IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B" : HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA.No.1868 & 1869/Hyd/2014
Assessment Year 2009-2010 & 2010-2011

Shalivahana Estates P. Ltd., (Formerly known as Shalivahana Estates) Secunderabad. PANAAQFS1547L	vs.	ACIT, Circle 10(1) Hyderabad.
(Appellant)		(Respondent)

For Assessee :	Mr. S. Rama Rao
For Revenue :	Mr. Y. Sesha Srinivas

Date of Hearing :	16.09.2015
Date of Pronouncement :	27.11.2015

ORDER

PER SMT. P. MADHAVI DEVI, J.M.

Both are assessee's appeals for the A.Y. 2009-2010 and 2010-2011 respectively. In both these appeals, the assessee is aggrieved by the order of the Ld. CIT(A) in confirming the action of the A.O. in holding that the amount of Rs.3 crores paid by the assessee to its sister concern Salivahana Associates, is not for the purpose of acquisition of property and in disallowing the claim of interest of Rs.10,05,932 thereon under section 24(b) of the I.T. Act.

2. Brief facts of the case are that the assessee firm, the owner of a property at Sarojini Devi Road, Secunderabad, entered into a development agreement with one of its sister concern M/s. Shalivahana Associates (referred to as "developer" hereinafter) for construction of a commercial complex on the said land with their own funds vide development agreement dated 01.04.2001. The said complex was completed in 2004 and thereafter the assessee entered into registered lease deeds dated 04.05.2005 with M/s. Secunderabad Hotels P. Ltd., for lease of the above mentioned constructed property. Thereafter, the assessee obtained a loan on lease rentals from UCO Bank to repay a loan obtained by the developer M/s. Shalivahana Associates from Oriental Bank of Commerce. Assessee claimed the interest paid to UCO Bank from 'the income from house property' as interest paid for acquisition or improvement of the property under section 24(b) of the Act for the first time during A.Y. 2005-06. During the scrutiny proceedings under section 143(3) of the Act for the A.Y. 2005-06, the A.O. called for the details of the loan advanced to the sister concern and after considering the details filed by the assessee, allowed the claim of the assessee. Similar claims made in A.Ys. 2006-07 and 2007-08 were allowed by the respective Assessing Officers. Thereafter, the CIT exercising jurisdiction under section 263 sought to revise the assessment orders for A.Ys. 2006-07 and 2007-08 on the ground that the assessee has obtained loans from UCO Bank against lease rentals and not for construction or

improvement of the property and therefore, the interest on such loan was not allowable under section 24(b) of the Act. Before the CIT, the assessee submitted that in the original development agreement dated 01.04.2001 the sharing ratio of the developer and the assessee was 65:35 respectively (of the bare structure) and that in addition to the above, the developer had agreed to pay an interest free non-refundable deposit of Rs.80 lakhs to the owner and that the developer failed to pay the non-refundable deposit and in lieu of that, the developer has agreed to enhance the sharing ratio to 50:50 and the supplementary agreement dated 19.12.2002 was accordingly entered into. It was further submitted that as the work was in progress, the assessee wanted to sell their share of the area with furnishings and requested the builder to complete all finishing and that both the parties mutually agreed for such works to be completed @ Rs.300 per sq. feet which worked out to about Rs.330 lakhs towards assessee's share and that as there was a slump in the real estate market at that time, the assessee and the developer agreed to let out the property to a suitable tenant and M/s. Secunderabad Hotels P. Ltd., came forward to take the entire area on lease for a period of 10 years. It was submitted that as agreed, the developer completed the work before 31.12.2004 and the area was let out from 01.01.2005 onwards and as the assessee had to pay the amount of Rs.330 lakhs to the developer, it had availed a loan of Rs.300 lakhs from M/s. UCO Bank against the future rents in the financial year relevant to

A.Y. 2005-06 and the interest thereon was claimed under section 24(b) which was duly considered by the A.O. before allowing the claim of the assessee. It was submitted that the loan was availed for improvement of the asset and therefore, the interest was allowable under section 24(b) and as it was only a brought forward loan from earlier years which was allowed in the first year i.e., A.Y. 2005-06, the A.O. has allowed the same during the A.Ys. 2006-07 and 2007-08 and hence the proceedings under section 263 may be dropped.

2.1. The CIT, however, observed that the sharing ratio in the original development agreement dated 01.04.2001 as well as supplementary agreement dated 19.12.2002 was 50:50 and the mention in the supplementary agreement of the sharing ratio in the original agreement being 65:35 is not correct as in the original agreement itself the sharing ratio is 50:50. He therefore held that the supplementary deed is a make believe deed to claim that assessee has provided some funds to the developer. He further observed that even in the lease deeds entered into with M/s. Secunderabad Hotels P. Ltd., there is no mention of the supplementary deed. Thus, he held the supplementary deed to be a colourable device introduced by the assessee to claim interest expenditure from the rental income. He accordingly held that the assessment order allowing the claim of interest under section 24(b) as erroneous and prejudicial to the interest of revenue and directed the A.O.

to further examine the allowability of the claim of the assessee under section 24(b) of the Act. The A.O. while giving effect to the order of the CIT under section 143(3) read with section 263 of the Act disallowed the claim under section 24(b). Meanwhile, assessee preferred appeals before ITAT against the order under section 263. 'B' Bench of this Tribunal in ITA.No.832 & 833/Hyd/2011 dated 26.03.2014 quashed the order under section 263 of the Act by holding it to be unsustainable. The relevant paragraph is reproduced hereunder :

> *"6. We have considered the issue and examined the paper book placed on record. As seen from the facts available on record, assessee did borrow funds to pay M/s. Salivahana Associates for completion of the building, which was leased out. Therefore, there is no diversion of funds as alleged by the Ld. CIT. Moreover, there is no other activity for the assessee except owning 50% share of the property which was leased out. As stated by the A.O. in A.Y. 2005-06, assessee's own resources of income is rental income and interest claimed on borrowed funds was examined in A.Y. 2005-06, wherein supplementary deed was also considered thereby, A.O. has given a finding that assessee owns 50% of the constructed area in the building. Not only that assessee also offered on income at 50% of the building, which was leased out, along with M/s. Salivahana Associates. Therefore, since assessee is owning the property of 50% of the share of the building and lease rent was also offered accordingly on the same area, finding by CIT that the supplementary agreement is not a real deed is not based on record. Just because assessee referred the original registered deed while leasing out the property, it does not mean that supplementary deed does not exist. Further for completion of the building, assessee paid an amount of Rs. 330 lahs out of which Rs. 300 lakhs was stated to be by way of loan from UCO Bank*

> *and as seen from the record, Rs.330 lakhs paid by the assessee was also offered by the said sister concern as income. Since these aspects were examined by the A.O. in A.Y. 2005-06 which was the first year, of not only rental income but also claim of interest on the borrowed funds, the observations of the CIT cannot be upheld. Since the A.O. examined this issue in the course of assessment proceedings, albeit in another assessment year while examining two assessment years simultaneously, any other opinion given by the CIT is not sustainable under law".*

2.2. Thereafter, during the A.Y. 2008-09, on the basis of the disallowance of the claim of interest in the earlier years, the returns of income processed under section 143(1) for the A.Ys. 2008-09, 2009-10 and 2010-11 were reopened by issuance of notice under section 148 of the Act to bring the amount to tax.

2.3. For the relevant assessment years before us, there was no compliance by the assessee to the notices issued under section 148 and no information was filed. Therefore, the assessment was completed under section 144 read with section 147 of the Act on the basis of the material available on record. The A.O. thereafter disallowed the claim of interest under section 24(b) on the same grounds on which the CIT sought to revise the assessments for A.Ys. 2006-07 and 2007-08 under section 263 of the Act. Aggrieved, the assessee preferred appeals before the CIT(A) who confirmed the orders of the A.O. for A.Ys. 2009-10 and 2010-11 and the assessee is in second appeal before us.

3. Ld. Counsel for the Assessee, Mr. S. Rama Rao, while reiterating the submissions made by the assessee before the authorities below submitted that the assessee's appeal for A.Y. 2008-09 was still pending before the CIT(A). As regards the present appeals and the issue therein, he has drawn our attention to the development agreements, supplementary deed to the development agreement and also loan applications of UCO Bank and also statement of account for the period 03.03.2005 to 02.09.2005 in UCO Bank the copies of which are all filed in the paper book filed before us. He has drawn our particular attention to the preamble of the Development agreement where the sharing ratio between the developer and the owner is mentioned as 65:35 and also para-5 of the agreement where it is mentioned that the developer is at liberty to sell their share of 50% of the premises. He submitted that the mention of 50% in para 5 is a mistake and the actual sharing ratio as agreed to was 65: 35 only as is further clarified in supplementary deed. The Ld. Counsel for the assessee further submitted that the assessments under section 143(3) read with section 263 were completed for the A.Ys. 2006-07 and 2007-08 and the assessee had challenged the order under section 263 before the ITAT and the Tribunal in ITA.No.832 & 833 of 2011 dated 26.03.2014 for the A.Ys. 2006-07 and 2007-08 respectively after accepting the existence of the supplementary deed, has quashed the proceedings under section 263 of the I.T. Act. He submitted that the assessments under section 143(1) for the relevant

assessment years before us i.e., A.Ys. 2009-10 and 2010-11 were reopened under section 147 on the basis of the assessments under section 143(3) read with section 263 for the earlier A.Ys. 2006-07 and 2007-08 and since the basis for those orders itself was knocked off by the Tribunal, according to him, the very basis for reopening of the assessment for the A.Y. 2009-10 i.e., assessment under section 143(3) read with section 263, is no longer in existence and hence these proceedings before us also are liable to be quashed. A copy of the orders of the Tribunal is placed before us.

4. The Ld. D.R, on the other hand, supported the orders of the authorities below and submitted that for the earlier assessment years, the assessments were revised under section 263 which has been quashed because according to the Tribunal, A.O. for A.Y. 2005-06 was aware of the supplementary deed by which the share of the property to the assessee was increased from 35% to 50% and hence such assessment order could not be revised, whereas the proceedings before us are the re-assessment proceedings which cannot be said to be same as revision proceedings under section 263.

5. Having regard to the rival contentions and the material on record, we find that the only dispute in this appeal is whether the assessee had borrowed funds for construction of the building and if so, whether the assessee is entitled to the interest on such borrowed

funds as deduction from the rental income. There is no dispute as regards the date of development agreement but the dispute is with regard to the sharing ratio mentioned in the development agreement and also about the existence of the supplementary deed and whether the assessee has advanced funds to the developer for the purpose of acquisition of property. To disbelieve the existence of the supplementary deed, the A.O. and the Ld. CIT(A) have relied upon the lease deeds entered into by the assessee with M/s. Secunderabad Hotels P. Ltd., wherein there is no mention of the supplementary deed even though they were stated to be executed after the execution of the supplementary agreement. They have observed that there is a mention of only the original development agreement dated 01.04.2001 in the registered lease deeds. Further, the A.O. has also considered the fact that the ratio of sharing between the assessee and the developer was mentioned as 50:50 even in the original development deed. As regards the assessee's claim of taking loan from UCO Bank Ltd. for acquisition of the property, the A.O. has observed that the loan has been taken after the execution of the lease deeds with M/s. Secunderabad Hotels P. Ltd., and therefore, the loan is on the rental income and not for construction of the building.

5.1. The Ld. Counsel for the assessee, in order to rebut this finding of the authorities below, has drawn our attention to the development agreement dated 01.04.2001

filed at pages 29 to 32 of the paper book to demonstrate that originally the sharing ratio was 65:35 only. He has also drawn our attention to the application form for the sanction/renewal/enhancement of the sanction of credit limits made to the Manager of the UCO Bank dated 19.01.2005. On perusal of the said application, we find that at item-8 of the application, as regards the purpose for which the credit limits are applied for, it is mentioned as "loan under rent scheme" and the purpose is mentioned as "to repay loan of M/s. Salivahana Associates taken from Oriental Bank of Commerce, S.D. Road Branch" and the amount mentioned is "Rs.3 crores". We also find from page 78 of the paper book filed by the assessee that UCO Bank has addressed a letter to the Chief Manager, Oriental Bank of Commerce, Secunderabad intimating that a cheque for Rs.3,44,00,000 bearing No.471770 dated 03.03.2005 favouring the Oriental Bank of Commerce for the account of M/s. Salivahana Associates is enclosed therewith and requesting the Bank to release the documents mortgaged by the loanee to the Bank since the assessee has availed credit facilities from UCO Bank against the same property. From the details of the property, it is clear that the very same building 'Bhuvana Towers' was mortgaged with the Oriental Bank of Commerce. Thus, though the assessee has taken the loan from UCO Bank after construction of the building, we find that the same has been taken to repay the loan taken from Oriental Bank of Commerce by its associate concern Shalivahana

Associates (the developer). The details of the purpose of loan from Oriental Bank of Commerce are not filed before us. Therefore, the exact purpose of the said loan is not known to us. However, the fact that the title deeds of Bhuvana Towers have been mortgaged with the Oriental Bank of Commerce raises the presumption that the loan must have been taken by the developer in relation to the said property. Since the construction of the property was completed in 2004 and the lease deeds were entered into on 01.01.2005, the contention of the assessee that the loan had been obtained by the developer for construction of the building is probable as no Bank would probably give a loan on a building which is not yet completed for any other purpose. However, the loan from Oriental Bank of Commerce was taken by the developer and the reason for the assessee to repay the same is stated to be for the purpose of acquiring the property.

6. Now, let us examine if the supplementary deed is acceptable. We find that initially the said deed was disbelieved by the CIT under section 263 wherein, he has reproduced the portion of both the development agreement as well as supplementary agreement, wherein the sharing ratio of parties has been mentioned as 50:50. The A.O., during the relevant assessment years before us, also has reproduced the same portion reproduced by the CIT in his order under section 263 to hold that the original agreement itself stipulated the sharing ratio as 50:50 and therefore the supplementary deed is a make

believe document. However, from the copy of the development agreement filed before us, we find that the developer had agreed to complete the construction of the building with its own funds and the sharing ratio is mentioned as 65:35. The reason for changing the sharing ratio is mentioned in the supplementary deed as providing of funds by the owner to the developer for the construction work. During the proceedings before the CIT under section 263, the assessee had stated that the developer had failed to pay the interest free non-refundable deposit of Rs.80,00,000 due to which the sharing ratio has been changed. There is no finding on this contention of the assessee by any of the authorities below. During the course of hearing before us also, the Ld. Counsel for the assessee, reiterated that the assessee did not receive the non-refundable deposit of Rs.80,00,000. Further, the reason for advancing the sum of Rs.300 lakhs has been mentioned as payment for finishing works @ Rs.300 per sq. feet for letting out the constructed area. It is not clear whether any agreement has been entered into for this purpose. However, since no copy of any such agreement is filed before us, it is presumed that there is no such written agreement. As seen from both the development agreement as well as the supplementary agreement, para-4 of the agreement provides that the developer shall complete the total construction including RCC civil works, while para-5 of the agreements provide that the developer shall bear all costs of architects, engineers, civil works, finishing and

shall indemnify Shalivahana Estates against any claims in this respect. Therefore, it is not clear as to what are the finishing works for which it was agreed to pay Rs.300 per sq. feet. The fact that the loan was obtained by the assessee after completion of the construction on the lease rentals cannot be the sole reason to come to the conclusion that the assessee has not incurred expenditure on the acquisition of the property. The time when the liability of the assessee has arisen is to be seen. If the assessee has agreed to pay the developer for the works outside the development agreement for making it fit for letting out the property with all amenities, it is the expenditure incurred by the assessee for acquisition or improvement of the property. The mode or time of payment would not determine the nature of the expenditure. Therefore, all these facts need verification by the A.O. which has not been carried out by the A.O. for the assessment years before us. But the first year of the claim is A.Y. 2005-06 wherein the claim of the assessee was allowed in the assessment proceedings under section 143(3) of the Act and this fact has been taken note of by the Coordinate Bench of this Tribunal while quashing the revision order under section 263 of the Act. As rightly held by the CIT(A), the observations of ITAT in the 263 proceedings may not be entirely relevant for the proceedings under section 144 read with section 147 of the Act but as seen from the copy of the assessee's submissions before the A.O. for the A.Y. 2005-06, we find that the assessee had submitted that it had requested the

builder to complete their share of constructed area for which the assessee shall reimburse the expenses incurred for providing all the amenities and that the availing of the loan was to reimburse the developer for such finishing works. Since the assessment for A.Y. 2005-06 was completed under section 143(3) of the Act after calling for various details and scrutiny of the same, it is to be presumed that the A.O. has verified the details and accepted the assessee's contentions after being satisfied about their acceptability.

7. It has been held by the Hon'ble Supreme Court in the case of Radhaswami Satsang vs. CIT reported in 193 ITR 321, that though, strictly speaking, *res judicata* is not applicable to the income tax proceedings as each assessment year is a unit and what was decided in one year might not apply in the following year, where a fundamental aspect permeating through different assessment years has been found as a fact in one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. The Full Bench of Hon'ble Delhi High Court in the case of Usha International reported in (2012) 348 ITR 485 has observed that when a regular order of assessment is passed in terms of the sub-section (3) of section 143, a presumption can be raised that such an order has been passed on application of mind and that a presumption can also be raised to the effect that in terms

of clauses (e) of section 114 of the Indian Evidence Act, the judicial and official acts have been regularly performed. Thus, there has to be consistency and uniformity in the approach of the Revenue in the assessee's own case in the subsequent assessment years on the same set of facts. Since the A.O. has accepted the assessee's claim after verification and the revenue has not taken any steps to revise or reopen the assessment for A.Y. 2005-06, the assessee cannot be asked to prove the same set of facts from year to year. Therefore, we are of the opinion that the disallowance of the claim of interest on the loan borrowed by the assessee from UCO Bank under section 24(b) of the Act is not sustainable. The assessee's appeals are accordingly allowed.

8. In the result, assessee's appeals for both the A.Ys. 2009-10 and 2010-11 are allowed.

Order pronounced in the open Court on 27.11.2015.

Sd/-	**Sd/-**
(S. RIFAUR RAHMAN)	**(SMT. P. MADHAVI DEVI)**
ACOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated 27th November, 2015

VBP/-
Copy to :

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2.	The ACIT, Circle 10(1), I.T. Towers, A.C. Guards, Hyderabad.
3.	CIT(A)-VI, Hyderabad
4.	CIT-V, Hyderabad
5.	D.R. ITAT 'B' Bench, Hyderabad.
6.	Guard File