

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : E : NEW DELHI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITAs No.2135 & 2136/Del/2022
Assessment Years: 2016-17 & 2017-18

ACIT,
Central Circle-26,
New Delhi.

Vs Noida Cyber Park Pvt. Ltd.,
DGL006, Ground Floor,
DLF Galleria,
Mayur Vihar Phase-I,
New Delhi – 110 091.
PAN: AAACF5292Q

Cross Objections No.103 & 104/Del/2023
(ITAs No.2135 & 2136/Del/2022)
Assessment Years: 2016-17 & 2017-18

Noida Cyber Park Pvt. Ltd.,
DGL006, Ground Floor,
DLF Galleria,
Mayur Vihar Phase-I,
New Delhi – 110 091.
PAN: AAACF5292Q

Vs. ACIT,
Central Circle-26,
New Delhi.

(Appellant/Cross Objector)

(Respondents)

Assessee by : Shri Gaurav Jain, Advocate &
Ms Shweta Bansal, CA
Revenue by : Shri Subhra Jyoti Chakraborty, CIT, DR
Date of Hearing : 22.11.2023
Date of Pronouncement : 15. 01.2024

ORDER

PER ANUBHAV SHARMA, JM:

The appeals are preferred by the Assessee against the orders dated
28.06.2022 of the Commissioner of Income Tax (Appeals)-29, New Delhi,

(hereinafter referred to as ‘the Ld. First Appellate Authority or in short as ‘ the Ld. ‘FAA’) in appeals No.CIT(A), Delhi-6-10248/2018-19 and No.CIT(A), Delhi-6-10418/2019-20 arising out of appeals before it against the orders dated 28.12.2018 and 26.12.2019 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) by the ACIT, Circle 18(2), Delhi (hereinafter referred to as ‘the Ld. AO’). The assessee has filed Cross Objections for both the assessment years.

2. Heard and perused the record. The Ld. Representatives have fundamentally relied upon the orders of Ld. Tax Authorities in their favour. As a matter of fact, the assessee is engaged in the business of conceiving, designing, developing, setting up and maintaining integrated technology parks and related services.

2.1 In ITA No.2135/Del/2022 & CO No.103/Del/2023 (AY : 2016-17), the relevant facts are that during the year relevant to assessment year 2016-17, the assessee has sold 4th, 5th, and 6th floor of tower C 28 & 29, Sector 62, Noida, for aggregate sale consideration of Rs. 40,89,55,000/-. Circle rate of these properties was Rs.63,41,22,000/-. The Ld. AO has made the addition of differential amount u/s 50C on the ground that sale consideration is less than circle rate. The assessee has objected to the same by stating that fair market value is less than circle rate. Therefore, the Ld. AO made the reference u/s 50C(2) to the Ld. DVO on 12/11/2018 who did not send the valuation report till

the finalization of assessment order. The Id. AO was not convinced with the claim of the assessee that section 50C is not applicable in case of leased properties and made the addition. This addition was deleted by the Id.CIT(A) following the order of the Tribunal in assessee's own case for AY 2015-16.

2.2 Further, the Id. AO questioned the loans given to related parties and, finding no commercial expediency or business interest in giving such loans, made the addition which was deleted by the Id.CIT(A) by accepting the plea of the assessee that the amounts were given to the subsidiary for the purpose of development of projects in which the assessee also had substantial interest. The Id.CIT(A) also deleted the loan processing charge in that regard which was disallowed by the Id. AO.

2.3 Further, in both the AY, the Id. AO questioned the travelling expenses of the assessee concluding that the same were not wholly and exclusively for business purpose which the Id.CIT(A) restricted to the extent of 25% deleting the remaining 75%.

2.4 Further, the Id. CIT(A) on his own has made a disallowance u/s 36(1)(iii).

2.5 Accordingly, the Revenue is in appeal in AY 2016-17, with the following grounds:-

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.22,51,67,000/- u/s 50C by following the decision of Hon'ble ITAT in the own case of the assessee

wherein it was held that provisions of section 50C are not applicable in the case of assessee when assessee himself adopted the sale proceeds as capital gain income. It also admits that the sale consideration were for Rs.63,41,22,000/-.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.22,51,67,000/- u/s 50C when the transfer of 'lease hold rights of property' for life long period assumes the character of 'deemed sale' as held by the Hon'ble Chennai High Court in the case of M/s Foxconn India Developer Limited (Tax Case appeal No. 801/2013).

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the circular No. 35/2016 of CBDT dated 13.10.20216 wherein the board has accepted the rulings of Delhi High Court that the onetime payment for transfer of leasehold rights is capital expenditure and assumes the character of deemed sale.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the disallowance of Rs.7,76,00,485/- to Rs.13,57,125/- u/s 36(1)(iii) when the assessee failed to brought on record any income from the loan advanced to M/s Logix Infrabuild (P) Ltd. even in the succeeding years during the appellate proceedings.

5. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs.12,49,16,473/- u/s 37 when the assessee failed to brought on record any business income/output from it even during the appellate proceedings.

6. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the disallowance of Rs.57,32,076/- to Rs.42,99,057/- on account of travelling expenses when the Ld. CIT(A) himself mentioned that the assessee failed to establish any link of these expenses with the business of the assessee company.

7. The appellant craves, leave or reserving the right to amend modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

2.6 The assessee has raised the following cross objection for AY 2016-17:

“i) Ld. CIT(A) grossly erred on fact as well as in law in restricting the disallowance of Rs.7,76,00,845/- made by Ld. AO u/s 36(1)(iii) to the extent of Rs.13,57,125/- on account of advance of Rs.1,15,00,000/-

outstanding from Sh. Vikram Nath failing to appreciate that the advance outstanding from Sh. Vikram Nath was a business advance.

ii) Ld. CIT(A) grossly erred on fact as well as in law in restricting the disallowance of Rs.57,32,076/- made by Ld. AO on account of traveling expenses to the extent of Rs.14,33,019/- being 25% of total expenses on ad hoc basis without appreciating the said traveling expenses were incurred for the business of the appellant.

iii) The appellant craves leave to add, alter, modify and withdraw any ground of appeal before or during the appellate proceedings.”

3. In ITA No.2136/Del/2022 & CO No.104/Del/2023 (AY : 2017-18), the AO had made disallowance on account of loan advanced to M/s Logix Infrabuild (P) Ltd., questioning the commercial expediency and also travelling allowances as done in the previous year.

3.1 Further made a disallowance of Rs.54 lakhs on account of alleged excess remuneration paid to Shakti Nath, who was the director as the assessee allegedly failed to explain the nature of services provided by him with documentary evidences of giving salary equivalent to directorship period even after his resignation as director. The same was deleted by Ld. CIT(A) to the extent of Rs.54,00,000.

3.2 The Revenue has filed the appeal with the following grounds:-

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs.19,87,10,976/- u/s 36(1)(iii) when the assessee failed to brought on record any income from the loan advanced to M/s Logix Infrabuild (P) Ltd. even in the succeeding years during the appellate proceedings.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs.54,00,000 on

account of excessive remuneration paid to Sh. Shakti Nath when assessee failed to explain the nature of services provided by him and documentary evidence of giving salary equivalent to directorship period even after his resignation from directorship.

3. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs.26,42,778/- on account of travelling expenses when the Ld. CIT(A) himself mentioned that the assessee failed to establish any link of these expenses with the business of the assessee company.*

4. *The appellant craves, leave or reserving the right to amend modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”*

3.3 The grounds of Cross Objection filed by the assessee read as under:-

“i) Ld. CIT(A) grossly erred on fact as well as in law in restricting the disallowance of Rs.20,00,68,101/- made by Ld. AO u/s 36(1)(iii) to the extent of Rs.13,57,125/- on account of advance of Rs.1,15,00,000/- outstanding from Sh. Vikram Nath failing to appreciate that the advance outstanding from Sh. Vikram Nath was a business advance.

ii) Ld. CIT(A) grossly erred on fact as well as in law in restricting the disallowance of Rs.35,23,703/- made by Ld. AO on account of traveling expenses to the extent of Rs.8,80,925/- being 25% of total expenses on ad hoc basis without appreciating the said traveling expenses were incurred for the business of the appellant.

iii) The appellant craves leave to add, alter, modify and withdraw any ground of appeal before or during the appellate proceedings.”

4. In regard to the first issue, Grounds No.1 to 3 in AY 2016-17, it comes up that the Id.CIT(A) has made the deletion primarily following the decision of the coordinate Bench of the Tribunal in the case of the assessee for 2015-16. The Id. DR has, however, relied on the judgement of the Hon’ble Supreme Court in the case **R.K. Palshikar (HUF) vs. CIT 1988 AIR 1305**. However, we have considered the order of the Hon’ble Supreme Court in the case of **R.K.**

Palshikar (HUF)'s case (supra) and observe that was case primarily for determination as to if capital gains tax is payable by the assessee on amounts of premium received by the assessee in respect of lease granted by the assessee. In those circumstances, the 99 year lease was considered to be transfer of capital asset generating capital gains. However, with regard to applicability of section 50C of the Act, the capital asset is to be of the nature of 'land or building or both' and, on that basis, the coordinate Bench has given relief to the assessee which has been followed by Id.CIT(A) and we see no reason to deviate from and interfere in the order of the Id.CIT(A). Ground No.1 to 3 are not sustainable.

5. In regard to the second issue, grounds No.4 and 5 for AY 2016-17 and ground No.1 for AY 2017-18, it comes up that the borrowed funds have been advanced to subsidiary by the assessee. We are of the considered view that investment in the subsidiary has to be *prima facie* considered to be out of business expediency unless established otherwise by the AO. The Id.CIT(A) has taken into consideration the agreement dated 02.07.2015 entered into between the assessee and M/s Logix Infrabuild (P) Ltd., which is a special purpose company (SPV) of the assessee and the fact that advance was given for the purpose of development of the projects by the special purpose company on the basis of the land allotted to this company by the Yamuna Expressway Industrial Development Authority. The assessee is, admittedly, entitled to the

revenue of 10% of the gross receipts. The Id.CIT(A) has taken into consideration the fact that in the financials the advance to M/s Logix Infrabuild (P) Ltd., was issued under the head 'Enterprises owned or significantly influenced by key management personnel or their relatives including fellow subsidiaries.' The Id.CIT(A) also examined the financials of M/s Logix Infrabuild (P) Ltd. to conclude that the assessee company has been shown as a fellow subsidiary. The Id.CIT(A) has also taken into consideration following fact:

“10.8 Further in para 4.6 of the assessment order, the AO has stated that the entire advance of Rs.228.30 crore as having been given to M/s Logix Infrabuild was not entirely funded through borrowed funds. It has been stated by the AO that out of Rs. 228.30 crores of advance given, the Appellant had surplus funds to the extent of Rs. 78.3 crores which form part of the total funding of Rs. 228.30 crores. It was seen that as on 31/03/2016, the appellant had aggregate liabilities of Rs. 527.24 crores, out of which the paid up capital and free reserves are Rs.233.55 Crore. Further, in Table 9 on page 20 of the assessment order, the AO has stated that appellant was having a sum of Rs.78.30 crore as total interest free source (excluding the borrowing). Considering the above, it will not be correct to conclude that entire loan given to M/s Logix Infrabuild was out of borrowed capital.”

6. It came up during the argument that presently the project is going on and loan is standing. We find no merit in the argument of the Id. DR that unless some revenue is shown from the project, the assessee cannot justify the loan and the interest expenditure was rightly disallowed. We are of the considered view that when business expediency in regard to the expenditure is established how far it fetches revenue in the relevant assessment year is not of much consideration unless there is specific evidence of wasteful or excessive

expenditure, which is not the case here. Thus, we find no substance in the grounds.

7. Coming to the third issue, the ground No.6 for AY 2016-17 and ground no 3 in AY 2017-18, regarding travelling expenses, the ld.CIT(A) has restricted the disallowance on ad hoc basis to 25%. The assessee has filed cross objections in both the AY contesting the restriction of the disallowance. It comes up that the ld.CIT(A) has taken into consideration the nature of business of the assessee and the fact that the books of account of the assessee are duly audited. However, he also observed that, “But, it is also a fact that appellant failed to establish any link of such expenses with the business of appellant.” The ld. AR has submitted that to rent out the spaces available in Noida, Director/employees in offices of the assessee had to travel abroad. It was submitted that the earning is from rental income and the ld. AR has shown that there is an increase in the rental income during the year by letting out the premises to foreign brands.

8. After taking into consideration the orders of the ld. tax authorities below, it comes up that the ld. AO had called for certain information about the events organized, the persons these Directors/employees met abroad, minutes of the meetings or any communications with the foreign clients, correspondences with intermediaries or other persons and the same was not provided. The AO had disallowed the travelling expenses to the extent of Rs.57,32,076/-.

8.1 We are of the considered view that the Id.CIT(A) has self contradicted himself by recording satisfaction on basis of audited financial and also while considering the plea of assessee, that the AO has not made any specific requisition in respect of such travelling expenses, the Id.CIT(A) concluded that the assessee had also failed to establish any link of such expenses with the business of the assessee. If Ld. CIT(A) was satisfied with audited financial then ad hoc disallowance should not have been made. At the same time while considering the plea of assessee that AO had not called for specific information Ld. CIT(A) concluded that assessee had not provided any live link then Ld. CIT(A) should have exercised his powers to enquire the matter himself or given opportunity to assessee to provide the link of such expenses with the business of the assessee. In the light of the aforesaid, we are of the considered view that the ad hoc disallowance by the Id. CIT(A) was not justified and the issue is required to be restored to the file of the AO to give an opportunity to the assessee to provide necessary evidences of procuring business by the visits of its employees/directors and, thereupon, the Id. AO shall decide the issue afresh. **Thus, the ground No.6 for AY 2016-17 and 3 in AY 2017-18 is allowed for statistical purposes and the cross objection No.(ii) of the assessee in that regard stand dismissed.**

9. Coming to ground No.(i) of the cross objections in both the AY, it comes up that disallowance arises out of the examination of loans and advances

related party. Ld. AO had examined the advances to M/s Logix Infrabuild Pvt. Ltd. only. The Id.CIT(A) has concluded that the advance to M/s Logix Infrabuild Pvt. Ltd. is business advance and we have also sustained that above. However, Ld. CIT(A) then observed in para 10.14 in AY2016-17 as follows, which is also verbatim as para 8.14 in AY 2017-18:-

*“10.14 However, on the perusal of the audited balance sheet of the appellant, it was seen that in the related party schedule of the audited balance sheet, an advance of Rs. 1,15,50,000/- is appearing as outstanding from Sh. Vikram Nath, Key managerial personnel of the appellant company. Such advance does not have any link with the business of the appellant. Accordingly, the interest pertaining to such advance of Rs. 1,15,50,000/- outstanding from Sh. Vikram Nath should have been disallowed u/s 36(l)(iii). However, it seems that the AO inadvertently missed to consider the advance of Rs.1,15,50,000/- outstanding from Sh. Vikram Nath for making disallowance u/s 36(l)(iii). Therefore, the interest corresponding to the said loan to Sh Vikram Nath is disallowed amounting to Rs.13,57,125/- (1,15,50,000 * 11.75%), since the said loan is not for the purpose of the business. Accordingly, the disallowance of Rs.7,76,00,485/- on account of interest on term loans u/s 36(l)(iii) of IT Act, 1961 is modified and restricted to Rs.13,57,125/-. Thus, Ground no. 5 is partly allowed and Ground no. 6 is allowed.”*

9.1 Id. AR has pointed out that this advance was not given in the present year and that this was also a business advance. We are of the considered view that as without giving assessee an opportunity of hearing this variation in the order of AO is made by the Ld. CIT(A) the matter needs to be restored to the files of Ld. CIT(A) to consider the same again after giving opportunity of hearing to the assessee. **The ground no. 1 in cross-objections of assessee are accordingly allowed for statistical purposes.**

10. In A.Y. 2017-18, vide ground no 2, the Revenue has challenged the disallowance of Rs.54 lakhs on account of excessive remuneration paid to

Shakti Nath. The Id.CIT(A) considered the fact that the AO has invoked section 40A(2)(a) in regard to the amounts paid to Shakti Nath. The Id.CIT(A) observed in para 9.9 as follows:-

*“9.9 The AO disallowed 30% of the total salary/remuneration paid to Mr. Shakti Nath amounting to Rs.54,00,000/- (180,00,000*30%) on ad-hoc basis. In the previous year also, the same salary/remuneration was paid to Sh. Shakti Nath. Further, the appellant is a company and the accounts are duly audited. The AO has not rejected the books of accounts of the appellant. The AO has mentioned that salary paid to Mr. Shakti Nath is excessive and unreasonable without assigning any appropriate basis or reason. The AO has not brought any material on record to establish that the salary is on higher side. Accordingly, the disallowance of Rs.54,00,000/- made by the AO on account of 30% of the salary paid to Sh. Shakti Nath is hereby deleted. Accordingly, Ground no. 4 is allowed.”*

11. We are of the considered view that ad hoc disallowance cannot be made u/s 40A(2)(a) of the Act, without a finding of the A.O as to what as per him, is the fair market value. Even if it is assumed that the payment made is excessive and unreasonable, such arbitrary and baseless, adhoc disallowances cannot be upheld. The Id. AO was supposed to give a factual analysis of the evidences to establish that the expenditure is excessive or unreasonable having regard to the fair market value of the services of Shri Shakti Nath. On the one hand, the Id. AO observed that the assessee has not filed any evidences justifying the payment and, on the other hand, he allowed 70% of the remuneration. This itself is arbitrary and the Id.CIT(A) has rightly deleted the same. Thus, this ground of the Revenue has no substance.

12. **As a consequence of above discussion, the appeals of the Revenue are dismissed except with regard to the issue restored to the files of Id. AO and the Cross Objections of the assessee are partly allowed.**

Order pronounced in the open court on 15.01.2024.

Sd/-

Sd/-

(NARENDER KUMAR BILLAIYA)
ACCOUNTANT MEMBER

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated: 15.01.2024.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi