

IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM

I.T.A. No.806/Mum/2016
(Assessment Year: 2011-12)

M/s. HCC Real Estate Ltd. 11 th Floor, 247 Park, Hincon House, LBS Marg, Vikhroli (W), Mumbai-400 083	Vs.	Dy. CIT – 10(3), Mumbai
PAN/GIR No. AABCH 6060 P		
(Assessee)	:	(Revenue)

I.T.A. No.693/Mum/2016
(Assessment Year: 2011-12)

Asst. CIT -15(2)(21), Room No. 403, 4 th Floor, Aaykar Bhavan, M. K. Road, Mumbai-400 020	Vs.	M/s. HCC Real Estate Ltd. 11 th Floor, 247 Park, Hincon House, LBS Marg, Vikhroli (W), Mumbai-400 083
PAN/GIR No. AABCH 6060 P		
(Revenue)	:	(Assessee)

Assessee by	:	Dr. Prayag Jha & Shri Vikrant Rajopadhye
Revenue by	:	Shri B. Srinivas

Date of Hearing	:	03.04.2018
Date of Pronouncement	:	14.06.2018

ORDER

Per Shamim Yahya, A. M.:

These are cross appeals by the assessee and the Revenue arising out of the order of the Id. Commissioner of Income Tax (Appeals) dated 27.11.2014 and pertain to the assessment year 2011-12.

Revenue's appeal

2. The grounds of appeal read as under:

1. "On the facts and circumstances of the case and in law, the Id.CIT(A) has erred in holding the assessee's business activity to be in existence on the basis of Hon'ble ITAT's observation for an year much antecedent to the year under consideration, without giving any credence to the fact that in subsequent many years till today, the assessee has not shown any business income, whatsoever.
 2. On the facts and circumstances and in law, the Id.CIT(A) has erred in misinterpreting Assessing Officer's allowance of business expenses for A.Y. 2012-13 as the authoritative proof of existence of business in a year previous to that.
 3. That on the facts and in the circumstances of the case and in law, the Id.CIT(A) has erred in allowing the assessee's claim of deduction of the following expenditure :
 - a) Employees remuneration and benefits Rs.373.55 lacs
 - b) Administrative and other expenditure Rs.213.81 lacs
 - c) Finance Cost Rs.1201.41 lacs
 - d) Depreciation Rs. 18.98 lacs
 4. On the facts and circumstances and in law, the Ld.CIT(A) has further erred with respect to the commencement of business as mere commencement of business in one year does not lead to an automatic allowance of expenses in successive years irrespective of the existence or its continuance of business activities.
 5. On the facts and circumstances and in law, the Ld.CIT(A) has further erred in ignoring his own decision for A.Yrs.2006-07, 2009-10 and 2010-11 wherein the order of the AO was upheld,
3. The Assessing Officer in this case observed that the assessee had not shown any income from business operation based on which he required the assessee to justify its claim vide letters dated 25.06.2013 & 01.01.2014. In response to the same, the assessee company filed its submissions on 10.10.2013, 17.10.2013, 20.01.2014 and 17.02.2014 which were considered by Assessing Officer before framing the assessment. As per the details furnished by the assessee before the Assessing Officer, it was submitted that the assessee company had acquired requisite permission from Government and was in the process of consolidating the land holding in respect of which expenses were met including employees remuneration, administrative and other expenses, finance cost etc. However, Assessing Officer was not satisfied with the explanation furnished and he went

on to hold that the assessee's whole project was in a nascent stage and hence, its business could not be said to have commenced during the year

4. Upon the assessee's appeal, the Id. Commissioner of Income Tax (Appeals) noted that the issue of commencement of business was already settled by the ITAT in assessee's own case for assessment year 2007-08 in ITA No. 4224/Mum/2011 vide order dated 04.01.2013, it was held as under:

"5. After considering the submission and perusing the material on record, I found that this issue should go back to the file of the AO to examine the same afresh, I noted that no doubt, one project was going on, however, many projects were in pipeline, it is seen that the assessee had entered into various agreements of Urban Development and entered into an agreement with the land owner for redevelopment of a prime property in the suburbs of Mumbai to conduct table survey, census of the occupants etc. at Vikhroli. For this, various analyses were conducted by ICICI property services. The assessee made an application to the Municipal Corporation of Greater Mumbai on 17-6-2006. It was further submitted that out of development expenses of Rs.76 crores, the expenses related to development of industrial park property were carried forward under work in progress in the balance sheet and which were not directly related to the said development activity were charged to profit and loss account. I further found that business was very much in existence and, therefore, it cannot be said that there was no business activity carried out by the assessee. If by any reason in various other proceedings, where working was in pipeline and working could not be started then also the expenses claimed on these activities are to be allowed in accordance with the business activities. Hence, I therefore, restore this issue to the file of the Assessing Officer to examine afresh after affording opportunity of being heard to the assessee."

5. The Id. Commissioner of Income Tax (Appeals) further noted that pursuant to the above direction of the ITAT, the Assessing Officer has accepted the assessee's claim of commencement of business and allowed the expenditure in relation thereto.

Accordingly, the Id. Commissioner of Income Tax (Appeals) after somehow discussion has concluded as under:

Therefore, in view of the specific finding of fact by the Hon'ble Tribunal in appellant's own case for A.Y.2007-08 and which was accepted by Ld. AO in order u/s 143(3) r.w.s 254 as also the decisions of Hon'ble Mumbai Bench of ITAT in the cases cited supra, I have no hesitation in holding that the appellant's business had commenced and, therefore, expenditure claimed by it on revenue account had to be allowed.

6. Against the above order, the Revenue has filed the appeal before the ITAT.

7. We have heard both the counsel and perused the records. As rightly pointed out by the Id. Commissioner of Income Tax (Appeals), this is covered in favour of the assessee in assessee's own case vide this tribunal order dated 04.01.2013. It is not the case that the Hon'ble jurisdictional High Court has reversed the order of the ITAT. Hence, respectfully following the precedent as above, we do not find any infirmity in the order of the Id. Commissioner of Income Tax (Appeals). Accordingly, the Revenue's appeal stands dismissed.

Assessee's appeal:

8. The grounds of appeal read as under:

1. On the facts and circumstances of case and law, the Ld. CIT(A) erred in confirming that Interest from ICD amounting to Rs.1254.84 Lakhs and Interest from debenture amounting to Rs.908.63 Lakhs is assessable under the head "Income from other sources" instead of "Income from business and profession".

2. WITHOUT PREJUDICE TO ABOVE:- On the facts and circumstances of case and law, the Ld. CIT(A) failed to appreciate that even interest income is assessable under the Head "Income From Other Source" then also business

expenditure required to be set-off against the "Income from Other Source" as per the Provision of "Set-off and Carry Forward".

3. WITHOUT PREJUDICE, the learned CIT(A) failed to appreciate that the Assessing Officer has erred in not allowing deduction of any expenditure under section 57 of the Act, against the income under the head "Income from Other Sources"

4. On the facts and circumstances of case and law, the Ld. CIT(A) erred in confirming the disallowance u/s 14A r.w.r 8D.

5. On the facts and circumstances of case and law, the Ld. CIT(A) erred in holding that sec. 14A r.w.r. 8D is sacrosanct (mandatory).

6. On the facts and circumstances of case and law, the Ld. CIT(A) erred in not restricting the disallowance u/s 14A to the extent of the Exempt Income of Rs.1 .74 Cr.

Apropos ground relating to addition on account of interest :

9. On this issue, the Assessing Officer has made the addition by observing as under:

Interest on ICD, Interest on Debenture, Interest from banks and interest on income-tax refund to be chargeable to tax under "Income from Other Sources."

As mentioned above, during the year,

- The assessee has earned interest income from interest from ICD of Rs. 1254.84 lakhs on account of funds lent as 'Inter Corporate Deposits. The interest income has been earned from the funds lying with the company. The interest incomes of Rs. 1254.84 lakhs which are interest on ICD are taxable as income from other sources.
- Similarly, the assessee has earned interest income from Banks of Rs. 41.94 lakhs on account of funds kept with banks as FD. The interest Income from banks has been earned from the funds lying with the company parked with the Banks. The interest income from bank; of Rs. 41.94 lakhs which are bank interest on FD are taxable as income from other sources.
- Similarly, the assessee has earned interest income from debentures of Rs. 908.63 lakhs on account of funds lent investment in debentures,. The interest income has been earned from the funds lying with the company & invested as debentures with the other companies. The debenture interest incomes of Rs. 908.63 lakhs which are debenture interest on are taxable as income from other sources.
- Similarly, the assessee has earned interest income from Income tax refunds of Rs. 0.28 lakhs. The interest incomes on Income tax Refunds of Rs. 0.28 lakhs which are taxable as income from other sources.

Having regard to the above discussion and as per provision of the Income-tax Act, 1961, the Interest of Rs. 2205.69 lakhs taxed under the head "Income from other sources".

10. Upon the assessee's appeal, the Id. Commissioner of Income Tax (Appeals) adjudicated the issue as under:

2.4.6 Ground Nos. 4,5 & 6 are against the action of Ld. AO in holding that interest from ICD and interest from debentures were taxable under the head 'Income from other sources'¹ instead of 'Profits and Gains of Business or Profession' as claimed by the appellant. While doing so, Ld. AO also held that revenue expenditure and interest and finance charges were to be capitalised rather than allowed as revenue expenditure. As regards the ICD, Ld AO has stated that the interest income was earned from the surplus funds lying with the company. Similarly, the appellant had earned interest income from banks on account of funds kept under FD and as such were taxable under the head 'Income from other sources'. He also states that the appellant had earned interest from deposits on account of funds lying with the company and invested with other companies. Similarly, it had earned interest income on income tax refunds and hence, all these items were held to be taxable under the head 'Income from other sources'. Thereafter, Ld. AO went on to hold that the appellant company had debited Rs.1201.41 lacs under the head 'Finance cost' against interest bearing borrowed funds shown as unsecured loans in the Balance Sheet. He also observed that the appellant company had also given advances to various subsidiary companies on which interest was charged and the same was shown as interest received on inter-corporate deposits and hence, the claim of finance cost was to be examined in the light of the provisions of section 57(iii) of the Act. Ld. AO also rejected the appellant's reliance on the decision of Hon'ble Supreme Court in the case of S.A.Builders Ltd. regarding deduction u/s 36(1)(iii) and 37(1) of the Act.

2.4.7 Per Contra, the appellant has relied on the decision of Hon'ble Delhi High Court in the case of CIT vs Kelvinator India (2015) 60 taxmann.com.78 (Del) in support of its claim that interest on debentures, fixed deposits were not to be excluded from business income for deduction u/s 32AB. However, I do not find that any specific submission has been made in respect of the taxability of interest income from ICD debentures etc. under the head 'Income from Other Sources'. On the contrary, I also find that my Ld. Predecessor in appellant's own case for A.Y.2006-07 and 2009-10 had confirmed the action of Ld. AO in taxing the interest income under the head 'Income from other sources' (ITA No. CIT(A)-22/ACIT-10(3)/IT-296/2011-12 and CIT(A)-22/ACIT-10(3)/IT-497/2011-12 vide orders dated 30th January, 2014). As the facts obtaining in the present year are in *pan materia* with the facts of earlier years, respectfully following the decision of

Hon'ble CIT(A)-22, Mumbai in the above two years, interest income earned from ICD etc. is held to be taxable under the head 'Income from other sources' However, as far as deduction of finance cost is concerned, the same has to be verified by the Ld. AO as to whether it pertains to the earning of interest income or to the business of the appellant company and in case there is no direct correlation with the earning of interest income, the finance cost shall be allowable to the appellant company, if it is so related to its other business.

11. Against the above order, the assessee is in appeal before us.
12. We have heard both the counsel and perused the records. We find that this incomes has been taxed as income from other sources on the ground that this interest has been earned from surplus fund lying with the company. Similar issue was also decided against the assessee in the earlier years. Hence, we do not find any infirmity in the action of the Id. Commissioner of Income Tax (Appeals) in holding that this income has to be taxed as income from other sources.
13. However, as regards the ground raised by the assessee that even if interest income is assessable under the head income from other sources, then also business expenditure is required to be set off against the income from other sources as per the provision of set off and carry forward. We find that the above is consequential issue to our adjudication as above, and no special direction in this regard is required. The Assessing Officer shall consider the same as per law.
14. As regards the other ground raised by the assessee the Id. Commissioner of Income Tax (Appeals) failed to appreciate that the Assessing Officer has erred in not allowing deduction of any expenditure u/s. 57 of the Act, against the income under

head income from other sources, we find that this ground is misplaced inasmuch as the Id. Commissioner of Income Tax (Appeals) has directed the Assessing Officer to verify this aspect as to whether finance cost pertains to the earning of the interest income and thereafter decide the issue. We do not find any infirmity in the direction of the Id. Commissioner of Income Tax (Appeals) in this regard.

Apropos ground relating to disallowance u/s. 14A.

15. The Assessing Officer has made disallowance by noting that the assessee has mutual fund investment balance at the end of the year Rs.32509.37 lacs. The assessee has earned the dividend income of Rs.174.58 lacs. The Assessing Officer noted that the dividend income being exempt, the assessee has not disallowed any expenditure u/s. 14A. The Assessing Officer has made disallowance u/s. 14A by also referring to special bench decision in the case of Cheminvest Limited vs. ITO 317 ITR 86 (AT) for the proposition that the disallowance u/s. 14A can be made even if no exempt income is actually earned. After having held so, the Assessing Officer has proceeded to make the disallowance u/s. 14A amounting to Rs.783.15 lacs.

16. Before the Id. Commissioner of Income Tax (Appeals), the assessee made elaborate submissions and also furnished a chart according to which the disallowance came to Rs.188.00 lacs. The Id. Commissioner of Income Tax (Appeals) considering the same held as under:

2.4.11 Having considered the entire gamut of case brought before me, i am of the considered opinion that in view of binding decision of Hon'ble Bombay High Court in the case of Court in the case of Godrej & Boyce Mfg. Ltd. (supra), the action of the Ld. AO in making disallowance u/s 14A r.w. Rule 8D is sacrosanct. It is seen that the appellant has made a claim of direct expenditure by way of interest towards certain loans of Rs.81.5 crores and Rs.65 crores respectively. Obviously, if these are verifiable, they would go out of the purview of disallowance made by the Ld. AO. In this regard, it would therefore, meet the ends of justice if the Ld. AO is directed to verify the claim made by the appellant towards inadmissible interest expenditure as also the claim of total average investments being Rs.23,408.47 lacs in place of Rs.29,970.95 lacs taken by the Ld. AO and thereafter, allow appropriate relief. Similarly, the claim of average assets of Rs.60,176.28 as against Rs.56,856.51 considered by Ld. AO also needs be verified before giving relief while giving effect to this order/

17. Against the above order, the assessee is in appeal before us.

18. We have heard both the counsel and perused the records. We find that the ld. Commissioner of Income Tax (Appeals) has actually remitted the issue to the file of the Assessing Officer to examine certain claims of the assessee. In our considered opinion, on the facts and circumstances of the case, the issue needs to be remitted to the file of the Assessing Officer with following further directions:

1. Disallowance u/s. 14A cannot be made in relation to investments which do not yield any dividend income during the year. (Hon'ble Bombay High Court decision in the case of *CIT vs. Ballarpur Industries Ltd.* [2017] 85 taxmann.com 37 (Bom).
2. Disallowance of interest is permissible only if the assessee's claim that it has sufficient own fund to make the investment is not correct. (Hon'ble

Bombay High Court decision in the case of Reliance Utilities & Power Ltd. [2009] 178 taxmann 135 (Bom)).

19. Hence, we direct the Assessing Officer to consider the issue afresh keeping in mind our above observations which duly have the mandate of Hon'ble jurisdictional High Court in various case laws. Needless to add, the assessee should be granted adequate opportunity of being heard.

20. In the result, the appeal by the assessee is allowed for statistical purpose and the appeal by the Revenue stands dismissed.

Order pronounced in the open court on 14.06.2018

Sd/-

(Ravish Sood)
Judicial Member

Mumbai; Dated : 14.06.2018
Roshani, Sr. PS

Sd/-

(Shamim Yahya)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai