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

Decided on: 18th March, 2015

\+ ITA 213/2015 & CM No.4961/2015

CIT-I ..... Appellant

Through Mr. N.P. Sahni, Sr. Standing Counsel with Mr. Nitin Gulati, Adv.

versus

M/S MALIBU ESTATE P LTD ..... Respondent

Through Mr. Mayank, Adv.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. Admit.

2. The question of law raised by the Revenue in its appeal under Section 260A of the Income Tax Act, 1961 (hereafter referred to as "the Act") is with respect to the correctness of the ITAT's order dated 13th December, 2013 in ITA No.2278/Del/2011. The Revenue urges that the ITAT fell into error in permitting the accountancy practices of the assessee for the relevant year.

3. The facts briefly are that assessee carries on business as a colonizer and real estate developer. It developed a colony known as 'Malibu Town' in Gurgaon. Its return for the Assessment Year 2007-2008 is ₹1,61,88,518/-. The Assessing Officer (AO) however determined the taxable income at

₹2,05,11,315/- after having added ₹34,20,797/- as deemed sales in respect of 22 specific properties. The AO felt that the appropriate method of accounting for revenue recognition was AS-7 supported by the Institute of Chartered Accountant. This standard recognises the percentage completion method which has to be followed by all developers. The AO recomputed the income by treating advances against properties which had NIL outstanding balances, as sales and consequently the income of the assessee.

4. The CIT(A) held that identical practice had been followed by the assessee for the previous year, Assessment Year 2006-07 and that AO's addition had been set aside. The CIT(A)'s order then noted the relevant extracts of his order for the previous year. The ITAT in the present case refused to accept the Revenue's contentions, and held as follows:-

> *"8. We have carefully considered the submissions and perused the records. We find that it is undisputed that assessee had been following particular system of accounting for revenue recognition which has been mentioned in the Accounting Policies filed alongwith the return of income for the year under consideration as well as for earlier years. The same has been reproduced in the order of the Ld. CIT(A) quoted above. When assessee has been following the particular system of accounting consistently, Assessing Officer has chosen to depart from the accepted method of accounting of the assessee without putting forth the cogent reasoning. Furthermore, it is also undisputed that in respect of properties for which the addition has been made in this year, the sales has been recognised in the subsequent years. Moreover, in the preceding assessment year Ld. CIT(A) has deleted the similar addition. The deletion by the Ld. CIT (A)*

was affirmed by the Tribunal in ITA No. 4085/Del/2009 vide order dated 20.4.2012.

9. In this regard, we refer to the decision of the Hon'ble Apex Court in the case of CIT vs. Excel Industries in Civil Appal No. 125 of 2013 vide order dated 8.10.2013. In this case the Hon'ble Apex Court has inter-alia held that when in earlier asstt. Years the revenue accepted the order of the tribunal in favour of the assessee, then Revenue cannot be allowed to flip flop on the issue and it ought let the matter rest rather than spend the tax payers money in pursuing litigation for the sake of it. Hon'ble Court has further expounded that in the subsequent accounting year, assessee has disclosed the income and paid tax thereon and if the rate of tax remained the same in the present asstt. year as well as in the subsequent asstt. year, the dispute raised by the Revenue was entirely academic or at best may have a minor tax effect".

5. Counsel for the Revenue urges that the same question in respect of Assessment Year 2006-07 has been entertained and the appeal is pending in ITA 252/2013. It is urged that consequently the present assessment year should follow the same pattern. It was urged that the AO has good reason to add the amount in respect of the 22 properties, having regard to the fact that the entire project had been completed but yet the assessee claimed otherwise.

6. Counsel for the assessee however submitted that the assessee as well as the ITAT in the present case has relied upon the decision in *CIT vs. M/s. Excel Industries Ltd*., CA No.125/2013 decided on 8th October, 2013. In that case the Supreme Court had relied upon *CIT vs. Shoorji Vallabhdas and*

Co., (1962) 46 ITR 144 (SC) to highlight that income tax cannot be levied on hypothetical income. Likewise, the Court relied upon *Godhra Electricity Co. Ltd. vs. CIT* (1997) 225 ITR 746 (SC). The counsel stated that the three tests indicated in *M/s. Excel Industries Limited* (supra) would apply to the circumstances of this case given that the accountancy practices adopted by the assessee had been accepted earlier and that it was deemed to be the most appropriate for the activity in question.

7. In *CIT vs. Manish Build Well Pvt. Ltd*., (2012) 204 Taxman106, a Division Bench of this Court had relied upon the Supreme Court ruling in *CIT vs. Balahari Investment Pvt. Ltd.* (2008) 299 ITR 1(SC). There, the Supreme Court noticed the difference between the project completion method and the percentage completion method, and commented that both can achieve the same result.

8. This Court in *Manish Build Well Pvt. Ltd.* (supra) held as follows:-

> *"9 After the above judgments of the Supreme Court it cannot be said that the project completion method followed by the assessee would result in deferment of the payment of the taxes which are to be assessed annually under the Income Tax Act. Accounting Standards 7 (AS7) issued by the Institute of Charted Accountants of India also recognize the position that in the case of construction contracts, the assessee can follow either the project completion method or the percentage completion method. In view of the judgments of the Supreme Court (Supra), the finding of the CIT (A), upheld by the Tribunal, does not give rise to any substantial question of law. Further, the Tribunal has also found that there was no justification on the part of the assessing officer to adopt the percentage completion method for one year (the year under*

appeal) on selective basis. This will distort the computation of the true profits and gains of the business. For these reasons, we are of the view that no substantial question of law arises. We, therefore, decline to admit question Nos. 2 and 3".

9. The above ruling clearly establishes that the project completion method was appropriate in the circumstances of the case and the rationale for not adopting it in respect of the 22 transactions by the AO was illogical. The Court notices that in *M/s. Excel Industries*, the Supreme Court had indicated three tests to deduce whether income accrued to the assessee is real or hypothetical i.e. if there is a corresponding liability of the other party to pass on the benefits even without the transaction; probability or improbability of realization of benefits by the assessee etc.

10. In these circumstances, the AO's decision was based on hypothetical income given that for the previous years AS-7 had been permitted. Furthermore, applying the decision in *M/s. Excel Industries Ltd*. (supra), we are of the opinion that the rule of consistency ought not to have been departed from in this case.

11. For the above reasons, no substantial question of law arises.

12. The appeal is consequently dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K.GAUBA
(JUDGE)

MARCH 18, 2015/rb