

W.P.No.4019 of 2022

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.07.2023

PRONOUNCED ON : 03.01.2024

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.4019 of 2022

and

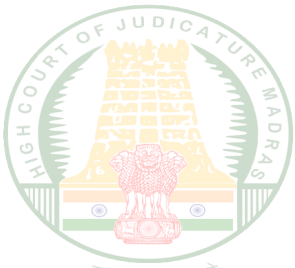
WMP.Nos.4161,4163 & 13667 of 2022

Express Infrastructure Private Limited,
Rep.by its Managing Director,
Kavita Y Singhanian

... Petitioner

VS.

- 1.The Income Tax Officer,
National Faceless Assessment Centre,
Income Tax Department,
Ministry of Finance,
Room No.401, 2nd Floor, E-Ramp,
Jawaharlal Nehru Stadium,
Delhi 110 003.
- 2.The Deputy Commissioner of Income Tax,
Corporate Circle-1(1)
Wanaparthi Block, 6th Floor,
Aayakar Bhavan,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai 600 034.



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3. The Commissioner of Income Tax (Appeals),
National Faceless Appeal Centre,
Delhi.
Respondents

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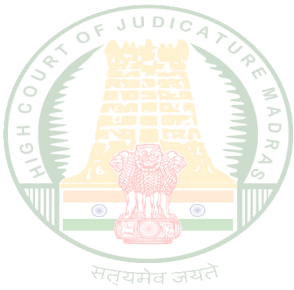
Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari, calling for the records in DIN & Letter No:ITBA/AST/F/17/2021-22/1039390471(1) dated 04.02.2022 on the file of the 1st respondent relating to the A.Y 2017-18 and quash the same.

For Petitioner : Mr.G.Baskar

For Respondents : Mr.B.Ramana Kumar
Senior Standing Counsel.

ORDER

The petitioner is aggrieved by the Impugned Order dated 04.02.2022, passed by the first respondent herein for the Assessment Year 2017-2018. By the impugned order, the first respondent has disposed of the objection of the petitioner against reopening of the assessment under Section 148 of the Income Tax Act, 1961.



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2. Operative portion of the Impugned Order dated 04.02.2022 reads as under:-

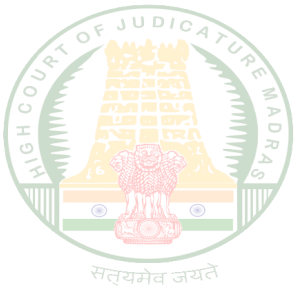
Assessee filed ROI in response to notice u/s. 148 of the Income Tax Act, 1961 on 21.04.2021.

The copy of reasons recorded was provided to the assessee on 30.04.2021.

Assessee filed objection to the re opening proceedings. Objections raised are dealt with as under:-

The Assessee filed Return of Income u/s. 139(1) of the I.T. Act, 1961, admitting total income of Rs.63,84,44,100/-. Assessment proceedings u/s.143(3) were completed on 27.11.2019.

During the course of proceedings, it was noted that the assessee had claimed an amount of Rs.11,00,19,005/- as marketing and sales expenses. Perusal of the records indicate that the assessee had entered into an agreement with M/s.Express Exclusive whereby company had agreed to develop the land acquired by eedpl by constructing residential apartments and selling the same. The company had undertaken to do so this entire activity at its own cost, risk and responsibility. The agreement intends to develop upto 6 blocks together with its requisite amenities with a total 6 blocks. Spanning over a saleable area about 4.28 acres total built up area is 9.25 sq.ft. to be



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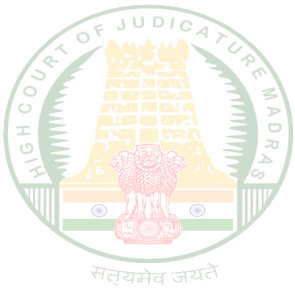
sold as residential apartment.

*It is noted that in pursuance to this agreement, the assessee had incurred certain expenditure which are claimed as **Model Flat and new sales office expenses and marketing expenses Express exclusive. Total expenses claimed amounts to Rs.11,00,19,005/-**. It is noted that the assessee had not recognized any income in respect of the project for which these expenses were incurred.*

Since no income was offered, it is believed that the respective project may not have been started or the assessee may be following project completion method. Since no revenue was recognized, expenses under the head Marketing and Sales Office should have been classified as work in progress. On perusal it is noted that the assessee has claimed these expenses as revenue and sought adjustment thereof against revenue receipt. Vide present proceedings, the revenue intends to assess these expenses as capital followed by capitalization as WIP. The assessee has objected to the reopening of the assessment on this issue.

The assessee has filed written submission giving details about the expenses incurred on marketing and sales office and claimed that these expenses were in the nature of revenue expenditure in respect of the ongoing project.

On this issue, it is replied that the expenses as discussed here in above were incurred in respect of the project in respect of which no income was offered in the Financial Year



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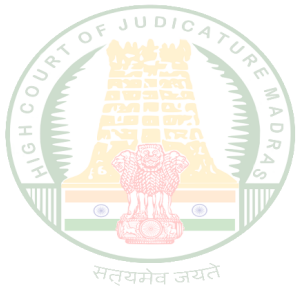
relevant to Assessment Year 2017-18 and as such these expenses should have been capitalized. It is further noted that these expenses were in the nature of Marketing and Sales and having enduring advantage. As such, the classification of such expenses as Capital Expenditure is proposed. Considering the facts of the case, it is recorded that the classification of such expenses as revenue expenses was improper. In view of these reasoning, objections raised not acceptable on this issue.

Issue No.2:

Capitalisation of Rs.2,81,66,380/- towards Loan Processing Charges.

On the basis of statement of accounts, it is noted that the assessee had claimed financial cost of Rs.12,34,07931. This financial cost relates to the Express Exclusive Project and as such this amount was transferred to the Work in Progress of the said project. On verification of the record, it was noted that the sum of Rs.2,81,66,330/- being Loan Processing charges remained to be capitalized as Work in Progress of the exclusive project.

On this issue, it is contended that these expenses were incurred for switching over of loans. It is further claimed that the assessee had taken financial assistance from the several banks for the purpose of maintaining cost of mall and office complex. It is further claimed that during the year, assessee had finance from



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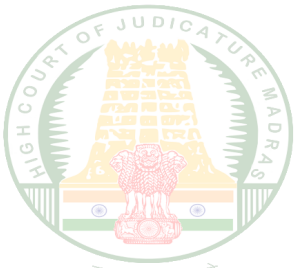
consortium of banks led by the Axis Bank Private Limited, which funded the project to HDFC Bank Limited. It is assessee's contention that such charges are expenses for switching over of loans.

The assessee's objection on this issue is not acceptable. Notes forming part of the financial statement has mention about these expenses as attributed to the Express exclusive project. Since such costs are directly attributed to the project where no income was recognized, all expenses including financial cost should have been capitalized. As such, it is held that the claim of such expenditure against the Revenue Receipt is improper.

The income has escaped assessment to the extent of adjustment of such expenditure. The assessment was reopened on the above mentioned factual position. During the course of reopening proceedings, the Assessing Officer had judiciously examined the issues and applied his mind.

In view of the above discussion, the assessee's objection stands rejected.”

3. The specific case of the petitioner is that the petitioner filed a regular Return of Income under Section 139 of the Income Tax Act, 1961 for the Assessment Year 2017-2018 on 28.09.2017, ultimately culminated in a Scrutiny Assessment Order dated 27.11.2019 under Section 143(3) of the Income tax



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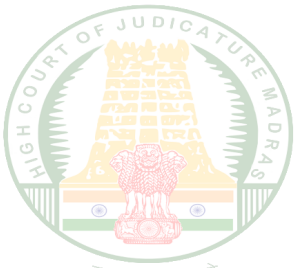
Act, 1961.

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4. It is submitted that the Scrutiny Assessment Order dated 27.11.2019 passed under Section 143(3) of the Income tax Act, 1961 preceded a notice dated 16.10.2019 under Section 142(1) of the Income Tax Act, 1961, wherein all the information were called for which were the subject matter of the proposed re-assessment. It is therefore submitted that there is no scope for reopening the assessment completed on 27.11.2019 and therefore there is jurisdictional error.

5. It is submitted that the Assessing Officer considered all the issues threadbare before passing Scrutiny Assessment Order on 27.11.2019 under Section 143(3) of the Income Tax Act, 1961. It is therefore submitted that the question of re-opening the assessment under Section 148 of the Income Tax Act, 1961 cannot be countenanced.

6. The petitioner has incidentally filed an appeal before the Appellate Commissioner in I.T.A.No.10138 of 2019-2020 against the Assessment order



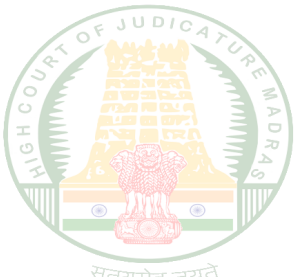
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dated 27.11.2019 which has now been transferred to the National Faceless Assessment Appeal Centre and is yet to be adjudicated.

7. The learned counsel for the petitioner would submit that out of two issues which were flagged vide notice issued under Section 143(2) read with Section 147 of the Income Tax Act, 1961 on 30.04.2021, the first issue related to expenses incurred by the petitioner towards Model Flat and New Sales Office Express Exclusive.

8. The learned counsel for the petitioner would submit that the expenses claimed as deduction was partly disallowed to an extent of Rs.3,61,04,486/- and therefore question of reopening of the assessment on the same issue which was considered before the Assessment Order dated 27.11.2019 was passed under Section 143(3) of the Income Tax Act, 1961 cannot be countenanced.

9. The learned counsel for the petitioner submits that as far as second issue relating to amounts paid towards foreclosure of loans is concerned, the said issue was also subject matter of the Scrutiny Assessment order dated 27.11.2019 as the said issue arising out of the foreclosure of loans with four



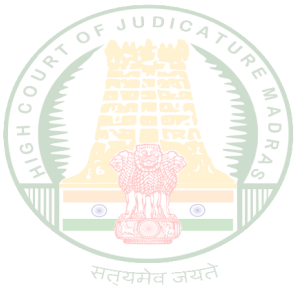
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banks and payment of processing charge was also considered by the Assessing Officer before passing the Scrutiny Assessment Order dated 27.11.2019.

10. Hence, it is submitted that the reopening of the assessment and overruling of the petitioner's objection to reopening of the objection vide Impugned Order dated 04.02.2022 is liable to be interfered and is therefore liable to be set aside.

11. The learned counsel for the petitioner submits that on the second issue, the view of the Delhi High Court in the case of **Commissioner of Income Tax vs. Gujarat Guardian Limited**, [2009] 177 Taxman 434 (Delhi), which has been affirmed by the Hon'ble Supreme Court reported in (2020) 107 CCH 0133 ISCC; Civil Appeal No.7615 of 2009 with Civil Appeal No.2414 of 2010 dated 14.01.2020.

12. It is submitted that this view has also been followed by the Hon'ble Division Bench of this Court in **Commissioner of Income-tax Corporate Circle 3, Chennai vs. Thiru Arooran Sugar Limited**, [2021] 130 taxmann.com 113 (Madras).



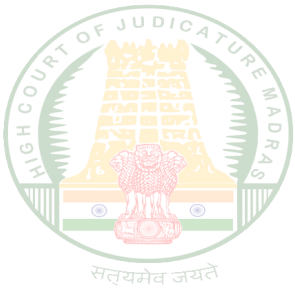
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13. Hence, the learned counsel for the petitioner submits that even otherwise on this count reopening of the assessment in respect of the amounts paid towards processing charges of loan and re-closure charges paid for loan has been rightly allowed and there is no scope for reopening of the assessment.

14. The learned Senior Standing Counsel for the respondents would submit that while overruling the objection of the petitioner against reopening of the assessment under Section 148 of the Income Tax Act, 1961, the respondents are not determining the issue one way or other.

15. That apart, the learned Senior Standing Counsel for the respondents would submit that the amounts that was written-off as expenses by the petitioner for the assessment year 2016-2017 was without actual generation of any income during the aforesaid Assessment Year (relevant financial year 2016-2017) and therefore the question of claiming expenses did not arise as it is contrary to the accounting standards.



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16. It is submitted that at the time of scrutiny assessment on 27.11.2019, the Assessing Officer was merely examining the amounts shown as expenses incurred towards Model Flat advertising, Marketing Expenses and New Sales office etc.

17. It is further submitted that the petitioner has not disclosed the income that the petitioner would have generated immediately after the project was launched during the financial year 2016-2017.

18. The learned Senior Standing Counsel for the respondents further submits that under *proviso* to Section 147 of the Income Tax Act, 1961 as it stood prior to 01.04.2021, it is clear that in terms of Explanation 2 to sub clause (c) to the third proviso to Section 147 as it stood then, it shall be deemed that where an assessment has been made but the income chargeable to tax has been under assessed, it shall deemed to be a case where income chargeable to tax had escaped assessment. It is therefore submitted that even in case where four years



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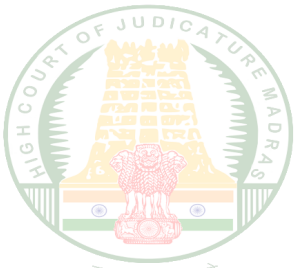
had lapsed the respondents were entitled to reopen the assessment.

19. In case, it is submitted that admittedly the notice under Section 148 of the Income Tax Act, 1961, was issued on 30.03.2021 within a period of four years from the end of the assessment and therefore there is no scope for interfering with the Impugned Order disposing of the objection of the petitioner against reopening of the assessment for the assessment year 2017-2018. Hence prayed for dismissal of the writ petition.

20. The learned Senior Standing Counsel for the respondents further would submit that only option available if at all is under Section 263 of the Income Tax Act, 1961.

21. have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent.

22. The reasons furnished for reopening the assessment vide Notice dated 30.04.2021 issued under Section 143(2) read with Section 147 of the Income



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Tax Act, 1961 reads as under:-

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“Issues as per reasons recorded for reopening:-

On verification of the records, it is seen from (Note-24-Other Expenses) of Notes forming part of Financial statement that the company has entered into an agreement with Express Exclusive Developers Private Limited (EEDPL), whereby the company has agreed to develop the land acquired by EEDPL, by constructing residential apartments and selling the same. The company has undertaken to do this entirely at its own cost, risk and responsibility as part of its own business, and EEDPL will be entitled to all the amounts realized for transfer of undivided interest in the said land. The agreement is to develop up to 6' block together with requisite amenities with a (Total 6 Blocks). Spanning over a saleable area about 4.28 acres total built up area is 9.25 lacs sq.ft. to be sold as residential apartment.

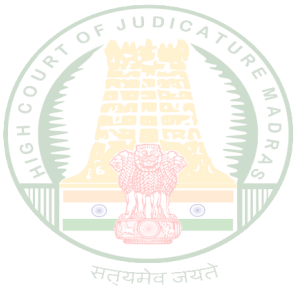
It is also seen from the P&L account that the following expenses is debited under other expenses as follows:-

*1.Model Flat and New Sales Office Expenses
Exclusive = Rs.6,23,52,886*

*2.Marketing Expenses Express Exclusive =
Rs.4,76,66,119*

Total = Rs.11,00,19,005

Since the assessee company not offered any income on sale proceeds of above said project in the FY relevant to the AY 2017-18 and hence claiming the above said expenditure of



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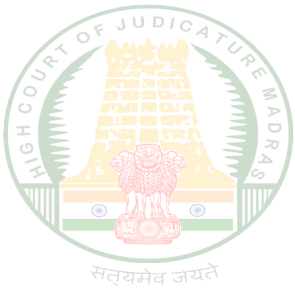
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Rs.11,00,19,005/- is not in order. Hence, the entire expenditure has to be disallowed and added back to the total income.

It is further observed from (Note 24- Finance Cost) of Notes forming part of Financial statement that the company has debited the finance cost of Rs.12,34,07,931/- (Express Exclusive Project) in the P&L account and the same was transferred to WIP of Express Exclusive project. However, it is seen that a sum of Rs.2,81,66,330/- towards Loan processing charges is omitted to be capitalised (i.e.) transferred to WIP of Express Exclusive Project.

Further, it is found from the P&L account that a sum of Rs.25,23,569/- is debited as Corporate Social Responsibility in the FY relevant to the AY 2017-18. However, it is observed from the computation statement that a sum of Rs.9,42,569/- towards CSR expenses is only added back to total income."Hence, the balance amount of Rs.15,81,000/- [Rs.25,23,569 – Rs9,42,569] is required to be added back to total income.

23. In the assessment, that was completed on 27.11.2019, one of the issue related to deduction claimed by the petitioner for a sum of Rs.6,13,52,886/- towards advertising and marketing expenditure for Model Flat measuring an extent of 5372 sq.ft. at Rs.11,420 per sq.ft.



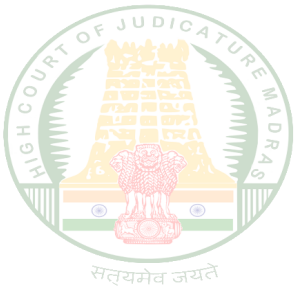
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24. While passing the Assessment Order dated 27.11.2019, the Assessing Officer held that the cost per sq.ft. arrived Rs.11,420/- per sq.ft. for the model flat was exorbitant. Therefore, the Assessing Officer restricted it to Rs.4,700 per sq.ft. for a sum of Rs.2,52,48,400/- [4700 x 5732 sq.ft.].

25. In the result, the expenses claimed for an amount of Rs.6,13,52,886/- was restricted to R.2,52,48,400/- under Section 37 of the Income Tax Act, 1961 and added the balance to the income of the petitioner. The petitioner is in appeal before the Income Tax Appellate Tribunal in ITA.No.10138/2019-2020.

26. The records reveal that now the petitioner has claimed a sum of R.11,00,19,005/- towards expenditure incurred for a Model Flat and New Sales Office Expenses Exclusive and Market Expenses Express .



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27. It is the case of the department that there was no corresponding income from the project for which the expenses were incurred. Respective projects may not have started during the relevant to the previous year for the assessment year.

28. Since no revenue was recognized expenses incurred under the head marketing and sale expenses have been classified work in progress which should not have been reckoned as revenue expenditure.

29. The second issue is regarding capitalised of a sum of Rs. 2,81,66,330/- towards Loan Processing Charges pursuant to closure of the loan and switching over of the loan. This was not an issue that was raised before the aforesaid Assessment Order dated 27.11.2019 was passed.

30. There was only disclosure in the Financial Statements that were filed by the petitioner before the Assessing Officer before the Assessment Order was



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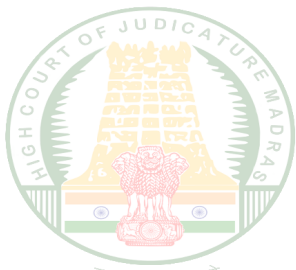
passed on 27.11.2019.

31. Notice issued under Section 148 of the Income Tax Act, 1961 is dated 30.03.2021. It is before the expiry of 4 years. If the income has escaped assessment, invocation of Section 148 of the Income Tax Act, 1961 cannot be interfered.

32. Further, there is no final determination of the tax liability in the impugned order dated 04.02.2022 seeking to reopen the assessment that was completed vide Assessment Order dated 27.11.2019.

33. It is open for the petitioner to urge that the deductions claimed by the petitioner were perfectly in order and therefore question of adding the amounts back to the taxable income of the petitioner would not arise. Therefore, this writ petition is liable to be dismissed.

34. Accordingly, this writ petition is dismissed. Liberty is however given



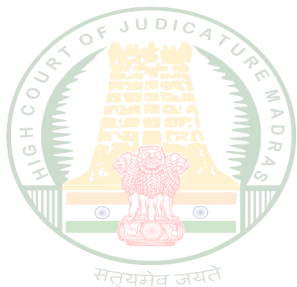
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to the petitioner to raise all objections before the Assessing Officer under Section 143(3) r/w 147 & 148 of the Income Tax Act, 1961 as it stood prior to 01.04.2021.

35. It is expected that the assessment orders will be passed by the Assessing Officer after affording an opportunity of hearing the petitioner and pass appropriate orders, preferably, within a period of six weeks from today. No costs. Consequently, connected miscellaneous petitions are closed.

03.01.2024

Index : Yes/No
Neutral Citation : Yes/No
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C.SARAVANAN, J.

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To

1. The Assistant Commissioner of Income Tax,
Circle 1 Large Tax Payers Unit,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai.
- 2.The Principal Commissioner of Income Tax 4,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai.
3. The Additional/Joint/Deputy/Assistant Commissioner of
Income Tax/Income-Tax Officer,
National Faceless Assessment Centre,
Delhi.

Pre-delivery Order in
W.PNo.4019 of 2022

03.01.2024