

**IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA**

**BEFORE SHRI A. T VARKEY, JM & DR. A.L.SAINI, AM**

आयकरअपीलसं./ITA No.664/Kol/2014

(निर्धारणवर्ष / Assessment Year: 2010-11)

<b>DCIT, Circle-55, Kolkata</b>	<b>Vs.</b>	<b>Dilip Chand Kankaria</b>
54/1, Rafi Ahmed Kidwai Road, 4 <sup>th</sup> Floor, Kol-16.		87, Lenin Sarani, Kolkata – 700 013.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AJXPK 5793 Q		
<b>(ASSESSEE)</b>	<b>..</b>	<b>(RESPONDENT)</b>

Assessee by : Shri Saurabh Kumar, Addl. CIT(DR)  
Respondent by : Shri Subash Agarwal, Advocate.

सुनवाईकीतारीख/ **Date of Hearing** : **14/11/2017**

घोषणाकीतारीख/**Date of Pronouncement** : **31/01/2018**

**आदेश / ORDER**

**Per Dr. Arjun Lal Saini, AM:**

The captioned appeal filed by the Revenue, pertaining to A.Y 2010-11, is directed against an order passed by the Commissioner of Income Tax(Appeals)-XXXVI, Kolkata, in Appeal No.86/CIT(A)-XXXVI/Kol/Wd-55(4)/Kol/2013-14, dated 08.01.2014, which in turn arises out of an order passed by the Assessing Officer u/s 143(3) of the I.T Act, 1961 (hereinafter referred to as the 'Act'), dated 25.03.2013.

2. The Revenue has raised the following grounds of appeal:

*"1. On the facts and in the circumstances of the case, Id. CIT(A) has erred in allowing the interest of Rs.74,76,809/- as not being established to have been wholly and exclusively for the purpose of business.*

*2. On the facts and in the circumstances of the case, the assessee failed to establish the rendering of services of the brokers and so Id. CIT(A) ought to have confirmed the disallowance of Rs.14,85,451/-.*

*3. The appellant craves leave to add, alter or abrogate any ground."*

3.The Ground No.1 raised by the Revenue relates to interest of Rs.74,76,809/- as not being established to have been used wholly and exclusively for the purpose of business.

3.1.The brief facts apropos this issue are that assessee filed its return of Income on 11.03.2011, declaring income of Rs.2,36,605/-. The assessee's case was selected for scrutiny u/s 143(2) of the Act and the Assessing Officer completed the assessment by making the disallowance on account of interest paid. The assessee accepted loan from various parties to the tune of Rs.7,54,95,000/- and he paid interest on the said loan at Rs.1,15,13,792/-. The assessee had given loan and advances to various parties to the tune of Rs.7,25,95,889/- and he received interest on these advances at Rs.21,62,584/-.

The assessing officer observed that only interest income of Rs.21,62,584/- was generated from the loan and advances given by assessee to various parties whereas the assessee employed nearly 96% of the loan taken in advances. The assessing officer noted that assessee paid interest at Rs.1,15,13,792/-, on loan taken by him to the tune of Rs.7,54,95,000/- and received interest at Rs.21,62,584/- on loan given by him to various parties to the tune of Rs.7,25,95,889/-, the loan accepted by the assessee from others and given by the assessee to others are more or less same but there was a huge difference between interest paid and received, therefore assessing officer considered Rs. 93,51,208/- (Rs.1,15,13,792 - Rs.21,62,584/-), being excess interest paid for non- business purposes and disallowed the same.

3.2 During the assessment proceedings, the assessee submitted the details of utilization of borrowed funds of Rs. 7,54,95,000/-, stating the followings:

- (i) Advances for occupancy Rs.3,66,38,797/-: The Assessee explained to AO that these advances were given for booking of space at Baruipur against occupier's right, they advanced the above amount to owners and ultimately they cancelled the arrangement and finally received Rs.75,00,000/- as compensation for the same.
- (ii) Interest bearing Loan Rs.1,96,67,114/-: The said amount was advanced as temporary loan and in turn assessee received interest at Rs.21,62,584/-.

(iii) Lease hold property at M.G. Road: Rs. 40,09,225/-: The assessee received rent of Rs.22,19,065/- from the above property and also received interest of Rs.6,92,400/-.

(iv) Sundry debtors of Devyank Arts Against sale of picture right:Rs.1,47,72,019/-: The assessee sold picture rights to above parties in earlier years for which part payment have not been made by the purchasers. However,the profit on sale of picture right has been shown in the respective years.

The AO observed that the assessee has made substantial borrowing for which interest has been paid. However, the borrowing has in turn been given to various companies and sundry debtors etc which were not related to his business and on which no income has been earned by the assessee. Out of the above, the AO has not made any comments for interest bearing loan of Rs.1,96,67,114/- and Lease hold property at Rs.40,09,225/-, but he has disputed the utilization of borrowed fund for advance for occupancy and sundry debtors against sale of picture rights. The AO made addition of Rs.93,51,208/- (Rs.1,15,13,792 -Rs.21,62,584/-), being interest paid for non- business purposes.

4. Aggrieved by the addition made by the Assessing Officer, the assessee filed an appeal before the Id. CIT(A) who has deleted the addition made by the Assessing Officer. The CIT(A) observed that Assessing Officer has disputed the utilization of borrowed fund for advance for occupancy and sundry debtors against sale of picture rights. The Id. CIT(A) held that assessee has admittedly paid a sum of Rs.3,66,38,397/- to various sister concerns who were the owners of the property and the contractor utilized for construction, while the assessee had the occupiers right. In lieu of the occupiers right and the loans given to the sister concern, he has received a sum of Rs.75 lakhs during the year. As the amount received by the assessee of Rs.75 lakhs for the year, in lieu of the loans given and occupiers right in property, is much more than the interest payable on borrowing of Rs.3,66,38,397/-,diverted to sister concerns for purchase of property, therefore, no disallowance on account of interest diverted for non business purposes was warranted.

4.1 The CIT(A) observed that other utilization of the borrowing was utilized to compensate for the sundry debtors of the proprietary concern M/s. Devyank Arts. The assessee repeated the explanation which he had stated before the Assessing

Officer, that since he was a film exhibitor, he sells the picture right to various companies, which was taken as income of the year in which it was sold. However, as a part of the payment remains outstanding, it appears as sundry debtors for which the borrowings had to be made. So, the borrowings were for the purpose of his film business. As per the assessee's explanation, since the borrowings were related to his business as film exhibitor, no disallowance could be made for interest paid, for related borrowings. Therefore, Id. CIT(A) deleted the addition.

5. Not being satisfied with the order of Id. CIT(A), the Revenue is in appeal before us. The Id. DR for the Revenue has submitted before us that the Assessing Officer has rightly observed that the excess of interest on loan given by the assessee i.e Rs.93,51,208/-, was not pertinent to those loan amount which have been borrowed and utilized for business purpose of the assessee, therefore he disallowed this interest on loan taken. The Id DR stated that the Id. CIT(A) has deleted the addition without considering the findings of the Assessing Officer. This way, Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. On the other hand, the Id Counsel for the assessee has defended the order passed by the Id CIT(A) and submissions made before the Id CIT(A).

6. Having heard the rival submissions and perused the materials available on record, we note that assessee has admittedly paid a sum of Rs.3,66,38,397/- to various sister concerns who were the owners of the property and the contractor utilized for construction, while the assessee had the occupiers right. In lieu of the occupiers right and the loans given to the sister concern, he has received a sum of Rs.75 lakhs during the year. As the amount received by the assessee of Rs.75 lakhs for the year, in lieu of the loans given and occupiers right in property, is much more than the interest payable on borrowing of Rs.3,66,38,397/-, diverted to sister concerns for purchase of property, therefore, Id CIT(A) has rightly held that no disallowance on account of interest diverted for non business purposes was warranted. Therefore, we are of the view that advances for occupancy is for the purpose of business and business expediency. For this, we rely on the judgment of Hon'ble Supreme Court of S.A. Builders, 288 ITR 01 (SC) wherein it was held:

*“The assessee borrowed the fund from the bank and lent some of it to its sister-concern (a subsidiary) on interest-free loan. The test in such a case is really whether this was done as a measure of commercial expediency. The decisions relating to s. 37 will also be applicable to s. 36(1)(iii) because in s. 37 also the expression used is "for the purpose of business". It has been consistently held in decisions relating to s. 37 that the expression "for the purpose of business" includes expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits thereby. The High Court as well as the Tribunal and other IT authorities should have approached the question of allowability of interest on the borrowed funds from the above angle. In other words, the High Court and other authorities should have enquired as to whether the interest-free loan was given to the sister company (which is a subsidiary of the assessee) as a measure of commercial expediency, and if it was, it should have been allowed. 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.*

6.1 We also note that other utilization of the borrowing, was utilized to compensate for the sundry debtors of the proprietary concern, M/s. Devyank Arts. The assessee repeated the explanation which he had stated before the Assessing Officer, that since he was a film exhibitor he sells the picture right to various companies, which was taken as income of the year in which it was sold. However, a part of the payment remains outstanding, it appears as sundry debtors for which the borrowings had to be made. So, the borrowings were for the purpose of his film business. As per the assessee's explanation, since the borrowings were related to his business as film exhibitor, no disallowance could be made for interest paid related borrowings. Based on the above facts and circumstances, we are of the view that borrowings made by the assessee were related to his business. Hence, we confirm the order passed by the Id. CIT(A).

6.2. In the result, the appeal filed by the Revenue (in Ground No.1), is dismissed.

**7.The Ground No.2 raised by the Revenue relates to brokerage commission paid by the assessee at Rs.14,85,451/-.**

7.1. The brief facts qua the issue are that the assessee paid brokerage commission of Rs.14,85,451/- for mobilization of loans and advances taken. The assessee paid brokerage commission to Sri Santi Kumar Surana of Rs.14,85,451/-, and the said payment was confirmed by Sri Surana against notice u/s 133(6) but he failed to appear against notice u/s 131 of the I.T. Act issued to him, during the assessment proceedings. The AO noted that since, the assessee failed to establish nexus between parties (assessee, broker and lender), therefore, he disallowed the brokerage commission of Rs.14,85,451/-.

7.2. Aggrieved by the addition made by the Assessing Officer, the assessee filed an appeal before the CIT(A), who has deleted the addition. During the appellate proceedings, the assessee submitted that brokerage was paid to Mr. Shanti Kumar Surana, for arranging loans. As per terms and conditions, the brokerage was to be paid @ 2.4% per annum depending upon the period for which the unsecured loan was taken. The CIT(A) observed that the Assessing Officer has not disputed the loans received. The broker has given the fully details of brokerage charged, and the payments were made by assessee by cheque and the TDS was deducted thereon. The CIT(A) noted that the Broker, Shri Shanti Kumar Surana, except to physical presence, during the assessment proceedings, made a detailed compliance, that is, he submitted his Pan No. and copy of income tax return and he confirmed the transaction with the assessee stating that he received the brokerage from the assessee. The CIT(A) noted that there was no basis for the Assessing Officer to disbelieve the brokerage paid, merely on the basis of non-appearance personally of the broker in response to 131 notice, when all the details for making enquiry, if any, was available with the Assessing Officer. Therefore, considering the these facts, the Id. CIT(A) deleted the addition made by the Assessing Officer of Rs.14,85,451/-.

7.3. Not being satisfied with the order of Id. CIT(A), the Revenue is in appeal before us. The Id. DR for the Revenue has submitted before us that the Assessing Officer disallowed the commission & brokerage of Rs.14,85,451/- claimed by the assessee, as the same was not incurred for arranging the loans taken by him. The Assessing Officer observed that most of the loan creditors were well known to the assessee, they were very old loan creditors continuing since several years ago. In any earlier years, no brokerage or commission was paid by the assessee, for arranging such loan from those loan creditors, then, why it was required in subsequent year, while the loan creditors are mostly remain same persons.

7.4 On the other hand, the counsel for the assessee submitted before us that brokerage was paid to Mr. Shanti Kumar Surana, for arranging loans. As per terms and conditions, the brokerage was to be paid @ 2.4% per annum depending upon the period for which the unsecured loan was taken. The Assessing Officer has not disbelieved the loans received. The broker has given the fully details of brokerage charged, the payments were made by assessee by cheque and TDS was deducted thereon. The counsel for the assessee submitted that there was no basis for the Assessing Officer to disbelieve the brokerage paid, merely on the basis of non-appearance personally of the broker in response to 131 notice, when all the details for making enquiry, if any, was available with the Assessing Officer. The counsel has also relied on the judgment of Calcutta High Court in the case of CIT vs. M/s Inbuilt Merchant P Ltd, G.A. No.3825 of 2013, dated 14.03.2014, wherein it was held that the Assessing Officer has overlooked the importance of the books of accounts maintained in the ordinary course of business. The books of accounts maintained in the ordinary course of business are relevant and they cannot be discarded in the absence of appropriate reasons. For the purpose of carrying on its business, the assessee has to recruit the agents. It may not be possible for the assessee to know them personally. Whatever address was furnished to the assessee, has been disclosed to the Income-tax Department. Payments were admittedly made by cheque after deduction of tax. The tax deducted at source has duly been deposited.

8. Having heard the rival submissions and perused the materials available on record, we note that during the appellate proceedings, the assessee submitted that brokerage was paid to Mr. Shanti Kumar Surana for arranging loans. As per terms

and conditions, the brokerage was to be paid @ 2.4% per annum depending upon the period for which the unsecured loan was taken. The CIT(A) observed that the Assessing Officer has not disputed the loans received, the broker has given the fully details of brokerage charged, the payments were made by assessee by cheque and the TDS was deducted thereon. There was no basis for the Assessing Officer to disbelieve the brokerage paid, merely on the basis of non-appearance personally of the broker in response to 131 notice, when all the details for making enquiry, if any, was available with the Assessing Officer. Besides, for identity, the broker has submitted to assessing officer his PAN No. and return of income filed by him declaring income nearly Rs. 3.4 Crores. The conclusions arrived at by the CIT(A) are, therefore, correct and admit no interference by us. We approve and confirm the order of CIT(A).

8.1. In the result, the appeal filed by the Revenue (in Ground No.2), is dismissed.

Order pronounced in the open court on this **31/01/2018**

Sd/-  
(A. T. VARKEY)

Sd/-  
(DR. A.L.SAINI)

न्यायिकसदस्य / JUDICIAL MEMBER      लेखासदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata; दिनांक Dated **31/01/2018**

RS,SPS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Assessee – DCIT, Circle-55, Kolkata
2. प्रत्यर्थी/ The Respondent- Dilip Chand Kankaria
3. आयकरआयुक्त(अपील) / The CIT(A), :Kolkata.
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.  
सत्यापितप्रति

//True Copy//      By Order

Senior Private Secretary,  
Head of Office/D.D.O,  
I.T.A.T, Kolkata Benches,  
Kolkata.