

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B' : NEW DELHI)**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
and
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCE)

**ITA No.8283/Del./2018
(ASSESSMENT YEAR : 2013-14)**

ITO, Ward 8 (4),
New Delhi.

vs. M/s. Experion Nirman P. Ltd.,
F – 9, 1st Floor, Manish Plaza – 1,
Plot No. 7, MLU, Sector 10, Dwarka,
New Delhi – 110 075.

(PAN : AADCK0600J)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Gautam Jain, Advocate
Shri Lalit Mohan, CA
Ms. Monica, CA

REVENUE BY : Shri Kumar Pranav, Senior DR

Date of Hearing : 25.11.2021

Date of Order : 22.02.2022

ORDER

PER AMIT SHUKLA, JM :

The aforesaid appeal has been filed by the Revenue against the impugned order dated 04.10.2018, passed by Ld. CIT (Appeals)-3, New Delhi for the quantum of assessment passed under section 143 (3) of the Income-tax Act, 1961 (for short 'the Act') for the assessment year 2013-14.

2. In the grounds of appeal, the Revenue has raised the following grounds:-

“1. Ld. CIT (A) erred in law and on facts of the case in deleting the addition of Rs.8,10,29,645/- on account of payments made to M/s. SBPL by the assessee company ignoring the fact that the said payment was not the part of the cost of the land and was outside the purview of section 37(1) of the I.T. Act, 1961.

2. Notwithstanding the above ground of appeal, Ld. CIT(A) erred in law and on facts of the case in deleting the addition of Rs.8,10,29,645/- made by the AO on protective basis u/s 40a(ia) of the Act for non-deduction of tax at source u/s 194H of the Act out of commission or brokerage paid by the assessee company to M/s. SBPL.”

3. The facts in brief are that the assessee company is a subsidiary of M/s. Experion Developers Private Ltd. (EDPL) and is engaged in the business of construction-development of projects including townships, group housing, commercial premises, hotels, resorts, recreational facilities and regional infrastructure. During the FY 2007-08, the assessee company was required to purchase contiguous land measuring 15.31251 acres in section 112 of Gurgaon district in Haryana. For this purpose, the assessee entered into an agreement with M/s. Soni Buildcon Private Ltd. (SBPL) who in turn had arrangements/understanding with the land owners with regard to purchase of said land parcels, i.e., it had obtained preferential rights to purchase the land and would further acquire such rights. As per the MOU/ Agreement, the price at which the land would be purchased was fixed at Rs.3.71 crore per acre of land, irrespective of the price at which such land would be actually purchased from the farmers in terms of sale deeds to be entered into with them. Given this, even if the price as per the actual sale deed was lower than the pre-fixed price, the assessee was required to pay to SBPL, the difference amount on account of transfer of rights held by it in terms of arrangements/ understanding with the land owners. The summary

of total payments made with regard to the purchase of the aforesaid land is as under:-

S.No.	Particulars	Amount (in INR)
1	Payment made to owners of land parcels (as instructed by SBPL)	48,70,64,106
2	Payment made to SBPL	8,10,29,645
3	Stamp duty charges	2,92,23900
	Total	59,73,17,651

Considering the fact that the above land was purchased for the purpose of development of a Group Housing project, it was recorded as inventory in the books of account of the assessee at a total purchase cost of Rs.59,73,17,651/-. During the year under consideration, the development rights in the said land were transferred by the assessee to its holding company EDPL on the basis of the Development Agreement dated 7th June 2012 between the companies.

4. Ld. AO held that payment of Rs.8,10,29,645/- made to SBPL in respect of purchase of land cannot be allowed as deduction u/s 37(1) of the Act as it is not payment for business purpose and cannot be allowed as cost of purchase of land. He further held that alternatively payment of Rs.8,10,29,645/- is to be disallowed u/s 40a(ia) for non-deduction of tax u/s 194H on the same payment though disallowance was made on protective basis. Reasoning given by the AO was that SBPL was a right holder in respect of the land which the assessee has directly purchased from the farmers/ land owners and the agreement is merely a self serving statement/averment and that SBPL has got understanding and arrangement with various land owners for acquisition of the said land is make believe arrangement. Further, averment regarding renunciation of rights by SBPL in favour of the assessee is also a self-serving statement including the agreement dated 17.04.2007 between the assessee and SBPL. He further observed that on going through the sale deeds in many cases, the

land owners have received advance payments directly from assessee in lieu of proposed sale transfers on dates earlier and as on or before to the date of agreement i.e. 17.04.2007 between the assessee and SBPL, therefore, this is an after-thought on part of the assessee as the assessee itself started negotiating with the land owners so as to inflate the cost of land. Assessing Officer has also noted the date of payment as mentioned in the sale deed in respect of various parties and the payments made to the respective sellers on or before 17.04.2007, the date on which so-called agreement was entered into by the assessee with SBPL. Apart from that, he also observed that SBPL could not have entered into any kind of understanding/ agreement with the land owners without making any advance payment to them in lieu of the proposed transfer of their land. Thus, he doubted the entire arrangement between the assessee and SBPL and held that claim of the assessee to have paid Rs.8,10,29,645/- to SBPL for renunciation of its rights in the land is a mere make believe story and assessee's claim cannot be accepted that the said payment made by the assessee for relinquishment of rights of SBPL in the land being purchased by the assessee. After detailed discussion, he held that such a payment claimed towards payment of cost of land cannot be allowed. The entire premise of the AO was disbelief of the arrangement and agreement between the assessee and SBPL which he has held to be self-serving agreement and according to him it is not proved that the nature of payments made to SBPL is an expense done wholly and exclusively for the purpose of business.

5. Without prejudice, Assessing Officer also held that the payment if at all has been claimed towards expenses, then same is in the nature of commission and brokerage paid to SBPL and same cannot be allowed, because assessee has not deducted any TDS on commission or brokerage, therefore, a disallowance of Rs.8,10,29,645/-, which has also been made on substantive basis, is also being made on protective basis u/s 40(a)(ia) as it has already disallowed the amount u/s 37(1) of the Act.

6. Before the Id. CIT (A), assessee's contention was that, for the purpose of group housing, the assessee required contiguous piece of land which was owned by the farmers in the form of small land and SBPL who in turn had arrangements/understanding with the land owners with regard to the purchase of said land parcels and it had obtained certain rights to purchase the land and also further acquired such rights. For this purpose, SBPL has entered into an Agreement to Sell with the respective land owners and it was only with regard to the preferential rights obtained by SBPL and it was not in the nature of a sale deed for transfer of land to SBPL. Thus, SBPL approached the assessee and assured that it had arrangements / understanding with the land owners and would arrange to get the contiguous land registered in the land with the assessee. In fact, assessee had given certain advance payments to the SBPL and to the land owners, the details of which has been incorporated in the impugned appellate order at page 5 for a sums aggregating to Rs.12,75,19,996/- starting from 5th April 2007 to 11th April 2007. The important terms of the said agreement is also incorporated in the impugned appellate order. It has been categorically agreed and mentioned that SBPL would be responsible for arrangement of contiguous land and getting the same registered in the name of assessee. Ld. AO has incorrectly held that there was no transaction between SBPL and land owners. Further during the appellate proceedings, additional evidences were also filed, i.e., agreement between land owners and SBPL which was admitted by the Id. CIT (A) and forwarded to the AO for examination and to submit his report. AO filed his remand report which has been incorporated in the impugned appellate order as well as the assessee's rejoinder on the said report. Another important fact which was brought on record by the assessee before the Id. CIT (A) that in the agreement to sell between the land owners and SBPL it was specifically provided that upon payment of full consideration as determined between the land owners and SBPL, land owners would get the land registered either in the name of SBPL or its nominees or other person as may be specified by the SBPL. Initially

payments were made by the SBPL to reserve its rights in the land and pursuant to such arrangement only, the land owners agreed and executed the sale deeds directly into the name of the assessee. The summary of total payments made by the SBPL and the assessee to the land owners are as under :-

Sale Deed No.	Name of the land seller	SBPL	Appellant	Total Payment
4099	Mangatram	9,333,333	38,400,001	47,733,334
	Daryab Singh	9,333,333	38,400,001	47,733,334
	Pratap Singh	9,333,333	38,400,001	47,733,334
	Kapoor Singh	9,333,333	38,400,001	47,733,334
	Kartar Singh	9,333,333	38,400,001	47,733,334
	Dayanand	9,333,333	38,400,001	47,733,334
	Total (A)	55,999,998	230,400,006	286,400,004
4104	Smt. Prem Devi	3,586,666	14,346,668	17,933,334
	Rishiraj	3,586,666	14,346,668	17,933,334
	Ram Avtar	3,586,666	14,346,668	17,933,334
	Total (B)	10,759,998	43,040,004	53,800,002
2274	Jitender	11,332,813	42,967,187	54,300,000
	Total (C)	11,332,813	42,967,187	54,300,000
4846	Satyanarayan	8,410,938	28,889,062	37,300,000
	Total (D)	8,410,938	28,889,062	37,300,000
8157	Sat Narain Jhangu	1,464,100	-	1,464,100
	Total (E)	1,464,100	-	1,464,100
4101	Dharamveer	10,760,000	43,040,000	53,800,000
	Total (F)	10,760,000	43,040,000	53,800,000
	Total (A+B+C+D+E+F)	98,727,847	388,336,259	487,064,106

7. Out of the total demand of Rs.48.71 crores made for the purchase of land, payment amounting to Rs.9.87 crores was initially made by the SBPL so as to reserve its right and remaining payment of Rs.38.84 crores were made by the assessee on behalf of the SBPL after the execution of the agreement with the land owners. The details of which are as under:-

S.No.	Particulars	Amount (in INR)
1	Payment made to owners of land parcels (as instructed by SBPL)	38,83,36,259
2	Payment made to SBPL - In respect reimbursement for advances already made to the land owners - For relinquishing its rights	9,87,27,847 8,10,29,645
3	Stamp duty charges	2,92,23,900
	Total	59,73,17,651

8. The copy of bank statement substantiating the said payments made by the assessee was filed before the AO and ld. CIT (A). Further, the differential between the price as agreed with the SBPL and price actually paid to the farmers for sale of land were paid to the SBPL for relinquishing/transferring all its present and future rights in the land to the assessee, which SBPL had acquired pursuant to the ATS entered with the land owners. Further, on review of the sale deeds (i.e. between land owners and the assessee), which ld. CIT (A) appreciated that the initial payments made by the SBPL (which was duly reimbursed to the SBPL) for acquiring the interest in the land were also specifically mentioned in the sale deed and such payments also forms the part of cost of the land in the sale agreement between land owners and the assessee. This fact also conveys that SBPL had dealt on principal to principal basis and the payment of Rs.8.10 crores has been made to SBPL on account of renunciation of preferential rights in land only.

9. Ld. CIT (A) after considering the entire gamut of facts as well as various additional evidences filed during the course of appellate proceedings as well as the report of the AO held that payment was towards interest in land and the assessee had treated the same as a part of the cost of land and made following observations in respect of the agreement to sell and sale deed :-

“a. The agreement to sell clearly shows that SBPL had an arrangement /understanding with the land owners, that too prior to entering the agreement with the appellant. Thus, it implies that SBPL was rightly having interest in the land i.e. right to being acquire the land either in its name or in the name of the third party;

b. Further, sale deeds have been executed pursuant to the agreement to sell between the land owners and the SBPL, wherein, it has been specifically provided that u on payment of full consideration as determined between the land owners and the SBPL, the land owners would get the land registered either in favour of the SBPL or its nominees or other person as may be specified by the SBPL;

c. Initial payment (i.e. advance money) has been made by the SBPL so as to acquire/reserve its interest/right in the land.”

10. Thereafter, Id. CIT (A) has allowed the payment and deleted the said allowances by observing as under:-

“2.6 I have considered the assessment order and submissions of the appellant. During the course of hearing and it has been observed that during FY 2007-08, the appellant was required to purchase contiguous piece land. For this purpose, the appellant based on the assurance made by the SBPL that it has got understanding/ agreements with various owners and will provide a contiguous piece of land entered into agreement (i.e. MoU) on 17/04/2007 with SBPL. On perusal of the MoU, it is seen that SBPL had arrangement /understanding with the land owners i.e. was holding rights in the land and SBPL was paid for assigning/relinquishing/transferring all its present and future rights in the land to be registered in the name of the appellant

2.7 The assessing officer in the assessment order has considered the aforesaid agreement (i.e. MoU) to be a self-serving document on the premise that the sale deeds were directly executed between the land owners and the appellant without there being any tripartite party agreement or SBPL being a party to the agreement as confirming party (i.e. witness to the deed). However, careful perusal of the agreement entered into with SBPL reveals that it specifically provides that SBPL will get the land transferred on registration of the sale deed directly in favour of the appellant. The assessing officer has also held that at no place in the MoU it is mentioned that SBPL had acquired any interest or right in the land. However, at Para 6 of the said agreement, it

is clearly mentioned that SBPL was paid consideration towards assigning/relinquishing/ transferring all its present and future rights in the said land.

2.8 Further, the assessing officer also asked the appellant to produce the authorised representative of the SBPL for further verification. Mere non attendance of the representative of SBPL before the assessing officer, did not render the payment as unexplained. I hold that the appellant has discharged its onus by furnishing the requisite information/ documents in respect of SBPL. Accordingly, I hold that the payment of Rs.81,029,645/- (i.e. over and above the payment of land cost) have been made to buy all the vested interests in the said land including existing rights under agreement to sell executed by land owners. Accordingly, the disallowance of payment of Rs.81,029,645/- made by the assessing officer is deleted and these grounds of appeal are allowed.”

11. We have heard the rival submissions and also perused the relevant findings given by the impugned orders and the material placed before us during the course of hearing. It is an undisputed fact that during the FY 2007-08, the assessee had requirement to purchase contiguous piece of land for its housing project and has entered into memorandum of understanding/ agreement with SBPL to provide contiguous piece of land which in turn it was to be acquired from various farmers and land owners. The MOU entered on 17.04.2007 clearly shows that there was an arrangement/understanding between the SBPL and the land owners and SBPL was paid for assigning/relinquishing/transferring all its present and future rights in the land to be registered in the name of the assessee. Most important fact was that, all these payments were made in the FY 2007-08. Now, in the AY 2013-14, AO held that the MoU and the payments made in the FY 2007-08 cannot be allowed. In other words, the expenditure incurred in AY 2008-09 was disallowed in AY 2013-14 and that to be u/s 37(1) of the Act. On this ground alone, we do not find any basis or the reason as to how the payments and the cost with regard to FY 2007-08 (AY 2008-09) is disallowable in AY 2013-14.

12. Apart from that, the terms of Agreement and MoU entered into between the assessee and SBPL and the conduct of the parties and the transactions undertaken with the land owners clearly show that there was clear cut understanding and arrangement between the assessee, SBPL and the land owners and the same cannot be termed as self-serving document as held by the Assessing Officer, because such an agreement has duly acted upon. In fact, the agreement reveals that SBPL has got the land transferred directly in favour of the assessee and it is provided that SBPL was paid consideration for assigning, relinquishing and transferring all its present and future rights in the said land. All these documents and the conduct that the payment made to SBPL, cannot be held to be a make-believe arrangement and such payment cannot be disallowed. Accordingly, the order of the Id. CIT (A) deleting the said disallowance is upheld.

13. Insofar as the alternative disallowance made by the AO on protective basis u/s 40(a)(ia) of the Act is also baseless because payments made to the consolidators of land have been made for the purpose of renouncing right/interest in the land and thus the assessee and the consolidator are transacting on principal to principal basis and cannot be regarded as commission or brokerage. Therefore, the assessee cannot be held to be liable to deduct tax at source in terms of section 194H of the Act as certainly its not in the nature of any commission or brokerage. Accordingly, the Id. CIT (A) deleting the said disallowance is upheld.

14. In the result, the appeal filed by the Revenue is dismissed.

Order was pronounced on 22nd day of February, 2022.

**SD/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER**

**SD/-
(AMIT SHUKLA)
JUDICIAL MEMBER**

Dated: 22.02.2022 / TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-3, New Delhi.
- 5.CIT(ITAT), New Delhi.

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