

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI  
BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND  
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 986/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2008-09)

Likproof India Private Ltd., Cecil Court, 2 <sup>nd</sup> floor, M. Bhusan Road, Next to Regal Cinema, Colaba, Mumbai - 400 001.	<b>बनाम/</b> v.	Addl. Commissioner of Income Tax - Ward 1(2), Aayakar Bhawan, M K Marg, Churchgate, Mumbai-400 020
स्थायी लेखा सं./PAN : AAACL1873B		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Assessee Company by	Shri Mihir Shah
Revenue by :	Shri A. Ramachandran

सुनवाई की तारीख /**Date of Hearing** : 07-06-2016

घोषणा की तारीख /**Date of Pronouncement** : 17-08-2016

आदेश / O R D E R

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the assessee company, being ITA No. 986/Mum/2013, is directed against appellate order dated 28<sup>th</sup> December, 2012 passed by learned Commissioner of Income Tax (Appeals)- 2, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2008-09, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 21<sup>st</sup> December, 2010 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143 (3) of the Income Tax Act,1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee company in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") reads as under:-

"1. Learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance of foreign exchange fluctuation loss of Rs. 15,66,857/- arising on revaluation of outstanding loans on the balance sheet date on the ground that same is capital loss and is not allowed as deduction under the Income Tax Act,1961. On the facts and in the circumstances of the case, the disallowance made ought to be deleted."

3. The brief facts of the case are that the assessee company is engaged in waterproofing, restoration and civil contract works for various clients.

4. During the course of assessment proceedings u/s 143(3) read with Section 143(2) of the Act , from the profit and loss account of the assessee company , the A.O. observed that the assessee company has debited an amount of Rs.12,90,079/ - as foreign exchange loss (net) under the head 'administrative and selling expenses'. The assessee company was required to explain by the AO that how foreign exchange loss in respect of loan to subsidiary company is allowable as revenue expenses.

The assessee company in reply submitted that it had granted interest bearing trade advance/ loan to its foreign associated enterprise (AE) in the normal course of its business. The assessee company submitted that it has a trading interest in its foreign AE and hence the loan receivable from its foreign AE is a trade investment. The assessee company submitted that it has earned interest of Rs. 43.10 lakhs on loan to foreign AE which has been offered for tax in the return of income filed with the Revenue. The exchange loss of Rs.

15.66 lakhs was arisen consequent to revaluation/restatement of such foreign currency loan as at the year end on 31-03-2008. Such expenditure being revenue in nature is allowable u/s 37(1) of the Act. The assessee company submitted that it is consistently following mercantile system of accounting and in accordance with this method of accounting, the assessee company is required to value all the trading assets and liability of foreign currency as on the valuation date. The exchange gain/loss arising due to valuation of such items is required to be debited/ credited to the profit & loss account. The assessee company relied on the decision of the Hon'ble Supreme Court in the case of CIT v. Woodward Governor India (P) Ltd., (2009)312 ITR 254(SC) and submitted that any loss arising on conversion of foreign currency liability at the year end is allowable as revenue loss. The assessee company has a trading interest in its foreign AE and hence the loan receivable from its foreign AE is a trade investment. The assessee company submitted that the foreign exchange loss accounted for in the profit & loss a/c is laid out and expended wholly and exclusively for the purposes of the business of the assessee company and hence, allowable u/s 37(1) of the Act.

The A.O. observed from the copy of foreign exchange loss ledger account filed during the course of assessment proceedings u/s. 143(3) read with Section 143(2) of the Act that the assessee company had debited foreign exchange loss of Rs. 15,66,857/- on account of fluctuation in exchange rate in respect of value of loan advanced to its associate concern M/s Likproof Construction LLC. The valuation of foreign currency loan to associate concern as per balance sheet date on 31<sup>st</sup> March, 2008 and corresponding foreign exchange loss is only a notional loss. There was no settlement of the loan as on 31<sup>st</sup> March, 2008. As per section 43A of the Act amended w.e.f. 1<sup>st</sup> April, 2003, any adjustment to the cost on account of foreign exchange valuation is allowable only on settlement/payment of the liabilities denominated in foreign currency. The A.O. held that in the instant case the foreign exchange loss is

computed as notional loss and further more the loss is not on account of any trading liability but it is related to loans advanced to foreign AE. Hence, the claim of notional loss in respect of the loans to subsidiary concern was not allowable as revenue expenditure. The A.O. distinguished the case law cited by the assessee company in the case of CIT v. Woodward Governor India (P) Ltd.(supra) as in that case the outstanding liability related to on account of import of raw materials which is certainly a trading liability. Hence, the A.O. disallowed the claim of foreign exchange loss amounting to Rs. 15,66,857/- claimed by the assessee company as not allowable as per Section 43A of the Act and added the same to the total income of the assessee company vide assessment order dated 21.12.2010 passed by the AO u/s 143(3) of the Act .

5. Aggrieved by the assessment order dated 21.12.2010 passed by the A.O. u/s. 143(3) of the Act , the assessee company filed its first appeal before the Id. CIT(A).

6. Before the Id. CIT(A) , the assessee company submitted that it had in the normal course of its business granted interest bearing trade advance/loans to its foreign AE as the assessee company has trading interest in the said foreign AE and hence the loan receivable from its foreign AE is a trading asset. The assessee company submitted that it has earned interest of Rs.43.10 lacs on loan to the said foreign AE and has offered it for taxation as business income in the return of income filed with the Revenue. The AO has accepted the interest income as business income. The assessee company had incurred exchange loss of Rs.15.66 lacs on revaluation/restatement of outstanding foreign currency loan receivable as on 31<sup>st</sup> March, 2008 from its foreign AE. The revaluation of foreign currency assets as on the balance sheet date was made in accordance with the consistent accounting method followed by the assessee company, hence, the exchange loss of Rs.15.66 lacs arising consequent upon the revaluation/restatement of such loan as at the yearend

should be allowed as expense u/s 37(1) of the Act. The AO had disallowed the said claim of foreign exchange loss on the ground that as per proviso to Section 43A of the Act any adjustment to the cost on account of foreign exchange is allowable only on settlement/payment of the liabilities and the loss is only a notional loss and the loss is not on account of any trading liability but it is related to loan liability.

The assessee company submitted that proviso to Section 43A of the Act is not applicable in the instant case as there is no liability incurred by the assessee company for acquisition of any asset for which liability is incurred for acquisition of asset from a country outside India consequent to change in foreign exchange rate during any previous year after acquisition of such asset. Rather the assessee company has given loan to its foreign AE and not borrowed any sum from its foreign AE, hence, the provisions of section 43A of the Act is not applicable. The assessee company relied upon the decision of Hon'ble Supreme Court in the case of CIT v. Woodward Governor India Private Limited (supra) . It was submitted by the assessee company that the AO has not disputed that the loan granted by the assessee company to its foreign AE is not a trading asset . The assessee company has granted loan to its foreign AE which is engaged in the similar business as that of the assessee company and hence it was pleaded that foreign exchange loss of Rs.15.66 lacs incurred by the assessee company on account of restatement/revaluation of such loan as on 31-03-2008 due to fluctuation of foreign exchange rates be allowed u/s 37(1) of the Act as it is laid out and expended wholly and exclusively for the purposes of the business of the assessee company.

The ld. CIT(A) rejected the contentions of the assessee company and observed that the assessee company had advanced money to it's foreign AE. The assessee company could not prove that the money is advanced for any trading purposes. The ld. CIT(A) held that the assessee company had advanced

money to its foreign AE as a loan and any loan given to a person for earning interest income has to be considered as capital asset. The ld. CIT(A) held that the loan granted to the foreign AE is a capital asset and any impairment with regard to money advanced is not allowable as deduction u/s 37(1) of the Act, vide appellate orders dated 28.12.2012 passed by the learned CIT(A).

7. Aggrieved by the appellate orders dated 28.12.2012 passed by the ld. CIT(A), the assessee company filed second appeal before the Tribunal.

8. The ld. Counsel for the assessee company submitted that the assessee company has incurred foreign exchange loss on loans denominated in foreign currency granted to its foreign AE in Emirates of Dubai in UAE on account of restatement/revaluation of loan as on the date of Balance Sheet owing to adverse fluctuation in foreign exchange rates. It is a loss on revaluation/restatement of outstanding loan denominated in foreign currency receivable from the foreign AE. The assessee company is engaged in waterproofing, restoration and civil contract works. The assessee company has incorporated a subsidiary company in Emirates of Dubai in UAE namely Likproof Construction LLC. The assessee company has granted loan to its foreign AE for some business needs which is in the nature of trade advance and the said loans are denominated in foreign currency. The ld. Counsel relied on the decision of Hon'ble Supreme Court in the case of CIT v. Woodward Governor India (P.) Ltd., (2009) 312 ITR 254(SC) and submitted that the decision of this case is applicable to assessee company's case. The ld. Counsel also relied on the decision of the Tribunal in the case of M/s ETP International Private Limited v. ITO in ITA No. 6506/Mum/2011 for the assessment year 2007-08 vide orders dated 29<sup>th</sup> August, 2012. He submitted that the interest income earned by the assessee company on these loans denominated in foreign currency are duly included as business income in return of income filed with the Revenue and due taxes have been paid.

9. The ld. D.R., on the other hand, relied on the orders of authorities below.

10. We have considered the rival contentions and also perused the material available on record including case laws relied upon by both the parties. We have observed that the assessee company has incorporated an associated company (AE) in UAE in Emirates of Dubai namely Likproof Construction LLC for undertaking construction work. Memorandum and Article of Association of said foreign AE i.e. UAE company Likproof Construction LLC filed by the assessee company is placed in the file. The assessee company has granted loans denominated in foreign currency to the said foreign AE and also charged interest from the foreign AE of which interest income is offered for taxation as business income which is accepted by Revenue. The assessee company has advanced the loan denominated in foreign currency to said foreign AE and the foreign exchange loss amounting to Rs. 15.66 lacs was debited to its P&L account which arose on account of adverse fluctuation in foreign exchange rates as on 31-03-2008 calculated on the outstanding value of the said loans denominated in foreign currency advanced by the assessee company to its foreign AE as on 31-03-2008. We have observed that the assessee company is not able to bring on record cogent material/evidences in support of its claim that business/trade advances/loans were extended by the assessee company to its foreign AE which has been in-fact actually utilized by its foreign AE for business purposes. The copies of Financial Statements of the said foreign AE or any other cogent material/evidences are not placed on records to prove and demonstrate that the assessee company extended trade/business advances to its foreign AE in Emirates of Dubai in UAE and the same were in-fact actually utilized towards business purposes by its foreign AE while consistent finding of fact is recorded by authorities below that the assessee company is not able to demonstrate and prove its

contentions that the said interest bearing loans/advances denominated in foreign currency were granted by the assessee company to its foreign AE in UAE for business purposes and its actual utilization by its foreign AE in UAE for business purposes. No such evidences has been placed before us by the assessee company to support its contention of having advances loans denominated in foreign currency to its foreign AE in UAE for business/trade purposes and its further actual utilization by its foreign AE in UAE for business purposes. The primary onus was on the assessee company to have led cogent evidences to substantiate its plea of grant of said loans to its foreign AE for purposes of trade/business and its actual utilization by foreign AE for business purposes, which the assessee company except for making bald statement could not led cogent evidences to substantiate its above stated contentions. The assessee company on the other hand is charging interest on these loans granted to foreign AE and presumption will arise unless rebutted that that the said loans are in-fact granted on capital field rather than being trading/business advances. In our considered view, this notional loss which arises owing to adverse fluctuation in foreign currency rates as on 31-03-2008 which led to restatement / revaluation of interest bearing loans denominated in foreign currency extended by the assessee company to its foreign AE in UAE and which could not be proved by the assessee company to have been extended for trade/business purposes , the presumption shall arise that loan is on capital field until the same is rebutted by the assessee company and hence the said notional loss arising on restatement/revaluation of foreign currency loans as on the date of Balance Sheet as on 31-03-2008 due to adverse foreign exchange fluctuations cannot be allowed as deduction u/s 37(1) of the Act while computing income of the assessee chargeable to tax under the Act. The decision of Hon'ble Supreme Court in the case of Woodward Governor India Private Limited(supra) and decision of Mumbai Tribunal in ETP International Private Limited(supra) relied upon by the assessee company are of no help to the

assessee company. The Hon'ble Supreme Court in Woodward Governor India Private Limited(supra) held that losses on account of fluctuation of foreign exchange rates owing to reinstatement of liability arisen for stock-in-trade were held to be allowable u/s 37(1) of the Act , while for post amendment to Section 43A of the Act w.e.f 01-04-2003 by Finance Act 2002 , the adjustment to cost of capital asset acquired out of borrowings in foreign currency for acquisition of capital asset is to be adjusted on payment of foreign exchange liability and not to be adjusted on notional basis merely on fluctuation of foreign exchange rates on the date of Balance Sheet. Similarly, in ETP International Private Limited( supra) , the Tribunal recorded a finding of fact that the money was advanced by tax-payer for business purposes which has been used by foreign AE for the purposes of business and hence relying on the decision of Hon'ble Supreme Court in the case of S A Builders v. CIT( 288) ITR 1(SC) such losses were allowed by the Mumbai Tribunal based on the facts of the case, while in the instant case the assessee company is not able to demonstrate that the loans/advances granted by the assessee company to its foreign AE in Emirates of Dubai in UAE was in the nature of trade/business advances for the purposes of business of the assessee company which has been in-fact actually utilized by its foreign AE for its business purposes. Hence keeping in view the peculiar facts and circumstances of the case as set out above , we dismiss the appeal filed by the assessee company . We order accordingly.

11. In the result, assessee company's appeal in ITA No 986/Mum/2013 for the assessment year 2008-09 is dismissed.

Order pronounced in the open court on 17<sup>th</sup> August , 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 17-08-2016 को की गई ।

Sd/-  
(MAHAVIR SINGH )  
JUDICIAL MEMBER

sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 17-08-2016

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व.नि.स./ R.K., Ex. Sr. PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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