

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1735/Del/2016
(Assessment Year: 2012-13)

ACIT, Central Circle-2, New Delhi	Vs.	Emaar MGF Construction Pvt. Ltd, 1 st Floor, ECE House, 28, KG Marg, New Delhi PAN: AABCE7912K
(Appellant)		(Respondent)

ITA No. 928/Del/2016
(Assessment Year: 2012-13)

Emaar MGF Construction Pvt. Ltd, 1 st Floor, ECE House, 28, KG Marg, New Delhi PAN: AABCE7912K	Vs.	ACIT, Central Circle-2, New Delhi
(Appellant)		(Respondent)

Revenue by :	Ms. Pramita M. Biswas, CIT DR
Assessee by:	Shri IP Bansal, adv Shri Vivek Bansal, Adv Shri Nitin Midha, CA
Date of Hearing	20/02/2020
Date of pronouncement	13/05/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

- These are the cross appeals filed by the revenue and the assessee against the order of the ld CIT(A)- 23, New Delhi dated 25.01.2016 for the Assessment Year 2012-13.
- The revenue has raised the following grounds of appeal:-
 - The order of the ld CIT(A) is not correct in law and on facts.*
 - On the facts and circumstances of the case, the ld CIT(A) has erred in law in deleting the disallowance of Rs. 12,99,96,970/- on account of Sham Agreement."*
- The assessee has raised the following grounds of appeal:-
 - Ground No. 1:*

The Ld. Commissioner of Income Tax (Appeals) - 23, New Delhi (hereinafter referred to as 'CIT(A')) has erred on facts and in law in following the order for assessment years 2009-10, 2010-11 and 2011-12 and holding that the disbursement of income as per the revenue sharing agreement with M/s Emaar MGF Land Limited (hereinafter referred to 'EMLL'), was not diversion of income by overriding the title, but application of income.

Ground No. 2:

The Ld. CIT(A) erred on facts and in law in not appreciating that in essence, under the arrangement between parties, the entire project was awarded and executed on the strength of EMLL and EMLL had, in fact, paid 75% of the total consideration to the appellant.

Ground No. 3:

The Ld. CIT(A) erred on facts and in law in not allowing deduction of expenditure incurred towards services obtained from EMLL, at 25% of revenue, actually paid as per the terms agreed between appellant and EMLL, and instead allowing deduction of cost/ expenses incurred by EMLL in providing support to the appellant.

Ground No. 4:

The Ld. CIT(A) erred on facts and in law in adopting its own method of computing reasonable expenditure that ought to have been incurred by the appellant in relation to services obtained from EMLL, which is not permissible in law."

4. Brief facts of the case shows that the assessee company derived income from promotion, construction, development and sale of integrated township, residential and commercial multi-storey buildings , complexes, hotels houses and apartments. It filed its return of income for assessment year 2012 – 13 on 28/9/2012 declaring loss of Rs 257337209/-. The assessment under section 143 (3) of the act was passed by the Asst Commissioner of income tax, central circle – 2, New Delhi (the learned AO) on 8/1/2015 making an addition of ₹ 129996970 to the total income of the assessee.
5. During the course of assessment proceedings the AO found that assessee has transferred the revenue sharing of ₹ 1 29996970 to its holding company EMMAR MGF land Limited [Holding co] pursuant to an agreement dated 7/4/2008 entered into by the assessee company and its holding company. The AO found that the above transaction is with a related party. The assessee explained that as per agreement dated 7 April 2008 entered into by assessee with its holding company titled as revenue sharing agreement pursuant to which the holding company will provide to the assessee company end to end support in planning, development, construction,

marketing and sale of its project namely Commonwealth Games Village 2010. As per the terms of the arrangement the company shall be liable to pay 24% with effect from July 1, 2009 of the gross revenue earned by it through sale proceeds from building and structure proposed to be constructed in the said project except in the case of sale of flats to the Delhi development authority, the company is liable to pay 17% of the gross revenue derived by the company. Accordingly the revenue for the year in the books of the assessee company is ₹ 1 29996970 of gross revenue shared with the holding company. The AO found that similar arrangement was made for assessment year 2009 – 10, 2010 – 11 and 2011 – 12, in which the issue was discussed at length and after examination of the complete facts of the records, the addition with respect to the revenue sharing agreement was made. AO also noted that during the year except the amount of the transaction, everything else remains the same. The assessee also reiterated the same arguments, which were raised before the assessing officer in earlier years. The learned assessing officer therefore following the orders of the earlier years he disallowed the above sum. The main reasons for disallowance were:-

- i. Reliance upon agreement dated 74 2008 is an afterthought. This document never existed and surface for the first time during present assessment proceedings.
- ii. Contents of the agreement dated 8/file/2008 mentioned in schedule 19 of the balance sheet are contradictory to the contents of agreement dated 7/4/2008. In spite of repeated opportunities, the assessee failed to furnish agreement dated 8/file/2008.
- iii. Holding company of the assessee company was already paid interest cost towards deployment of funds and hence adequately compensated.
- iv. The holding company being the shareholder virtually owning the entire shareholding of the assessee company was in any case, responsible for arranging the funds required for executive the CW G Village project. Even without there being an agreement to this effect, it was the responsibility of the owners of the company to arrange for the funds. By virtue of being the owner of the assessee company, the

holding company had already assumed the inherent risk associated with the project. Therefore, such assumption of risk could not be a factor for revenue sharing between the related entities.

- v. The manner of accounting treatment of the said sum of ₹ 1 29996970/- is also dubious inasmuch as the same has been reduced from the turnover instead of debating it separately in the profit and loss account.
 - vi. No tax deduction at source has been deducted from this payment and therefore even the provisions of section 40 (a) (i.e. a) would get attracted.
 - vii. The said amount has been shown as liability as on 31/3/2012 by making a book entry and there is no actual movement of funds commensurate to such transactions.
 - viii. Since the transaction is between two related entities it is hit by the provisions of section 40A (2) (a). Issue of agreement dated 7/4/2018 is self-serving document and there are no real intangible services rendered by the holding company to the assessee company for claiming this amount as its share of revenue.
 - ix. The quantum of sharing revenue out of gross sales is inordinately high, which would result in transfer of the entire profit from the project to the holding company.
 - x. There are several case laws on the subject in favour of the revenue where it has been held that such payment made to related party are hit by the provisions of section 40A (2) (b) and are therefore not allowable.
 - xi. The agreement dated 7/4/2008 or for that matter 8/05/2008 are Sham agreements in the nature of colorable device is executed with an intention of reducing the tax liability.
6. Above assessment order was challenged by the assessee before the learned CIT – A. The learned CIT – A following the order of his predecessor gave a similar direction to allow the claim of the assessee as per the detailed formula given therein. He further confirmed that the disbursement of income as per the revenue sharing agreement with the holding company of the assessee was not a diversion of income by overriding title but an

application of income. He concurred with the view of the predecessor in earlier year's decision. He further agreed with the finding of his predecessor that the assessee is not eligible for deduction of expenditure incurred towards services obtained from its holding company at the 25% of the revenue. Thus, the expenditure claimed by the assessee was disallowed. Therefore, revenue as well as the assessee both are aggrieved with the order has preferred this appeal before us.

7. Coming to the appeal of the assessee, the learned authorised representative Shri I.P. Bansal, advocate submitted a detailed chart that identical disallowance has been made in the case of the assessee for assessment year 2009 – 10 to assessment year 2014 – 15. He submitted that the coordinate bench has already decided the issue for assessment year 2009 – 10 to assessment year 2014 – 15 as per order dated 26 December 2019 reported in (2020) 113 Taxman.com 275 (Delhi – tribunal) and therefore the appeal of the assessee as well as of the revenue is covered by that decision.
8. The learned departmental representative vehemently objected to the fact, it is altogether a new case made out by the learned assessing officer, and therefore the earlier decision of the coordinate bench does not apply to the facts of the present case.
9. We have carefully considered the rival contention and perused the orders of the lower authorities. The identical issue has been decided by the coordinate bench in case of the assessee for assessment year 2009 – 10 to assessment year 2014 – 15 on 26 December 2019. We also perused grounds of appeal of all these years, which are identical to the appeals of the assessee as well as of the revenue. The challenge by the revenue is to the agreement holding that it is a sham agreement to which the revenue has been transferred to its holding company. The coordinate bench as per para number 47 onwards has held as under:-

“47. We find that the assessee is under the obligation to part away with the source of income to the holding company and it was not its volition alone, to give away the revenue that could have been otherwise accrued to them. An agreement entered into by the holding company with the assessee for providing financial security cover and to part away 25% sales proceeds was clearly a case of division of source of income between the holding company and the assessee. The flats to be constructed, by the assessee company were the source of income and the holding

company had created a lien over 25% for a quid pro quo thereof and therefore took away 25% shares from the sale proceeds. It is not a case that the entire sale proceeds of flats and therefore, the income there from would have accrued to the assessee and 25% thereof had been applied or given away by the assessee to the holding company. The assessee acts as a collector of revenue for the holding company of the receipt to the extent of 25% of the sale proceeds. The 25% belongs to the holding company by virtue of the contributions made and the agreement entered.

48. The relevant judgments relating to diversion of income by overriding title are as under:

"In CIT vs. Sitaldas Tirathdas [1961] 041 ITR 0367 (SC) Hon'ble Apex Court held that, an obligation] to apply income in a particular way before it was received or before it was accrued or arisen to the assessee, results in diversion of income; but where there is an obligation to apply an income which has accrued or arisen or received, it would amount to merely apportionment of income. It observed as under:

"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow, it is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable. In our opinion, the present case is one in which the wife and children of the assessee who continued to be members of the family received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not; a case in which by an overriding charge the assessee became only a collector of another's income."

In Dalmia Cement Ltd. v. CIT [1999] 104 Taxman 97/237 ITR 617 (SC) assessee-owner of factory had, by an agreement dated 24.07.1962, agreed to sell same to 'M' and agreement, provided that profit from factories from 30.09.1962 would be for benefit of transferee on completion of sale transaction, though actual transfer of factory had taken place on 30.09.1964, income pertaining to period 01.10.1962 to 30.09.1964 could not be assessed in assessee's hands as it stood diverted by overriding title. It held that if there is an agreement before the sale transaction

takes place to the effect that this transaction will go to the account of another person and not to the account of assessee company, then, the income would stand diverted by an overriding title as a matter of fact, even before the accrual. The Hon'ble Apex Court held as under:

"Held, reversing the decision of the High Court, that the profits stood diverted to the purchaser in terms of and in accordance with the agreement dated July 24, 1962, read with the supplemental agreement dated November 2, 1962, and the date of actual transfer of the factory in question which, in fact, had taken place on September 30, 1964, did not alter the situation. The income stood diverted by an overriding- title as a matter of fact even before the accrual. There was no question of enabling the assessee to retain the profit in its own hand, after the "sale agreement". The sale transaction had taken place and by reason of the event and in terms of the provisions of the agreement, the question of tracing the profit in the hands of the assessee did not and could not arise. In any event profits of a business do not accrue from day to day but at the end of the accounting year. Profits were ascertained on September 30, 1964, when the property was transferred and as such for the year 1965-66 the question of profit accruing to the assessee did not arise. Section 60 has its application only to a case where income accrues to the transferee but the income-earning asset or source of income remains with the transferor. In this case, the very existence of the agreement to transfer dated July 24, 1962, ruled out and totally excluded the application of section 60. There appeared to be clear inconsistency between the assessment of capital gains on the transfer of the factories on the one hand and the finding of accrual of income since the computation of capital gains were affected by treating the gross amount of consideration as the sale price. The Income-tax Officer thus by implication accepted the profits as belonging to the transferee and not the transferor-otherwise, the net amount paid alone ought to have been taken as the sale price. The High Court's judgment, therefore, not only suffered from apparent inconsistency but on a totality of the situation was inherently Contradictory. The profits arising from the working of the two cement factories situated in Pakistan for the year October 1, 1962 to September 30, 1963, and for the year October 1, 1963 to September 30, 1964, were not taxable in the hands of the assessee-company."

The Hon'ble Kerala High Court in Sarala Devi (K.) (Smt.) Vs. Commissioner of Income-tax 1996 222 ITR 211 (Ker) held that it nature of obligation which is a decisive factor. It held as under: "In order to determine whether there has been a diversion of income by overriding title the true test is whether the amount Sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There difference between an amount which a person is obliged to apply out of his income and an amount which by the nature obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before, it reaches the assessee, it is deductible; but where the income is required to

be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which income never reaches the assessee, who even if he were to feet it, does so, not as part of his income, but for and on behalf of the person to whom it is payable."

49. From the facts of the case, it can be said that where a superior title is created before any income accrues or arises, it would be the diversion of income by overriding title but where there is no obligation attached and income is applied as per assessee's own choice after it accrues, it will not be a case of diversion by superior title as no superior title existed. In diversion, there is no earmarking by the assessee of a particular income but a charge is created upon his property being source of income. A charge created voluntarily for own purpose cannot be claimed as diversion. If there is an obligation before an income accrues and the assessee is under compulsion to discharge his obligation, it would be a case of diversion by superior title but, where there is no compulsion and no pre-existing obligation, but it is assessee's choice to create an obligation on himself either before income received, accrues or arisen or thereafter, it would only be a case of application of income. A compulsion at source imposed by a third party is necessary to create a superior title. Just because diverted income is collected by the assessee himself for and on behalf of the beneficiary; it cannot be inferred that it was only an application and not diversion. In the instant case, the assessee has been obligated by virtue of the agreement to divert the income at source and also for the contributions made by the holding company. Thus, we hold that the revenue sharing agreement entered with the holding company by the assessee is diversion of income by overriding title. The revenue's contention that the entire transaction is sham and aimed at only to divert the income to EMLL cannot be said to be correct based on the facts and the judicial pronouncements."

10. In view of the above finding of the coordinate bench in case of assessee itself based on the same agreement, we do not find any merit in the appeal of the assessee in deleting the addition made by the learned CIT – A holding that the agreement between the holding company as well as the assessee was not

sham agreements. Accordingly, we dismiss the appeal of the learned assessing officer.

11. Now we come to the appeal of the assessee. The coordinate bench has also dealt with the issue whether the payment of the disbursement income to the holding company was diversion of income by overriding title or merely on application of income. The coordinate bench has held in paragraph number 51 of the order of the coordinate bench, it has been held that the payment made to the holding company is obligated the in diversion of income by overriding title. The coordinate bench also after considering the contribution made by the holding company and keeping in view the amounts that have been already offered for taxation in the hands by the respective entities the above expenditure is allowable in the hands of the company. The relevant paragraphs as cited above that the revenue sharing agreement entered with the holding company by the assessee is a diversion of income by overriding title, we allow ground number one of the appeal following the reasoning given by the coordinate bench.
12. In view of our above finding, the ground number two, three and four of the appeal of the assessee, following the order of the coordinate bench in assessee's own case for the earlier years and in absence of any change in the facts and circumstances of the case are also allowed with similar directions.
13. In the result, appeal filed by the learned assessing officer is dismissed and appeal filed by the assessee is allowed.

Order pronounced in the open court on 13/05/2020.

-Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 13/05/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi