02.2017 which is arising out of the order u/s 143(3) of the Income Tax Act 1961(hereinafter called as the 'Act') framed on 27.02.2015 by ACIT, Circle 3(1), Indore.

2. The Revenue has raised following grounds of appeal:

> "Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law by deleting the addition of Rs.67,00,000/- made by the AO without considering the fact that the assessee could not prove business expediency of the expenditure and payment is based on sham documents as brought out by the AO".

3. Briefly stated facts as culled out from the records are that the assessee is a Private Limited Company engaged in the activity of civil construction, purchase and sale of immoveable property. Income of Rs. 2,34,76,649/- declared in the Return of Income filed on 29.09.2012. Case selected for scrutiny through CASS. Necessary notices u/s 143(2) and 142(1) of the Act along with the questionnaire duly served upon the assessee. While examining the records Ld.A.O observed that the assessee has claimed an expenditure of Rs.67,00,000/- as a compensation given to Mr. Deepak Gupta as per the award given in the settlement deed between the assessee and Mr.Deepak Gupta. The alleged amount was paid to Mr. Deepak Gupta for assisting the company in purchasing land at Gram Khajarana, Indore and further to get the agriculture land converted to commercial purpose in order to construct high raise building. Ld.A.O issued notice u/s 131(1) of the Act to Mr. Deepak Gupta who appeared and gave statement accepting that he has been paid Rs.67,00,000/- for various works done by him during 5 years starting from April, 2007. The letter of remembrance and settlement deed were also placed on record.

Ld.A.O raised doubt on the genuineness of these documents as they were not executed on legal paper and the witnesses are also the close relatives of the assessee company. He accordingly held that there was no business expediency to pay compensation to Mr.Deepak Gupta nor any perpetual damage or loss are caused to Mr.Deepak Gupta for which alleged compensation was given. Documents submitted by the assessee were not treated as authentic and just after thought. Ld.A.O accordingly disallowed the expenditure of Rs.67,00,000/- claimed under the head "compensation for land" which is added to the cost of sale of land and the addition was made and income assessed at Rs.3,01,76,649/-

4. Aggrieved assessee filed an appeal before the Ld. CIT(A) and succeeded as Ld.CIT(A) appreciated the "letter of remembrance", Settlement deed as well as the fact that Mr.Deepak Gupta has offered the impugned amount of compensation for taxation for tax and the company is also assesseble at maximum rate of tax which proves that there was no loss to the revenue.

5. Aggrieved revenue is now in appeal before the Tribunal.

6. The Ld. Departmental Representative vehemently argued supporting the findings of Ld. Assessing Officer and submitted that the impugned expenditure is merely a colourable transaction to

evade and shift tax liability and genuineness of the expenditure is also doubtful. He referred and relied on the judgment of Hon'ble Apex Court in the case of Lachminarayan Madan Lal V CIT (1972) 86 ITR 439.

7. Per contra the Ld. Counsel for the assessee referring to the written submission place on record submitted that the receiver of the compensation of Rs.67,00,000/- i.e. Mr. Deepak Gupta regularly files his income tax return and the impugned amount has been offered to tax and the income tax return has been filed prior to the date of filing of return by the assessee company. The compensation was solely for business expediency and was related to the project to be taken up by the company in the future. The Ld.A.O failed to appreciate that as per the conditions laid in para 6 of the "Letter of Rememberance" dated 6.3.2007 the compensation was payable at Rs.83,80,449/- which as per the settlement deed was finally settled at Rs.67,00,000/-.

8. Ld. Counsel for the assesee relied on following judgments;

a) Sassoon J. David & Co. (P.) Ltd. v. CIT [1979J 118 ITR 261 (SC)
b) S.A. Builders Ltd. v. Commissioner of Income-tax

[2007J 288 ITR 1 (SC)

c) CIT v. Birla Cotton Spg. & Wvg. Mills Ltd./ Birla Bros. (P.) Ltd. [1971J 82 ITR 166 (SC)

d) Haji Aziz & Abdul Shakoor Bros. v. CIT [1961] 41 ITR 350 (SC)

e) Addl. CIT v Rajasthan Spg. & Wvg. Mills Ltd [2005] 274 ITR 465 (Raj)

f) Sri Venkata Satyanarayan Rice Mills Contractor Co. v. CIT [1997] 223 ITR 101(SC)

g) Addl. ITR v. Kuber Singh Bhagwandas [1979] 118 ITR 379 (MP) (FB)

h) CIT v. Pure Pharma (P.) Ltd [2005] 277 ITR 273 (MP)

9. We have heard rival contentions and perused the records placed before us and carefully gone through the judgments referred and relied by both the parties. Revenue's sole grievance is against the findings of Ld.CIT(A) deleting the disallowance of expenditure of Rs.67,00,000/- claimed on account of compensation paid by the assessee company to Mr. Deepak Gupta. The Ld. Assessing Officer while disallowing the impugned expenditure raised doubt on genuineness as well as business expediency of incurring such expenditure.

10. We find that the assessee company is doing the business of civil construction and purchase and sale of property. The assessee

company planned to make high rise building on the agriculture land measuring 0.174 ha at Gram Khajarana, District, Indore. The company approached Mr. Deepak Gupta to work as broker for purchase and sale of immoveable properties and to provide services for getting the land converted for commercial purposes. The letter of Rememberance dated 6.3.2007 was executed between the assessee and Mr.Deepak Gupta for the development of high rise building project, marketing and land conversion work as per terms and conditions mentioned in this Letter of Rememberance (paced at page 93 to 96 of the paper book). In para 3 of this "Letter of Rememberance" Mr.Deepak Gupta agreed to put his time, effort and contacts for success of the project along with taking care of marketing, advertisement and management for selling the constructed area. In consideration for this work the assessee company agreed to pay Mr. Deepak Gupta a sum to be calculated by applying 7.5% of the total sellable built up area. Subsequently due to poor market conditions as well as slump in the real estate market, the assessee company decided not to launch the project as the current market conditions were not favourable and the company would have suffered loss if the project has been taken up. This decision of the company to stop the project was taken in the financial year 2011-12 but up to that time many of the works relating to the project were started. Perusal of the records shows that the assessee paid diversion tax, property tax etc. during the financial year 2008-09 to 2010-11. Various payments were also made to Nagar Palika Nigam, Indore. Proposed plan for high rise commercial building at the commercial plot (after being converted from agriculture land to commercial land) was also prepared by A&M Consultants, Architect & Planners. The copy of plan is placed at page 106 to 117 of paper book. It shows that positive steps were taken by the company with the assistance of Mr. Deepak Gupta towards the commercial project and work related to preliminary start of the project was done in the period 2011-12 but as soon as the company has decided to stop this project being not viable Mr. Deepak Gupta approached for the compensation for various services provided by him in all these years. Mr. Deepak Gupta referring to para-6 of the letter of rememberance asked the company for compensation as the company has changed its plan to launch the project and in this situation he is entitled to 5% of the value of the sellable built up area as compensation. To settle this issue both the parties agreed for a settlement and on 3.3.2012 a settlement deed was prepared with the witness of two persons of the company agreed to pay Rs.67,00,000/- as compensation to Mr. Deepak Gupta for various works done by him for the company and to compensate against the financial damage which Mr. Deepak Gupta has suffered due to cancellation of the forthcoming project of the company.

11. It is not disputed that the alleged amount of Rs.67,00,000/- was duly offered to tax by Mr.Deepak Gupta in his regular income tax return. Mr. Deepak Gupta has also given statement before the Assessing Authority u/s 131(1) of the Act giving complete details of

the work he has done for the company and also accepted that he has received Rs.67,00,000/- as compensation.

12. We also find that the Ld.CIT(A) had decided in favour of the assessee thereby deleting the disallowance of Rs.67,00,000/- by observing as follows;

*"**5. Ground No.1:-** This ground of the appellant is directed against the addition of Rs.67,00,000/- being compensation paid to Shri Deepak Gupta. The detailed facts of the case as per the penalty order are reproduced at Para No.2 above. The detailed submissions of the appellant are reproduced at Para No.3 above.*

***5.1** As detailed in the assessment order the appellant had entered into an agreement with Shri Deepak Gupta and according to the said agreement Shri Gupta was to be paid an amount worked out at the rate of 7.5% on the total saleable Built up Area of the project as Marketing Management & Brokerage Fees. However as per the agreement it was also agreed that in case the project was shelved for any reason Shri Gupta will be paid only an amount of 5% as compensation. As has been noted in the assessment order the project was shelved and the land was sold by the appellant as such. Shri Gupta raised a claim for compensation which at the rate of 5% would have worked out to 83,80,449/- but was settled at Rs.67 lacs again as per an agreement. The AO has held that the expenditure is capital in nature and that the agreement is collusive. It is however to be noted that it is an admitted fact that the land in question was acquired by the appellant and the role of Shri Gupta in the said deal has not been disputed. Thereafter it has also been stated that Shri Gupta was material in processing the case for development of a high rise on the said land. This fact has not been disproved. The fact that the approval for high rise building faced difficulties has also been placed on record. The appellant has thus* *placed a justification on record for the project not taking off. The appellant was supposed to pay to Shri Gupta for Marketing Management and brokerage. AO has noted that the prevailing rate of brokerage was only 3% and hence the payment was excessive. Appellant has pointed out that the payment at the rate of 5% works out to Rs. 83,80,449/- and Shri Gupta has apart from marketing also worked in finalizing the deal and thereafter preparing the project details and getting sanctions for the project and hence the payment of Rs.67,00,000/- which works out to 3.99% is reasonable. Statement of Shri Deepak Gupta was recorded during the course of assessment proceedings and he had confirmed the transactions and the receipt of Rs.67 Lacs. The receipt has been shown by him in his return of income and from the copy placed on record the Total Income returned by Shri Gupta is Rs. 63,12,797/- hence it cannot be said that the payment was with the view to avoid tax in the hands of payer and payee. It has also been stated that Shri Gupta was a director in the company Deepak Gupta Real Estate Pvt. Ltd. which was also in the same line of business and had received payments from other concerns dealing in real estate in support of which a copy of Form 26AS was filed showing credits from other concerns under section 194H. From the material brought on record it is thus seen that Shri Gupta rendered services to the appellant as per agreement and was entitled to be compensated for the same and such compensation was not unreasonable. The addition of Rs.67,00,000/- therefore cannot be sustained and hence is directed to be deleted. This ground of the appellant is therefore allowed".*

13. From perusal of all the series of transactions as well as detailed findings of Ld. C) we find substance in the pleading of Ld.

Counsel for the assessee that the impugned compensation of Rs.67,00,000/- paid by the company to Mr. Deepak Gupta was purely for business expediency. In the nature of business the assessee company is engaged such persons are required to increase the business, who have good contacts in real estate market, who have expertise in quickly getting the legal formalities completed and also who are expert in marketing the products of the company. In the instant appeal there was a plot of agriculture land owned by the company. It contacted Mr. Deepak Gupta. Positive work started by way of paying various taxes to local authorities. Land was converted for commercial purposes. Proposed plan was ready for the high rise building. For all these works Mr.Deepak Gupta was involved on each stage. Had the company completed the project then Mr. Deepak Gupta would have gained much higher amount than the impugned compensation paid. The work undertaken by Mr.Deepak Gupta was as per the letter of rememberance. Thereafter due to slump in real estate market upcoming project was stopped. Mr. Deepak Gupta demanded for the compensation of Rs.83,80,449/- which was finally settled at Rs.67,00,000/-. It proves that the alleged expenditure was incurred on the ground of commercial expediency. Our this view finds support from the judgment of Hon'ble Apex Court in the case of S.A. Builders Ltd. V CIT (2007) 288 ITR 1*(supra)*.

14. The Ld. Departmental Representative referred and relied on the judgment of Apex Court in the case of Lachminarayan Madan Lal (1972) 86 ITR 439 (*supra),* wherein the issue is related to payment of commission to selling agency firm which was owned by four major partners and two minors, and three out of the four major partners were wives of the partners of the assessee firm and the two minors were sons of the partners having no business experience. Business address of the commission receiving firm as well as the assessee firm was same. On the basis of these facts the Tribunal confirmed the findings of A.O holding that the commission paid was not genuine. But in the instant appeal the facts are completely different as discussed above and Mr. Deepak Gupta has vast experience in real estate market and therefore this judgment relied by the revenue will not of be any help to them.

15. It is also pertinent to note that Mr. Deepak Gupta filed his return of income on 25.9.2012 and offered the income of Rs.67,00,000/- for tax and his total income disclosed is at

Rs.63,12,2797/- and paid income tax of Rs.18,77,595/-. On the other hand the assessee company filed its income tax return on 29/9/2012 and after claiming the expenditure of compensation at Rs.67,00,000/- disclosed total income of Rs.2,34,76,649/- and paid income taxes at Rs.77,27,686/-. It shows that both the persons i.e. Mr. Deepak Gupta and the assessee company had paid taxes and it is not the case that Mr. Deepak Gupta has set off the income against some expenditure and the assessee company avoided to pay the tax. It proves that there is no major loss to the revenue.

16. We therefore in the given circumstances of the case are of the considered view that the alleged payment of compensation made by the company to Mr. Deepak Gupta was for business and commercial expediency and the alleged transaction cannot be categorized as colourable transaction rather the transactions have been entered within the four corners of law and cannot be said to be an after thought planning as the payment to Mr. Deepak Gupta has been made before the close of financial year itself by account payee cheque. We find no reason to interfere in the findings of

Ld.CIT(A) deleting the disallowance. Sole Ground raised by the revenue is dismissed.

17. In the result the appeal of the revenue stands dismissed.

Order was pronounced in the open court on 12.09.2018.

Sd/-	Sd/-
(KUL BHARAT) JUDICIALMEMBER	(MANISH BORAD) ACCOUNTANTMEMBER

Indore; दिनांक Dated : 12/09/2018

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Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Private Secretary/DDO, Indore