

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, C, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "C", MUMBAI**

**श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष**

**Before Shri Joginder Singh, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA NO.6258/Mum/2013
Assessment Year: 2010-11**

Peepul Tree Properties P. Ltd., C/O. Kalyaniwalla & Mistry, Army & Navy Bldg. 3 rd Floor, 148, M.G. Rd. Mumbai-400001	बनाम/ Vs.	Asst. CIT 5(1) Aayakar Bhavan, M.K. Rd. Mumbai-
(Assessee)		(Revenue)
P.A. No.AAECM6392E		

निर्धारित की ओर से / Assessee by	Shri Nitesh Joshi, & Shri M.M. Golvala (AR)
राजस्व की ओर से / Revenue by	Shri C.W. Angolkar (DR)

सुनवाई की तारीख / Date of Hearing :	13/04/2016
आदेश की तारीख / Date of Order:	20/05/2016

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals), Mumbai-4

{in short 'CIT(A)'}, dated 14.08.2013 passed against assessment order u/s 143(3) dated 23.01.2013 for the Assessment Year 2010-11 on the following grounds:

- 1. Both the lower authorities erred in not allowing deduction under Section 24(b) in respect of the loan processing charges paid to bank - Rs.1 crore.*
- 2. Both the lower authorities erred in not considering the specific definition of "interest" under Section 2(28A) of the Income Tax Act.*
- 3. The Appellant submits that the processing charges paid should be allowed as deduction under Section 24(b) while computing "Income from House Property".*
- 4. Both the lower authorities erred in not allowing deduction under Section 24(b) in respect of prepayment charges paid to bank - Rs. 1,32,44,633/-.*
- 5. Both the lower authorities erred in not considering the specific definition of "Interest" under Section 2(28A).*
- 6. The Appellant submits that the pre-payment charges paid should be allowed as deduction under Section 24(b) while computing "Income from House Property".*
- 7. Both the lower authorities erred in not allowing as a deduction common area maintenance charges, amounting to Rs.3,70,62,516/-, recovered by the Appellant from tenants, while arriving at the annual value under Section 23 of Income Tax Act.*
- 8. Both the lower authorities erred in relying on the decision of the Supreme Court in case of Goetze India Limited (284 ITR 323).*
- 9. Both the lower authorities erred in holding that for raising a new claim, a revised return is to be mandatorily filed.*
- 10. The learned Commissioner of Income Tax (Appeals) erred in holding that the amount recovered by the appellant in respect of Common Area Maintenance charges cannot be assessed separately under the head "Income from other Sources".*

2. The assessee also filed following additional grounds which were admitted with the consent of both the parties.

1. The learned Commissioner of Income-tax (Appeals) erred in not directing the Assessing Officer to grant full TDS credit on the basis of original TDS certificates which had been furnished to the Assessing Officer at the time of scrutiny assessment proceedings.

2. Without prejudice, the Appellant submits that the Assessing Officer be directed to grant TDS credit on the basis of TDS credit appearing presently in Form No. 26AS.

2. During the course of hearing, arguments were made by Shri Nitesh Joshi, & Shri M.M. Golvala, Authorised Representative (AR) on behalf of the Assessee and by Shri C.W. Angolkar, Departmental Representative (DR) on behalf of the Revenue.

4. Ground No.1 to 6: These grounds deal with the connected issues of disallowing loan processing charges and pre-payment charges paid to the bank.

4.1. The brief facts as culled out from the order of the lower authorities are that during the year, the assessee company owned an information technology park at Malad, Mumbai and had leased out its portions to various tenants. The Income earned from the said activity was offered under the head "Income from house property" and was accepted as such by the AO in the assessment order. In the earlier years also the

assessee has been showing the said income under the head income from house property and the same has been accepted as such regularly. The assessee has also been claiming deduction on account of payment of interest to six bankers from whom the assessee had taken loan for constructing the said property. The deduction of interest has also been consistently allowed by the AO in all the years. In the year under concern, the assessee took fresh loan from Axis Bank which was utilized for the exclusive purpose of repayment of loans to the aforesaid six parties. In the process of change over of the lender, the assessee paid prepayment charges of Rs.1,32,44,653/- to these six bankers to whom loans were prepaid and also paid processing charges of Rs. 1 crore to Axis Bank for availing the fresh loan. This is where the dispute arose. The AO disallowed both of these amounts i.e. prepayment charges as well as processing fee on the ground that no such deduction is allowable u/s 24 as the assessee is granted the benefit of standard deduction of 30% and therefore, no further deduction can be allowed to the assessee.

4.2. Being aggrieved, the assessee filed an appeal before the Ld. CIT(A) wherein he made detailed submissions in support of his claim. The Ld. CIT(A) was not satisfied and he upheld the order of the AO with following observations:

“5.2.7. Processing fees are administrative charges levied by certain banks to process the loan applications from various categories of loan applicants. Administrative charges and processing fees do not guarantee the sanction of loan and

therefore, the said processing fees are not always directly related to the payment of interest. There may be cases where processing charges have been paid by the loan applicant but no loans were actually sanctioned by the banks and therefore, no interest was paid by the loan applicant. On the other hand pre-payment is perceived as a risk, because such pre-payment of loan is often linked with restructuring of loan through cheaper re-financing and therefore, the loaner bank is deprived of the projected cash inflow in respect of a loan already sanctioned by the bank. The pre-payment penalty is not with reference to interest but with reference to parting fees/penalty levied by the old bank from the loan applicant, when the loan applicant moves from old bank to the new bank for better or convenient prospects.

5.2.8. Having regard to facts and circumstances of the case and in the light of the aforesaid decisions, the processing charges and the pre-payment penalty, penalty are held not allowable deduction u/s 24 (b) of the Act. The case laws relied upon by the appellant are distinguishable from the facts and circumstances of the present case, hence they are not squarely applicable in this case. In view of the above, the disallowance of processing charges of rs.1 crore and of pre-payment penalty of Rs.1,32,44,633/- made by the LAO are confirmed.”

4.3. Being aggrieved, the assessee filed an appeal before the Tribunal.

4.4. During the course of hearing before us, it has been argued by the Ld. Counsel of the assessee that genuineness of the payment is not doubted nor it has been doubted that fresh loan has been utilised for prepayment of the earlier loans which were used for the purpose of acquiring or constructing the impugned property from which rental income has been received by the assessee. Thus, in his view, the only issue to

be decided here is that whether the assessee is eligible to claim the deduction u/s 24 of the Act on the impugned payments or not. In this regard, he drew our attention upon section 24(b) to argue that interest payable on borrowed capital is allowable to the assessee. For the purpose of explaining scope and meaning of the term 'interest', he referred to provisions of definition clause as contained in section 2(28A) defining the meaning of the term 'interest', contending that the scope of word 'interest' has been widely adopted under the definition clause which shall clearly include both of these payments i.e. 'processing fee' as well as 'pre-payment charges'. In support of his claim he also relied upon following judgment:

1. Pentagram Properties Pvt. Ltd. vs. DCIT (ITA No.3713/M/2010) dated 12th August 2011
2. Supreme Petrochem Ltd. v. DCIT (ITA No.5773/M/2006) dated 5th October 2009
3. Shri Trilochan Singh Sahney vs. ACIT (ITA No.5304/M/2006) dated 30th November 2009
4. Windermere Properties (P) Ltd. v. DCIT (34 taxmann.com)
5. DCIT v. Jammu & Kashmir Bank Ltd. (36CCH 463)
6. CIT vs. Gujarat Guardian Ltd. (177 Taxman 434, Delhi)

4.5. In addition to the above arguments he also distinguished the decision in the case of Haddock Properties Pvt. Ltd. vs. DCIT (ITA No. 3714/M/2010) dated 07.09.2011 which has been relied upon by the AO in his order to decide this issue against the assessee. Per contra, Ld. DR has relied upon the orders of the lower authorities and submitted that these

payments were of capital in nature and therefore, these are not allowable.

4.6. We have gone through the submissions made by both the sides and orders of the lower authorities as well as judgments relied upon before us. It is noted that it is not in dispute that interest paid on impugned loans was allowable u/s 24(b) of the Act. Thus, the only issue to be decided by us is whether ‘pre-payment charges’ and ‘processing fee’ shall form part of the word ‘interest’ as used in section 24(b) of the Act. For this purpose, we need not labour much as the term ‘interest’ has been defined in section 2(28A) as under:

“Interest means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;”

4.7. Perusal of the above said definition shows that the term ‘interest’ has been defined in a manner giving it a wider scope. It clearly shows that the term ‘interest’ shall include any services fee or other charges in respect of moneys borrowed and it goes to the extent of saying that any charges in respect of any credit facilities which has not been utilized. If we carefully analyse this definition, we find the answer right here in this definition. The ‘processing fee’ charged by Axis Bank is nothing but service fee charged by the bank and therefore it is clearly allowable as per plain provisions of the Act. As far as

the prepayment charges are concerned, these have been paid for the loans which have been refunded and thus no more utilised by the assessee. It has been clearly provided that any charges incurred even for any credit facility which has not been utilised shall also form part of the term 'interest'. Even, otherwise, both of these payments have been made for the purpose of availing of the loan at lower interest cost. It is for the assessee to plan its financial affairs in the best possible manner. It is none of the business of the revenue to guide the assessee or put any obstacle in the management of its financial affairs. The assessee appears to have done the restructuring of its loans and changed its lenders for the purpose of reducing its interest burden by availing loan from the lenders at lower rate of interest. The prepayment charges and processing fee borne by the assessee at this stage were be compensated subsequently by payment of lower amount of interest. In any case, so long as the expenses incurred by the assessee are genuine and not part of any colorable device to make tax evasion, then such expenses should be allowed under the relevant provisions of the Act.

4.8. It is noted that our view is supported by plethora of judgments. In the case of Pentagram Properties Pvt. Ltd. (supra), the Mumbai bench of the tribunal while allowing the claim of the assessee on account of payment of processing fee observed as under:

“The assessee is in appeal questioning the decision of the CIT(A) regarding the allowance of processing fees. Section 24(b) allows deduction in respect of any interest payable

on capital borrowed for the purpose of acquiring, constructing, repairing or renewing the property. Section 2(28A), which was inserted by the Finance Act, 1976, with effect from 1st June 1976 defines “interest” as interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized. It is seen from the definition that even a service fee paid in respect of the moneys borrowed is included in the definition of “interest”. The processing fee is charged by the lender since the processing of the loan application and connected documents involves a service rendered by him to the borrower. By virtue of the definition of the word “interest”, the processing fee, which perhaps may not otherwise fall to be considered as interest, is to be treated as interest and allowed as a deduction under section 24(b) of the Act. If we may say, that with respect, the CIT(A) would appear to have lost sight of the fact that it is by definition of the word “interest” that the processing fee is to be treated as interest and the fact that the processing is done before the grant of the loan cannot be put against the assessee in the light of the definition. The assessee’s contentions are also supported by the order of the Single Member, Pune Bench in the case of Chintamani Hatcheries (P) Ltd. vs. DCIT (2000) 75 ITD 116 (Pune) (SMC), where it has been held that processing fee for obtaining a loan is a service fee and has to be allowed as interest in view of the definition in section 2(28A). The Circular No. 202, dated 5th July 1976, issued by the CBDT (copy filed) while explaining the provisions of section 2(28A) also clarify the position. We therefore accept the assessee’s claim based on section 2(28A) and direct the Assessing Officer to allow the processing fee of Rs.55,00,000/- as deduction under section 24(b) while computing the property income....”

4.9. Similar view has been taken with regard to claim of prepayment charges by the Mumbai Bench in the case of

Windermere Properties (P) Ltd. (Supra) with following observations:

“We have heard the rival submissions and perused the relevant material on record. There is no dispute on the fact that the assessee availed loan for acquisition of certain premises, the income from which was shown and accepted under the head “Income from house property”. The assessee claimed deduction of Rs.11.05 crore u/s 24(b) of the Act. The Assessing Officer did not allow deduction of Rs.1.56 crore paid as prepayment charges for the closure of the loan account which was taken for acquisition of property fetching the extant house property income. Under these circumstances the question arises as to whether such amount of ‘prepayment charges’ paid to HDFC for closure of loan account is deductible u/s 24(b) of the Act. This provision provides that: “where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital” shall be allowed as deduction in the computation of income under the head “Income from house property”. The term “interest” has been defined in section 2(28A) to mean: “interest payable in any manner in respect of any moneys borrowed or debt incurred and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized”. The definition of interest u/s 2(28A) makes it manifest that it has basically two components, viz., firstly, the amount with nomenclature of interest for moneys borrowed and secondly, the amount paid by whatever name called in respect of the money borrowed or debt incurred. The second category may also encompass any charge paid for not utilizing the credit facility. When we incorporate the definition of ‘interest’ in section 24(b), the position which emerges is that not only the amount paid designated as interest but also any other amount paid by whatever name called in relation to such debt incurred also qualifies for deduction. 4. Adverting to the facts of the instant case, it is noticed that the assessee obtained loan from HDFC Limited for acquisition of property. Later on it arranged the

money from other sources and repaid the loan which was taken for acquisition of property. The bank accepted the early repayment of loan on receipt of prepayment charges. By such repayment, the assessee managed to wipe out its interest liability in respect of the loan, which would have otherwise qualified for deduction u/s 24(b) during the continuation of loan. It is obvious that these prepayment charges have live and direct link with the obtaining of loan which was availed for acquisition of property. It is beyond our comprehension as to how the amount paid as interest for the loan taken is allowable as deduction but the amount paid as prepayment charges of the very same loan is not deductible. In our considered opinion the payment of such 'prepayment charges' cannot be considered as de hors the loan obtained for acquisition or construction or repair etc. of the property on which interest is deductible u/s 24(b) of the Act. Both the direct interest and prepayment charges are species of the term 'interest'. We, therefore, set aside the impugned order on this issue and order for the grant of deduction."

4.10. Similar view has been taken by the Hon'ble Delhi High Court in the case of Gujarat Guardian Ltd.(supra). Similar view has been taken in few other cases also as relied upon by the Ld. Counsel.

4.11. In the case of Haddock Properties Pvt. Ltd., as was relied upon the lower authorities, loan processing charges were disallowed by the AO and the action of the AO was upheld by the Bench. But, if we read the judgment fully, we find that facts of the said case are clearly different. In the said case, the disallowance was made mainly for the reason that processing charges were paid on account of issuance of debentures and Hon'ble Bench while deciding this issue clearly made out a distinction by mentioning that processing charges were not

paid for obtaining loan amount. The relevant observations of the judgment are reproduced below:

“Therefore, these processing charges in our view are not paid for obtaining funds or loan amount. Further the debenture issued by the assessee cannot be equated with the direct loan for acquiring the property in question but the funds raised through the debentures were partly applied for repayment of loan taken for acquisition of the property.

10. As regards the decisions relied upon by the learned AR on the point that any charges in respect of money borrowed by the assessee would fall in the definition of interest. It is pertinent to note that in all those cases the charges were either paid for taking loan for acquiring the properties or for restructuring of loan with the object to take some advantage of interest liability or some financial leverage. Therefore, the facts of the case in hand are distinguishable because the processing charges were not paid for obtaining loan or restructuring of loan but for issue of debenture and only the part of the funds received were utilized for repayment of the loan. Accordingly, we are of the view that the processing charges for issue of debenture cannot be treated as interest paid on debenture and consequently cannot be allowed as a deduction u/s 24(b).”

4.11. Thus, perusal of the above clearly shows that the bench has rather supported the case of the assessee by observing that in case processing charges would have been paid for obtaining loan, then, the same would have been indeed allowable. Thus, in our considered view, the legal position is clear that these payments are allowable u/s 24(b) and therefore, AO is directed to grant the benefit of the same the disallowance made by the AO is directed to be deleted. Thus, ground nos. 1 to 6 are treated as allowed.

5. Ground No.7 to 8: in these grounds the assessee has made claim of maintenance charges, amounting to Rs. 3,70,62,516/- recovered by the assessee from its tenants.

5.1. The brief facts as narrated before us by the parties are that in all the earlier years, the impugned year as well as subsequent years, though the assessee has been showing its total income under the head 'income from house property', but by way of note given in the computation sheet, the assessee has stated that the assessee company reserves its right to claim common area maintenance charges amounting to Rs.3,70,62,516/- as deduction to arrive at the annual value u/s 23 relying upon the Mumbai Tribunal judgment in the case of Sharmila Tagore vs. JCIT 93 TTJ 483 (Del). It is an admitted fact that neither in the earlier years nor in the subsequent years this claim has ever been exercised by the assessee or has ever been allowed by the AO. During the assessment proceedings of the impugned year, the AO refused to grant this claim on the ground that there is no such provision u/s 23 or 24 to grant the benefit of such deduction under the head income from house property. In view of these circumstances, the assessee offered and requested the AO to treat the impugned rental income as 'income from other sources' and accordingly allow the corresponding expenses incurred for earning income from other sources i.e. aforesaid maintenance expenses be allowed as a deduction. Both of the lower authorities did not accept the submissions of the assessee.

5.2. Being aggrieved the assessee filed appeal before the Tribunal.

5.3. During the course of hearing, assessee has vehemently submitted that income should be assessed as per the provisions of law and no tax can be collected without the authority of law. Per contra the Ld. DR opposed the submissions of the assessee.

5.4. We have gone through the submissions of the assessee carefully; there is no dispute on the proposition that tax liability of assessee has to be determined strictly in accordance with law. But a claim can be allowed to assessee which is valid as per law and made by the assessee in accordance with law and in a complete and rightful manner. In case the assessee wants its income to be assessed under different head as per the provisions of law, then, the minimum duty expected from the assessee is to at least file a revised computation sheet of income offering the income in proper heads and making appropriate claims against each and every head separately. This exercise is not expected to be done by the AO on behalf of the assessee. But nonetheless, with a view to meet the ends of justice and in view of these peculiar facts and circumstances of the case, we find it appropriate to give an opportunity to the assessee to file revise computation sheet of income before the AO making out its claim in an appropriate and complete manner. Thus, these grounds are sent back to the file of the

AO who shall give adequate opportunity of hearing to the assessee to make its claim as per law. The assessee shall file requisite details and documents so as to enable the AO to verify the income and corresponding claim as per law and facts. The assessee is free to raise all legal and factual issues before the AO. Thus, these grounds are treated as allowed for statistical purposes.

6. In the additional grounds raised before us the assessee has requested for appropriate directions for granting full TDS. Thus, we send these grounds back to the file of the AO with the direction to allow opportunity to the assessee to file requisite details and documents. The AO shall grant credit of TDS certificate after verifying requisite facts. these grounds may be treated as allowed for statistical purposes.

7. In the result, this appeal filed by the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on 20th May, 2016.

Sd/- (Joginder Singh)	Sd/- (Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 20/05 /2016

Patel, P.S. नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**