$~116

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 433/2024

PR. COMMISSIONER OF INCOME TAX -7 .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar & Mr. Rishabh Nangia, Advs.

versus

VR DAKSHIN PRIVATE LIMITED (FORMERLY KNOWN AS M/S SUGAM VANIJYA HOLDINGS PVT. LTD.)

.....Respondent

Through: None

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% **13.08.2024**

CM APPL. 46369/2024 (806 Days Delay in Refiling)

Bearing in mind the disclosures made, the 806 days in refilling the appeal is condoned.

Application stands disposed of.

ITA 433/2024

1. Notice. Although the respondent is stated to have been placed on advance notice, none has appeared on its behalf when the matter was called.

2. Consequently, let learned counsel appearing for the appellant take steps for service upon the respondent through all permissible modes including via approved courier service.

3. Having heard Mr. Rai, learned counsel appearing in support of the appeal, we note that insofar as questions 'C', 'D' and 'E' and which pertained to the exclusion of the entity Bright Buildtech Ltd. are concerned, the **Income Tax Appellate Tribunal**[1] has returned the following findings which are clearly unexceptionable:

> "**14.** We have heard both the parties and perused all the relevant material available on record. The Ld. AR made the contention before us that the adjustment made in the transfer pricing proceedings was made on a protective basis and as per Tribunal's decision in AY 2013-14 in the present assessment year the transfer pricing adjustment would become academic as the expenses would remain to be capitalized and the adjustment will not affect the profit and loss account. But the contention of the Ld. AR appears to be not correct as the adjustment made by the Transfer Pricing Officer is more of alternative assessment in the nature rather than a protective as claimed by the Ld. AR. There is a substantive assessment in the Assessment Year 2013-14. Merely not having any impact/effect to the profit and loss account will not make the present assessment void. Hence, the contention of the Ld. AR that there is no substantive assessment does not sustain. Thus, the protective assessment is valid in this year. Ground No. 6 is dismissed. Therefore, we proceed on the alternative contentions of the Ld. AR. In the present case, the assessee has acquired the FCCDs which are unsecured during the Financial year 2011-12 and till the date of Assessment Year 2013-14, where the business was not commenced coming under tax purview as held in Assessment Year 2013-14 by the Tribunal. But, the Ld. DR submitted that in the present Assessment Year, the business was commenced and the decision in the case of Indian Vaccine (Supra) has not been considered in assessee's own case for Assessment year 2013-14 by the Tribunal. The Ld. DR more specifically distinguished the decision of India Oil Panipat Power Consortium Ltd. which was relied by the Tribunal in A.Y. 2013-14. Though the Ld. AR in his submission tried to refute those distinction, was not able to succeed because of the fact that in the present assessee's case in this Assessment Year, the business has commenced and assessee could not make out the case that the funds were not at all directly or indirectly linked to the business of the assessee. The Ld. AR has made the submission that a search for the interest paid on debentures by the broadly comparable companies engaged in the development of real estate was conducted for set off 34 comparable transactions. The range of interest rate charged in the comparable

[1] Tribunal

uncontrolled transactions is 15% to 18.50% with the median of 17.45%. Since the interest paid by the assessee @ 15% p.a. is within the arm's length range. The International transaction relating to repayment of interest on FCCDs is at an arm's length. But from the perusal of the order of the TPO is can be found that the TPO rejected the approach and economic analysis of the assessee without giving any specific reasons and determined an arm's length interest rate of 0.717% and proposed to compare the same with the interest of 15% p.a. paid by the assessee on the FCCDs and thereby proposing an adjustment to the income of the assessee. Further, it can be seen that the contentions of the Ld. AR that the TPO has inappropriately considered Bright Buildtech as a comparable agreement appears to be correct. The NCDs issued by Bright Buildtech at 1% rate of interest and these have been issued to an overseas entity namely Clear Horizon Investments Pvt. Ltd. in two tranches. The total amount of the NCDs issued to Clear Horizon is Rs. 365 crores. From the balance sheet of Bright Buildtech in the year of issue reveals that the book value of the total assets of Bright Buildtech is Rs. 654,33,84,492/- as compared to 365 crores which is the total amount of NCD issued. Thus, percentage of NCDs issued to Clear Horizon to the total assets of Bright Buildtech is 55.78%. As per Section 92(A)(2)(c) of the Act, Clear Horizon shall be treated as an Associated Enterprise of Bright Buildtech since the loan was Clear Horizon exceeds 51% of the book value of the total assets of the Bright Buildtech. Thus, the NCD issued by Bright Buildtech to Clear Horizon cannot be taken as the comparable since Clear Horizon is an AE of Bright Buildtech. The Ld. AR has given the benchmarking results of the comparables taken by the TPO after excluding Bright Buildtech as below:

S. No.	Company Name	Coupon Rate
1	Kapstone Constructions Pvt. Ltd.	21.3%
2	Flicker Project Pvt. Ltd.	13%
3	Ashiana Landcraft Realty Pvt. Ltd.	14%
4	Ashiana Landcraft Realty Pvt. Ltd.	14%
	Average	15.58%

Thus, from the above chart we can see that the average of the comparables taken by the TPO/AO (after excluding Bright Buildtech) comes at 15.58%. Hence, we direct the TPO to consider the transaction of the assessee in relation to the payment of interest on FCCDs in light of these four comparables mentioned hereinabove at arm's length. Thus, Ground no. 7 to 10 are allowed."

4. We note that insofar as question 'A' is concerned, the same already stands admitted inter partes in terms of the orders passed in ITA 82/2020 and ITA 212/2024. We also find merit in the challenge which stands raised to the question of capitalization of market research expenses and depreciation of leasehold improvements and which the Tribunal has recorded to be revenue in nature. We take note of the undisputed position of these expenses being pre-commencement of business expenses.

5. We, consequently, admit the instant appeal on the following two questions of law:

A. Whether on the facts and in the circumstances of the case, the Tribunal has erred in deleting the addition made by the **Assessing Officer**[2] on account of income from other sources without appreciating that during the stage of pre-commencement of business, interest derived by the assessee from the borrowed funds which were invested in fixed deposits with banks would be chargeable to tax under the head 'income from other source' and not to reduce the capital work in progress?

B. Whether on the facts and in the circumstances of the case, the Tribunal has erred by not relying on the judgment in the case of **MIS Tuticorin Alkali Chemicals & Fertilizers Ltd.**

[2] AO

vs CIT[3] wherein the Apex Court has held that interest earned during pre-commencement period by placing surplus funds in the bank account is taxable as income under the head income from other sources?

6. Let the matter be called again on 21.11.2024.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

AUGUST 13, 2024/kk

---

[3] [227 ITR 172 (SC)]