

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

**BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.753/Del./2007
(ASSESSMENT YEAR : 2003-04)**

M/s. Bharti Teletech Limited, vs. DCIT, Circle 2 (1),
D – 195, Okhla Industrial Area, New Delhi.
Phase – I,
New Delhi – 110 020.

(PAN : AABC8884F)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Anil Bhalla, CA
REVENUE BY : Shri K.K. Jaiswal, DR

Date of Hearing : 13.04.2016

Date of Order : 29.04.2016

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. Bharti Teletech Limited (hereinafter referred to as 'the assessee'), by filing the present appeal, sought to set aside the impugned order dated 18.10.2006 passed by Ld. CIT(A)-V, New Delhi qua the assessment year 2003-04 on the grounds inter alia that:-

"1. The learned Commissioner of Income Tax (Appeals) has erred both on facts and in law in confirming the action of the learned Assessing Officer (AO) in disallowing depreciation on

Goodwill amounting to Rs.1,26,56,250/- allegedly on the ground that the same is not allowable u/s 32 of the Income Tax Act, 1961.

2. The learned Commissioner of Income Tax (Appeals) has erred both on facts and in law in upholding the action of the learned AO in disallowing the expenditure on account of interest paid amounting to Rs.48,08,518/- allegedly on the ground that the assessee has utilized its interest bearing funds to advance loans to its subsidiary companies.”

2. Briefly stated, the facts of this case are : originally assessee has filed return qua the assessment year 2003-04 declaring total income of Rs.4,78,34,082/- which was processed under section 143(2) of the Income-tax Act, 1961 (hereinafter ‘the Act’) on 27.02.2004 but later on the return was revised on 10.03.2005 declaring an income of Rs.4,72,61,650/- to claim expenses pertaining to the relevant previous year but booked in the next financial year and to claim benefit of late deposit of EPF by relying upon the decision of the ITAT, Delhi in the case of Vestas RRB India Ltd. The assessee claimed the expenses pertaining to AY 2003-04 recorded in the tax audit report for FY 2003-04 relevant to AY 2004-05. The same was claimed in the relevant previous year while revising the return. Thereafter the case was subjected to scrutiny and consequent upon the issue of notices u/s 143(2) and 142(1), Shri Karan Mehta, CA put in appearance, filed necessary details, books of accounts and also discussed the case.

3. Assessee company is into the business of manufacturing and trading of telephone instruments and during the relevant previous year, the assessee declared total loss of Rs.36.33 crores as compared to Rs.37.72 crores in the immediately preceding year. The AO disallowed the expenditure claimed by the assessee on account of interest paid amounting to Rs.48,08,518/- on the ground that assessee has utilized its interest bearing funds to advance loans to its subsidiary companies which has also been affirmed by the CIT (A).

4. The assessee carried the matter before the Id. CIT (A) who has partly allowed the appeal. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

5. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1

6. The Id. AR for the assessee challenging the impugned order contended that AO as well as CIT (A) have erred in disallowing the depreciation of goodwill amounting to Rs.126,56,250/- u/s 32 of the Act and relied upon the order passed by **ITAT, Delhi Bench**

‘A’, New Delhi in case cited as ACIT, Circle 2 (1), New Delhi vs. Bharti Teletech Ltd. in ITA Nos.5321 & 5322/Del/2012 for AYs 2008-09 & 2009-10 order dated 19.12.2012. On the other hand ld. DR for the revenue relied upon the order of the CIT (A).

7. Undisputedly, the assessee company is engaged in the business of manufacturing and trading of telephone instruments and has claimed depreciation on goodwill amounting to Rs.126,56,250/-. The AO disallowed the claim of depreciation on goodwill claimed by the assessee on the ground that the goodwill is not an intangible asset as defined in section 32(1)(ii) of the Act. CIT (A) also affirmed the findings returned by the AO.

8. To proceed further, section 32(1)(ii) is reproduced for ready reference as under :-

“32.(1) [In respect of depreciation of—

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed.”

9. Identical issue has been decided by the coordinate Bench of the Tribunal in the case of **Bharti Teletech Ltd.** (supra) by

following the law laid down by Hon'ble Apex Court in judgment cited as **CIT vs. Smifs Securities Ltd. – 348 ITR 302.**

10. Hon'ble Apex Court decided the issue in controversy in para 9 of the judgement cited as **Smifs Securities Ltd.** (supra), which is reproduced for ready reference, as under :-

“We quote hereinbelow Explanation 3 to Section 32(1) of the Act:

"Explanation 3.-- For the purposes of this sub-section, the expressions `assets' and `block of assets' shall mean—

[a] tangible assets, being buildings, machinery, plant or furniture;

[b] intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature."

Explanation 3 states that the expression `asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading the words `any other business or commercial rights of similar nature' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression `any other business or commercial right of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b).

In the circumstances, we are of the view that `Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act.”

11. Following the law laid down by the Hon'ble Apex Court, we are of the considered view that when the AO has not disputed the

fact that the assessee has no goodwill to claim the depreciation, disallowance made by the AO and affirmed by the CIT (A) is not sustainable in the eyes of law. Moreover, in assessee's own case qua the AYs 2008-09 and 2009-10, the coordinate Bench of the Tribunal in **Bharti Teletech Ltd.** (supra) has already held that the assessee is entitled to claim depreciation on goodwill which is an asset u/s Explanation (3b) to section 32(1) of the Act. Consequently, ground no.1 is determined in favour of the assessee.

GROUND NO.2

12. Assessee claimed expenditure to the tune of Rs.91,40,242/- out of which AO has disallowed an amount of Rs.48,08,518/- on account of interest on prorata basis.

13. Undisputedly, assessee company has advanced the loan to M/s. Bharti Infotec Ltd., one of its subsidiaries, which is into the business of BPO/Call Centre and other value added telecom service. It is also not disputed that vide Memorandum and Articles of Association, lying at page 90 of the paper book, it is permitted to invest into the companies to do such business. It is also not disputed that the amount advanced by the assessee has been accepted as business advance. At the same time, it is also not disputed that this company is having enough interest free funds as

has been reflected in the balance sheet for the year ending 31.03.2003, lying at page 132 of the paper book.

14. The Id. CIT (A) affirmed the disallowance made by the AO by returning the following findings :-

“4.2 During the appellate proceedings it is submitted that the appellant company is in the business of manufacturing and trading of telecom products and to promote companies with objects harmonized with that company. To do the downstream business in the line of call centers the appellant company promoted a subsidiary named Bharti Infotec Limited, and advanced a sum of Rs.18.43 crores as advance against share application money in the preceding previous year. According to the appellant giving such advance to the subsidiaries was considered by the then AO as business advances and the then AO did not disallow the appellant's claim. In its support the appellant has produced the copy of Memorandum of Association and Articles of Association to show that it was allowed to invest in subsidiaries as also to carryout such business. The appellant has further submitted that it was having sufficient interest free funds to invest in subsidiaries and that investments in such shares was made out of mixed funds presumption should be that the same was made out of interest free funds. In this regard the appellant has submitted some figures of deposits and withdrawals made out of various bank accounts and submitted that due to huge volume of transactions it was not possible to find out the nexus between the amount received from Bharti Enterprises and amount given to Bharti Infotec Limited. It is thus submitted that considering the fact that AO has also not brought on record any material to show the nexus no disallowance was to be made. In its support the appellant has relied on the judgement of Calcutta High Court in case of Indian Explosive 147 ITR 392, Woolcom Bers 134 ITR 219 and British Paints 190 ITR 196. The appellant has also submitted that except for payment of interest to Bharti enterprises all other interest was paid on secured loans as well as against overdraft facilities. According to the appellant it was also in the business of advancing and that it had earned income by way of interest in preceding previous years which were offered to tax. The appellant has harped on the ground that the amount advanced to subsidiary was out of mixed funds and hence no disallowance should be made.

4.3 I have gone through the contention of the appellant and do not find any merit in its case. It is well settled now that onus lies with assessee to prove its claim with cogent material whereas in the instant case the appellant has not produced any evidence to prove that interest free funds were only used for advancing money to Bharti Infotrac Limited. Further appellant's argument that it was investing in subsidiaries to harmonize its business activities and therefore amount invested in subsidiaries should be treated as for business purpose can also not be accepted for the reason that appellant has failed to establish as to how such investment has advanced the existing business activities of the appellant company and therefore in absence of such explanation offered I am unable to accept the argument of the appellant that investment in subsidiaries had in any way promoted the business activities of the appellant company. It is also not in dispute that both interest free funds and interest bearing funds were routed through common hotchpotch i.e. all the funds were intermingled in such a way that it was not possible to identify the nexus between the advances received and advances made and therefore under the circumstances it would be apt to adopt the method of apportionment taking into consideration the total funds as well as interest free funds so advanced, which in the instant case AO has followed and therefore in absence of any material brought on record to prove the nexus of interest free funds available with the company to advances made interest free, I am not inclined to accept the argument of the appellant that no disallowance should be made. As regard reliance placed by the appellant on various judgements the same are of no avail as facts of those case are distinguishable from that of the appellant's case. Thus considering the facts of the case disallowance made by the AO is confirmed.”

15. The Id. AR for the assessee, by relying upon the judgment passed by the Hon'ble Supreme Court in the case cited as **Hero Cycles Pvt. Ltd. – 63 taxmann.com 308 (SC)**, contended that when the loan has undisputedly been advanced to promote a subsidiary company, the interest paid cannot be disallowed.

16. The operative part of the judgment (supra) is reproduced for ready reference as under :-

“12. Insofar as loans to the sister concern/subsidiary company are concerned, law in this behalf is recapitulated by this Court in the case of S.A. Builders Ltd. v. CIT (Appeals) [2007 (288) ITR 1/158 Taxman 74]. After taking note of and discussing on the scope of commercial expediency, the Court summed up the legal position in the following manner:-.

26. The expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency.

27. No doubt, as held in Madhav Prasad Jatia v. CIT [1979 (118) ITR 200 (SC)], if the borrowed amount was donated for some sentimental or personal reasons and not on the ground of commercial expediency, the interest thereon could not have been allowed under section 36 (1)(iii) of the Act. In Madhav Prasad's case [1979 (118) ITR 200 (SC)], the borrowed amount was donated to a college with a view to commemorate the memory of the assessee's deceased husband after whom the college was to be named, it was held by this court that the interest on the borrowed fund in such a case could not be allowed, as it could not be said that it was for commercial expediency.

28. Thus, the ratio of Madhav Prasad Jatia's case [1979 (118) ITR 100 (SC)] is that the borrowed fund advanced to a third party should be for commercial expediency if it is sought to be allowed under section 36(1)(iii) of the Act.

29. In the present case, neither the High Court nor the Tribunal nor other authorities have examined whether the amount advanced to the sister concern was by way of commercial expediency.

30. It has been repeatedly held by this court that the expression "for the purpose of business" is wider in scope than the expression "for the purpose of earning profits" vide CIT v. Malayalam Plantations Ltd. [1964 53 ITR 140 (SC), CIT v. Birla Cotton Spinning and Weaving Mills Ltd. [1971 82 ITR 166 (SC), etc.]”

17. By following the ratio of the judgment in **Hero Cycles Pvt. Ltd.** (supra), we are of the considered view that when AO has not disputed that the loan was advanced to M/s. Bharti Infotec Ltd. as per Memorandum and Articles of Association to promote business of its subsidiary, the interest claimed by assessee thereon cannot be disallowed. Moreover, it was commercial expediency of the assessee company to advance the loan to promote business of its subsidiary company. So, we are of the considered view that the advances made to the subsidiary companies are to be treated as business advances.

18. Moreover, when the assessee company was carrying out its business activities through its subsidiaries and the assessee company was having interest free funds to the tune of Rs.99.27 crores and Rs.101.11 crores available with the assessee company in the beginning and end of the financial year respectively under consideration as per balance sheet not disputed by the AO when the assessee has claimed to have paid loan amount to its subsidiary from the mixed fund, then, it should be assumed that payment was

made out of interest free funds. So, when the AO has not disputed the fact that the assessee company has used interest free funds only for advancing money to M/s. Bharti Infotec Ltd., the question of making disallowance on prorata basis does not arise.

19. By following the ratio of the judgment in the case of **Hero Cycles Pvt. Ltd.** (supra), we are of the considered view that when the assessee has made investment for business expediency to promote the business of its subsidiary, the interest paid thereon has to be allowed and as such, AO as well as CIT (A) have erred in making disallowance of assessee's claim of deduction on account of interest on prorata basis. Consequently, ground no.2 is determined in favour of the assessee.

20. In view of what has been discussed above, we hereby allow the present appeal filed by the assessee.

Order pronounced in open court on this 29th day of April, 2016.

**Sd/-
(N.K. SAINI)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Dated the 29th day of April, 2016/TS

Copy forwarded to:

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

**AR, ITAT
NEW DELHI.**