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

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Judgement delivered on:03.02.2017

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ITA No.710/2016 & CM No. 38487/2016

UNITECH HOSPITALITY SERVICES LIMITED Appellant
Through: Mr. Gagan Kumar, Advocate.

Versus

ASSISTANT COMMISSIONER OF INCOME TAX Respondent
Through: Mr. Ruchir Bhatia, Senior Standing
Counsel with Mr. Puneet Rai,
Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (OPEN COURT):-

CM No. 38487/2016 (for exemption)

Allowed, subject to all just exceptions.

The application stands disposed off.

ITA No.710/2016

1. The appellant has impugned the order of the Income Tax Appellate Tribunal (hereinafter referred to as the 'ITAT') dated 07.03.2016, which confirmed the order of the Assessment Officer (AO) and of the Commissioner of Income Tax (Appeals) [CIT(A)] disallowing deduction of ₹6,73,76,070/- towards license fee, external development charges and conversion charges. The following question of law was framed for consideration in this appeal on 10.01.2017:-

“Did the ITAT commit an error in confirming the disallowance of Rs. 6,73,76,070/- claimed by the assessee as one relating to license fee, external development charges and conversion charges, in the circumstances of the case?”

2. The facts of the case are that M/s. Unitech Business Parks Pvt. Ltd. (hereinafter referred to as the "UBPL") purchased 3.39 acres of land on 31.08.2004 from M/s. Unitech Ltd., M/s. Pioneer Profin Ltd. and M/s. Sarda Plywood Industries Ltd., the “original allottees”. On 30.03.2006, UBPL entered into an Agreement to Sell (ATS) with M/s. Unitech Developers & Hotels Pvt. Ltd. (hereinafter referred to as the "UDHPL") for sale of the said land and it was agreed that all the approvals for construction shall be obtained by the purchaser. However, since the purchaser was unable to pay the monies, it sought cancellation of the ATS.

3. By a Memorandum of Understanding (hereinafter referred to as the “MoU”) executed between UBPL and UDHPL and the Unitech Hospitality Services Limited - the appellant on 01.04.2007, the ATS dated 30.03.2006 was treated as cancelled and the said land was agreed to be sold to the appellant. It was also agreed that all expenses incurred on development shall be borne by the appellant.

4. Meanwhile, on 05.10.2006 and 06.12.2006, although the original allottees had all rights and interests in favour of UBPL by way of the Sale Deed, nevertheless, paid an amount of ₹13,67,23,723/- to the Department of Town and Country Planning, Government of Haryana (hereinafter referred to as the "DTCP, Haryana") towards license fees, external development charges and conversion charges of the aforesaid land.

5. The DTCP, Haryana gave necessary approval for the development of the said land vide letter dated 18.04.2007. UBPL executed a Sale Deed in favour of the appellant on 25.03.2008 for a consideration of ₹7.16 crores. A week later i.e. on 31.03.2008, the appellant capitalized ₹22,23,51,205/- in its books of accounts towards cost of land, stamp duty charges and license fees, external development charges and conversion charges. Upon sale of one of the two blocks constructed on the said land, on 06.03.2009 the appellant apportioned a sum of ₹6,73,76,070/- towards a portion of license fees, conversion charges and external development charges as proportionate cost of the land beneath Block-A. However, the AO disallowed this apportionment cost. Both, in the appeal before the CIT(A) and ITAT, the said disallowance was upheld. The Tribunal examined the MoU dated 01.04.2007 executed between UBPL, UDHPL and the appellant and did not find any such monies or consideration payable by the assessee to either the Seller UBPL or to the original allottee. It reasoned *inter alia*:-

“6.....According to this agreement it is stated that united business park ltd is the owner of the licensed land which was purchased by it from Unitech Ltd on 31-August-2004. On 30.3.2006 Unitech business park ltd further entered into the agreement to sale this property to Unitech Developers and Hotels Pvt. Ltd for Rs. 675 lacs only. As unitech developers and hotels Pvt ltd could not pay the price agreed to unitech business park ltd, Unitech Developers and hotel Pvt ltd and the assessee jointly approached the Unitech business parks ltd for cancellation of agreement to sale dated 30th March 2006 and assessee agreed to purchase that property on payment of mutually agreed consideration. On reading of the said MOU we could not find any consideration to be paid by the assessee to the owner of the land agreed

based on this MOU. Therefore for the exact consideration and cost of land the only relevant documents required to be seen is the sale deed executed between the assessee and Unitech business parks ltd. This sale deed dated 25.03.2008 which is filed in the PB 89-91. According to that sale deed the total consideration for 3.398 acre of land was Rs.716 lacs and stamp duty paid of Rs. 4296,000/-. On reading of the sale deed we could not find any reference of the amount of license fees etc to be paid to the owner or to the other party. The terms and conditions of the sale deed are as under:-

*“1. That in lieu of payment of aggregate **consideration of Rs. 7,16,00,000/-** (Rupees Seven Crore Sixteen Lac Only), the VENDOR doth hereby sell, transfer, convey and assign all its rights, title and interest in the land admeasuring 3.398 acres situated in Block-B at Greenwoods City, Gurgaon, Haryana, unto the VENDEE together with all its rights, liberties, privileges, liens, easements, advantages, passages, pathways, permission grants whatsoever attached or annexed to the said land.*

2. That the VENDEE has paid the aforesaid total consideration of Rs.7,16,00,000/- (Rupees Seven Crore Sixteen Lac Only) vide cheque No.856317 dated 25.03.2008 drawn on Canara Bank, Nehru Place, New Delhi to the VENDOR, the receipt whereof the VENDOR hereby admits and acknowledges.

3. That hereafter the VENDOR Company is not left with any right, lien or claim of any nature whatsoever in the said land/ plot of land shall henceforth be owned and developed by the VENDEE requirements, per its own requirements.

*4. That the VENDOR simultaneously with the execution of this Deed of Sale has handed over the **vacant physical possession of the said land/plot to the VENDEE.***

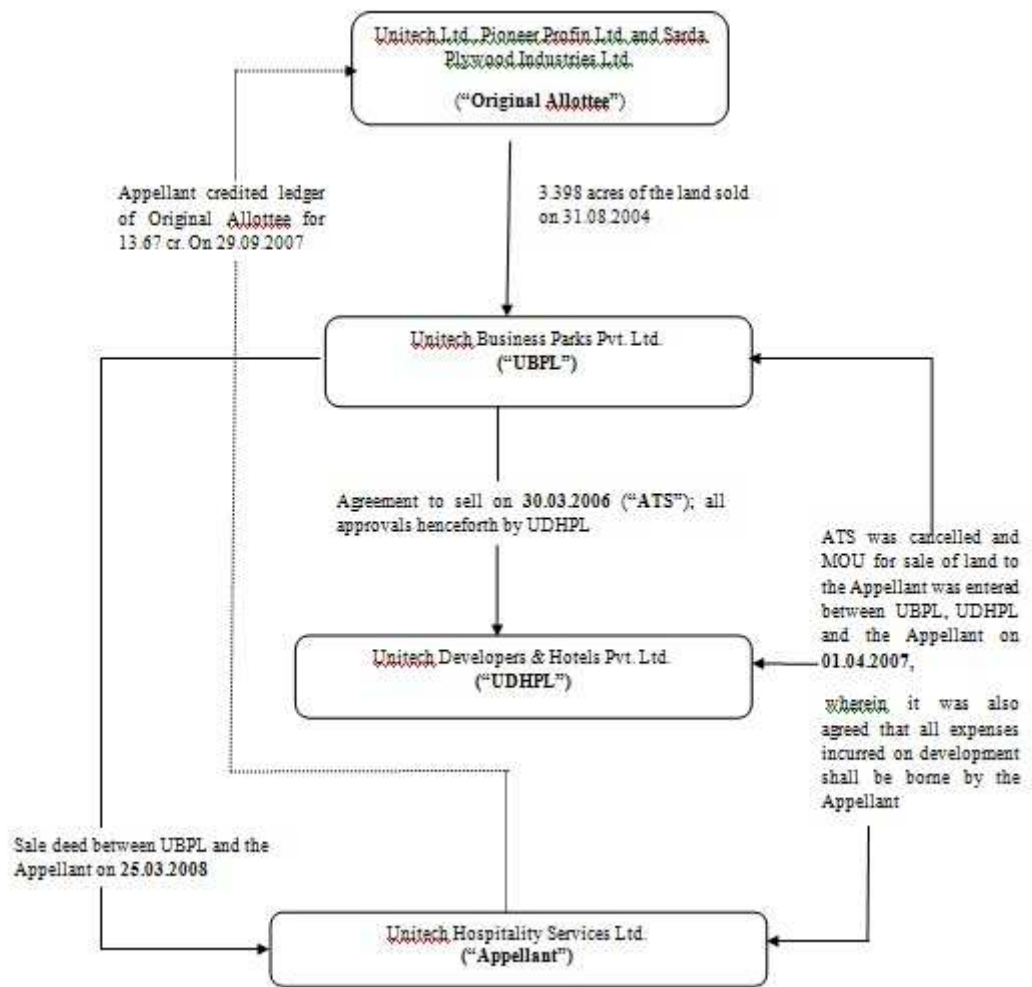
5. That all taxes, levies,- assessments, demands or charges, which are levied in respect of the said plot of Land upto the date of execution of this Deed of Sale are paid by the VENDOR. However, the said assessment, charges, rates etc., which may be levied in future shall be borne and paid by the VENDEE.

6. That all expenses, incurred on registration of this Sale Deed including Stamp Duty and other charges have been borne and paid by the Vendee."

7. According to paragraph No.5 of that sale deed of tax levies assessment demand or charges which are levied in respect of the said plot of land paid up to the date of Sale deed are to be paid by the vendor and after that by the assessee. Contrary to the statement made by the assessee according to the sale deed in Para No.1 of the sale deed total interest in the land were transferred by Unitech business Parks Ltd to the assessee for Rs. 7.16 only. We failed to understand that if such cost is to be borne by the assessee why it does not find a mention in the sale deed or MOU executed by the parties. Further AO and CIT (A) both have perused these documents and based on that have disallowed these costs to the assessee. Therefore in our opinion merely because the assessee has recorded the cost of external development charges and license fees in the books of account by crediting it to some other parties account and showing it as work in progress i.e. opening stock, it cannot be granted as deduction from the sales price of the land when (1) the cost has been incurred by the other party, (2) the sales deed proves otherwise, (3) MOU relied up on by the assessee does not support the argument of the assessee. LD AR has argued vehemently that the assessee has already accounted this expenditure as it is work in progress and it has been taken as closing stock therefore it has to be granted as deduction in the next year as it becomes opening stock in that year. For this proposition he relied on the decision of the Supreme Court in the case of VK. Builders and contractors Pvt.

Ltd. Vs. CIT reported in 318 ITR 204. At the first instances the argument looks attractive but on examination of the facts before the Supreme Court and the facts of the case of the assessee, this argument deserves to be dismissed. Fact before the Supreme Court in case cited before us is quite different. The Hon'ble Supreme Court has held that according to the principle of accountancy that the figure of the closing stock of the earlier years does form the opening stock of the next year and it cannot be questioned in the subsequent year. Off course, there cannot be any question on acceptance of this accounting principle. However, Hon'ble Supreme Court was not concerned the issue like in the case of the assessee where the cost debited itself cannot be considered as the cost of the land unsupported by evidences in the form of conveyance deed and MOU executed by the buyer and seller. Therefore reliance by AR on the decision of Honorable Supreme Court is misplaced as it does not apply to the facts of the case of assessee. On probing amount of the work in progress the AO has come to know that these expenses have not all been incurred by the assessee and on perusal of the sale deed AO has stated that sale consideration is inclusive of all rights. Therefore in this case AO is disputing the closing stock of the earlier years also. In view of the above facts and circumstances of the case we are of the view that learned Commissioner of Income-tax (Appeals) has rightly confirmed that disallowance of Rs. 6,73,76,070/- towards the cost of land, we confirm the order of learned Commissioner of Income-tax (Appeals) and dismiss the ground No.1 of the appeal of the assessee.”

6. For the convenience of this Court, the learned counsel for the assessee had relied upon the following sequence of events and structure of financial transactions between the parties:-



7. The Court would note that by the Conveyance Deed dated 31.08.2004, the original allottees had, for a consideration of ₹6.75 Crores, agreed to convey, sell, transfer and assign all their rights and interest in the aforesaid plot of land to the Vendee i.e. UBPL alongwith all its rights, liberties etc. in the said plot of land. It further recorded that the Vendors are left with no right, lien or claim of any nature whatsoever in the said land. Clauses (5) and (6) of the said Agreement record that all the external development charges up to the date of the said Conveyance Deed had been paid by the Vendee to the original allottees and nothing further remained to be paid in that regard. The taxes, levies, assessments, demands or charges

etc. had been paid by the Vendors and all further charges etc. in that regard would be payable by the Vendee, the purchaser. Therefore, as far as the Vendor the original allottee was concerned it had divested itself of all interests in the sold land. The Court is of the view that if the original allottee chose to make any payments in subsequent years towards license fee and development charges and conversion charges, it may be out of benevolence or whatever other considerations, but the amount of ₹13,67,23,723/- paid by it could not be fastened either upon the Vendee, UBPL or upon the subsequent Vendee the appellant for reimbursement. The agreement between UBPL and UDHPL dated 30.03.2006 does not stipulate any such liability or reimbursement to the original allottee. In any case, such monies before reimbursement or transfer to the original allottee would be subject to tax in the hands of the assessee.

8. The ATS dated 30.03.2006 between the UBPL and UDHPL records the transfer of the said plot of land admeasuring 3.39 acres for a consideration of ₹6.75 crores of which an amount of ₹10,00,000/- was acknowledged to have been received by the Vendor and the balance of ₹6,65,00,000/- was to be paid by 30.04.2006. The ATS further recorded:-

“(6) All costs, charges and expenses payable on or in respect of this agreement and on all other instruments and deeds to be executed, if any, pursuant to this agreement, including stamp duty and the registration charges of the Sale Deed, shall be borne and paid solely by the Vendee.

(7) That all rates, taxed, levies, etc. in respect of the said Plot of Land upto the date of registration of Conveyance Deed shall be paid by the Company and thereafter such rates, taxes and charges shall be paid by the Vendee.”

9. The MoU dated 01.04.2007, recorded that UBPL had purchased the land by Registered Conveyance Deed dated 31.08.2004; the land was meant for development of a commercial complex. The ATS between UBPL and UDHPL for a sale consideration of ₹6.75 crores was required to be concluded by a Sale Deed by 30.04.2006. This time was extended to 31.03.2007, but even then the purchaser UDHPL was unable to perform its part of contract. Hence, through the MoU the appellant was requested to take over the liabilities and funds under the ATS and to remit UDHPL's expenses incurred by it towards the commercial complex on the said land. The assessee agreed to the above terms. The MoU recorded *inter alia* as under:-

"1. That all the expenditure incurred and spent on the construction and development of Commercial Complex on the Said Land shall be transferred and accounted for in the books of accounts of 'UHSL'.

2. That the transfer of expenses, as mentioned hereinabove shall include expenses, such as, License fee, Architect's fee, EDC, IDC, conversion charges, construction cost including materials consumed/unconsumed at site of the Project or any other indirect expenditure incurred in connection with the construction and development of the Said Commercial Complex.

3. That as a consequence of the Understanding as agreed herein, the ATS dated 30.03.2006 and the Supplementary Agreement dated 25.04.2006 shall stand cancelled and the Conveyance Deed of the Said Land shall be executed by 'UBPL' in favour of 'UHSL' within a period of one year from the date hereof.

4. That it is expressly agreed in between the Parties that

they shall remain bound by this Understanding and shall take all consequential steps in accordance with the provisions of this MOU.

5. That in the event of any controversy or ambiguity pertaining to or arising out of this MOU, the same shall be referred to the Chairman of the Holding Company i.e. Unitech Limited and the decision of the Chairman of the Holding Company shall be binding on all the Parties.”

10. Aforesaid clauses (1) and (2) clearly state that the transfer of expenses shall include all expenses such as, license fee, external development charges, conversion charges. Instead the expenses made towards conversion and development of the commercial complex were to be transferred to the books of accounts of UHSL the appellant. Significantly, it does not stipulate reimbursement of any monies by the appellant to the original allottee. Therefore, the appellant was under no obligation to make any payments to the original allottee. Hence, its payment of ₹13.67 crores to the latter on 29.09.2007 is of its free volition and under no legal obligation under any of the documents relied upon by the appellant. The said amount could not be claimed as against the costs etc. for development of the said land. The Sale Deed was executed between the UBPL and the appellant on 25.03.2008, however, in the absence of any obligation under any agreement between the appellant, the UBPL and UDHPL to pay monies of any sort to the original allottee, the appellant could not claim the sum of Rs.6.75 crores towards deduction from income. The AO had further disallowed and disputed the addition of such costs on the ground that no such expenses had at all been incurred by the assessee and the perusal of the Sale Deed showed that the sale consideration was inclusive of all rights. Hence, the costs of transfer of

rights alongwith all developments/constructions thereon were included in the sale consideration.

11. The ITAT also distinguished the reliance of the appellant on ***V.K. Builders and Contractors Pvt. Ltd. Vs. CIT reported in [2009] 318 ITR 204 (SC)*** on the ground that the facts of the present case and the documents such as Conveyance Deed etc. did not support the debiting of the aforesaid cost.

12. Similarly, in the same vein, the appellant has also relied upon the decision of the Allahabad High Court in ***Ram Luxman Sugar Mills Vs. Commissioner of Income-tax, [1967] 63 ITR 51 (Allahabad)*** and of the Andhra Pradesh High Court in ***Commissioner of Income Tax Vs. Mopeds India Limited [1988] 31 ITR 347 (AP)*** to contend that the assessee has a right to value his stock at market price or cost price, whichever is lower, if he desires to do so. The said precedent, however, is inapplicable to the facts at the present case because the valuation of the closing stock whatever it may be would by itself not create a liability to pay any amounts to the original allottee, since no such liability was transferred to the appellant.

13. In view of the above, the Court is of the view that there is no error in the impugned order. Accordingly, the question of law framed is answered in the negative and against the appellant.

14. The appeal is dismissed in the above terms.

NAJMI WAZIRI, J.

S. RAVINDRA BHAT, J.

FEBRUARY 03, 2017/sb