

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI

Before Shri Mahavir Singh(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.1196/Mum/2014
(Assessment year: 2009-10)

Reliance Hypermart Ltd (Now merged with Reliance Retail Ltd), 5 th Floor, Court House Lokmanya Tilak Marg, Dhobi Talao, Mumbai 400 002. PAN : AABCR1718E	vs	ACIT-7 (2), Mumbai
APPELLANT		RESPONDENT

Appellant by	Shri Vijay Mehta
Respondent by	Shri Ram Tiwari

Date of hearing	31 -05-2018
Date of pronouncement	27 -07-2018

ORDER

Per G Manjunatha, AM :

This appeal filed by the assessee is directed against order of the CIT(A)-132, Mumbai dated 23-12-2013 and it pertains to AY 2009-10.

The assessee has raised the following grounds of appeal:-

1. Ground no. 1:

i) The learned Commissioner of Income tax (hereinafter referred to as CIT(A)) erred in confirming the disallowance of claim for deduction in respect of revenue expenditure incurred during the year amounting to Rs. 79,23,44,6107-.

2. The brief facts of the case are that the assessee company is engaged in the business of trading and merchandising goods and

services, filed its return of income for AY 2009-10 on 28-09-2009 declaring total loss of Rs.1,77,53,82,414. The case was selected for scrutiny and notices u/s 143(2) and 142(1) of the Act, were issued. In response to notices, the authorized representative of the assessee appeared from time to time and filed various details, as called for. During the course of assessment proceedings AO noticed that the assessee has claimed revenue expenditure of Rs.79,23,44,610 in statement of total income; however, such expenses has been treated as pre-operative expenses and capitalized under the head 'work-in-progress'. Therefore, called upon the assessee to explain as to why pre-operative expenses capitalized in books and claimed as revenue expenditure shall not be disallowed while computing income from business or profession. In response to notice, the assessee, vide its letter dated 18-11-2011 submitted that it has incurred various revenue expenditure in connection with its business and such expenses are revenue in nature have been debited in books of account under the head 'project development expenditure' and are appearing directly in the balance-sheet as part of capital work-in-progress. Since, such expenditure are of revenue in nature and are incurred during the year for the purpose of business and also there is no provision to claim revenue expenditure incurred during a particular year in any other assessment

year as per the provisions of the Income-tax Act, such expenditure has been claimed as revenue expenses u/s 37(1) in the computation of income. The assessee also filed detailed reply on the issue of expenditure and explained how such expenditure is allowable as revenue expenditure.

3. The AO, after considering relevant submissions of the assessee rejected claim of the assessee towards preoperative expenses capitalised in books under the head, work-in-progress and claimed as revenue in nature u/s 37(1) in the statement of total income by observing that as per assessee's own version, it has acquired and added a number of outlets during the year across the country and impugned expenditure has been incurred in connection with acquisition and addition of new outlets. As the expenditure has resulted in creation of substantial tangible asset, the same is bound to be treated as capital expenditure. The AO has given various reasons to deny the claim of the assessee towards revenue expenditure in the statement of total income. Relevant portion of order of AO is extracted below:-

“4. The above argument of the assessee is considered carefully and the same is not acceptable for the following reasons:

a. As per assessee's own version it has acquired and added a number of outlets during the year across the country and the impugned expenditure has been incurred in connection with acquisition and addition of new outlets only. As the expenditure has resulted in creation of substantial tangible asset, the same is bound

to be treated as capital expenditure only in view of the accounting principles.

b. In notes to Schedule C (Fixed assets) to the balance sheet, the impugned amount is shown as pre-operative expenses, which cannot be allowed as revenue expenditure for the year under consideration.

c. An expenditure cannot enjoy dual status of being capital in Books of Accounts and revenue for the purposes of Income Tax.

d. The assessee itself in its books of accounts treated the same to be capital in nature and accordingly capitalized the same as 'Capital WIP'. Even the auditors have not come out with absolutely clear remark in the Tax Audit Report at clause No.17 where it states that the assessee had launched a project and the same is implemented in a phased manner. If the same expenditure pertains to a particular project, then all the expenditure incurred on the project till it is implemented, needs to be capitalized and the same cannot be claimed as revenue.

e. The said capital expenditure has not generated any income/loss to be eligible to be claimed as revenue,

f. It is also relevant to note here that as per provisions of sect 145, the assessee has to follow a consistent accounting policy unless there is any specific notification issued by the Central Government/with regard to any specific accounting standard to be followed. In violation of this principle the assessee has followed one accounting policy for the purposes of Companies Act and another for Income Tax as far as "Project Development Cost" claim is concerned.

g. As per assessee's own version the impugned expenditure has not been incurred in connection with running of day-to-day business but has been incurred for acquisition of new outlets and the assessee was well aware of this fact, that is why it has treated this expenditure as capital expenditure in its books of accounts. When it is so then how the said expenditure can be allowed to be treated as revenue expenditure, the assessee has not been able to establish."

4. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee has filed elaborate written submissions, which have been reproduced at para 3 on pages 2 to 8 of the order of Ld.CIT(A). The assessee also filed details of various expenditure incurred and debited to project development expenditure in the books of account. The assessee also relied upon certain judicial

precedents to support its view. The sum and substance of the arguments of the assessee before the Ld.CIT(A) are that even though it has treated certain expenditure in the nature of pre-operative expenses to be capitalized under the head 'work-in-progress', but fact remains that such expenditure are in the nature of revenue expenditure like rent, salary, travelling expenses, professional fees, electricity, power, fuel, etc and other day to day expenses which are incurred towards existing business activity for the purpose of expansion by setting up more outlets. Therefore, there is no reason for the AO to disallow such expenditure only for the reason that the assessee has provided the same in the books of account as pre-operative expenses.

5. The Ld.CIT(A), after considering relevant submissions of the assessee and also relying upon case laws cited by the assessee, observed that the assessee has failed to prove that these expenses were paid by it during the previous year relevant to AY 2009-10 in the course of its business. Though there is no dispute that these expenses are revenue expenses and assessee has been expanding its business of trading in various products during the year by acquiring portion of Reliance Retails Ltd, as it is evident from the director's report and also the expenses, in principle, were admissible u/s 37 of the Act, as is already uphold by the ITAT, Mumbai Benches. However, in absence of

any proof that they were incurred by the assessee and coupled with the fact that such expenses were incurred prior to the date of agreement, there is no merit in the argument of the assessee that these are incurred in the course of business activity and which is allowable u/s 37(1) of the Act. The relevant portion of the order of the Ld.CIT(A) is extracted below:-

"3.5 I have looked into details. As per the slump sale agreement dated 18th June, 2009 the employees in respect of whom wages bonus and employees benefits were claimed by the appellant are appearing in Schedule 3 of agreement. For the same, the appellant were asked to furnish a copy of these parties' ledger account along with TDS details to show that payments were made by the appellant during the previous year 2008-09 relevant to AY 2009-10. The appellant was given 7 days time. However, even after lapse of said period, it is noted that a copy of accounts to show that these payments were made by the appellant has yet not been furnished. The appellant during the appellate proceedings have relied upon the decision given by the Hon'ble Mumbai in case of their sister concerned in ITA No 5997/Mum/2011 for AY 9 in the case M/s. Reliance Footwear Ltd. Vs. ACIT and stated that the issue is decided in favour of appellant.

As the matter is apparently on the same line, in the instant appeal, as per appellant, appellant has been asked to furnish the details of salary and wages paid and issue which has already dealt with in case of Reliance Footwear in para 6.2 as under: -

" 6.2 So far as it relates to the observations made by Ld. CIT(A) in his order that assessee vide letter dated 28.06.2011 has merely given the name, designation and amount paid with reference to salary paid without giving any proof of work actually being done, we may mention that we have carefully gone through the details filed by the assessee before Ld.CIT(A). Copy of the documents submitted before Ld. CIT(A), as mentioned earlier, were filed before us. We find that assessee in the details so filed has mentioned job description of each of the employees along with amount paid to him describing also that how much TDS has been deducted. For example job description is described as sourcing product design and development; sourcing and procurement; category management; marketing communication, marketing consumer behaviors; distribution and logistic; sourcing and procuring; talent acquisition buyer etc. In the note which has been filed along with the details it is clearly mentioned that the assessee has employed these persons for carrying out market research work such as to contact various manufacturers and suppliers of the footwear and other accessories; getting base price and delivery schedules as well as comparing the products of various manufacturers of unbranded products with the price and quality of branded products, preparing various reports for this purpose, planning, distribution and logistic, sourcing, designing products, inventory planning discussing consumer preferences for various product range etc. The submissions made by the assessee before Ld. CIT(A) matches with the job description of all the employees, Therefore, it cannot be said that assessee did not provide the necessary details, by furnishing these details, the assessee had placed on record prima facie material to substantiate the query raised by Ld. CIT(A). Without pointing out any defect and without bringing any adverse material on record, Ld. CIT(A) has observed that assessee has failed to prove that the expenditure was made wholly and exclusively for the purpose of business of the assessee. Thus, there is no basis for recording such finding. Therefore, even for the additional reasons described by Ld. CIT(A), the disallowance cannot be upheld."

3.7 Now, further going through the facts and details, these points emerge:

1. The price paid as consideration of Rs.10,62,63,00,000/- does not match with total Project Development Expenditure debited at Rs.95,14,27,44,415/-. Out of this, assessee claimed Rs.79,23,44,610/- as 'revenue expenses' out of total 'Project Development Expenses' during the year relevant to AY 2009-10.

2. The ledger account of individual employees or even consolidated salary account along with supporting evidence in form of details TDS, the payments made by the appellant as salary and wages Rs.20,01,66,068/- and then contribution to PF, gratuity and leave encashment of Rs.82,51,105/- has not been substantiated. The appellant has also failed to show TDS made on these salaries apparently paid by them and however has not been able to show that payment for PF and other statutory allowances have been paid by them in absence of any supporting document showing them as payer for these amounts claimed as their revenue expenses.

3.8 In view of these facts, I am of the considered opinion that the appellant has failed to prove that these expenses were paid by the during the previous year relevant to AY 2009-10. Though there is no dispute that these expenses are revenue expenses and since appellant has extending its business of trading in high quality products ranging over 20000 products during the year by acquiring portion of Reliance Retail Ltd. as its evident from the Directors' report also; hence the expenses in principle were admissible u/s.37 of the Act; as is already upheld by Hon'ble ITAT, Mumbai. However, in absence of any proof that they were incurred by the appellant and coupled the fact with that agreement is dated 18.1)6.2009 and expenses are claimed to be of previous year 2008-09r el evant to AY 2009-10 and transfer date is 31st March, 2008, thus, it is clear that expenses actually did not pertain to business of appellant but that of Reliance Retail Ltd. pertaining to earlier years before the date of transfer and hence the claim is not admissible. As stated earlier also the audit report of the appellant clearly states in point 10 under the head 'Project Development Expenditure', these expenses as 'pre-operative expenditure' totaling to Rs.9,005.89 lacs out of which appellant has capitalized 1,589.15 lacs. It is noteworthy that AO has also observed in the assessment order that these expenses are debited as 'pre-operative expenses' in notes 2 in the Schedule 'C' (fixed assets) of the Balance Sheet.

3.9 In view of this there was no ambiguity that these expenses were not incurred during the PY 2008-09 relevant to AY 2009-10 and hence they being not admissible u/s, 37 have to be disallowed. The action of AO is upheld. Ground No. 1 is dismissed.”

6. The Ld. AR for the assessee, at the time of hearing submitted that the issue is squarely covered in favour of the assessee by the decision of ITAT, "D" Bench in the case of M/s Reliance Footprint Ltd in ITA No.5997/Mum/2011, wherein under similar set of facts, the ITAT by following the decision of Hon'ble Bombay High Court in the case of CIT vs Kothari Auto Parts Manufacturing Ltd 109 ITR 333 (Bom) and the decision of Hon'ble Gujarat High Court in the case of CIT vs Alembic Glass Industries Ltd 103 ITR 750 (Guj), held that the expenditure incurred by the assessee are for the purpose of expansion of its

business and those expenditure are in the nature of revenue expenditure and does not create any asset and also did not provide any enduring benefit to the business of the assessee so as to say that expenditure was capital in nature. The facts in this case are identical to the issue which has already been considered by the ITAT, therefore, for similar reasons, the addition made by the AO towards disallowance of revenue expenditure claimed in the statement of total income, but treated as pre-operative expenses and capitalised under the head 'capital work-in-progress' in the books of account is deleted. The Ld.AR further submitted that the Hon'ble Bombay High Court upheld the findings of the ITAT in the case of M/s Reliance Footprint Ltd in Income-tax Appeal No.892 of 2014 dated 05-07-2017. Therefore, the issue is well settled by the decision of jurisdictional High Court and hence, the addition made by the AO cannot be sustained.

7. On the other hand, the Ld.DR strongly supporting the order of the Ld.CIT(A) submitted that it is evident from the assessee's own version that it has treated expenditure incurred towards expansion of its existing business as pre-operative expenses to be capitalised in the books of account, but claimed as revenue expenditure in the statement of total income. Therefore, from assessee's own contention it is very clear that an expenditure cannot enjoy dual status of being capital in books and

revenue for the purpose of income-tax, hence, the AO had rightly disallowed revenue expenditure claimed by the assessee and such disallowance has been affirmed by the Ld.CIT(A) and, therefore, his order should be upheld.

8. We have heard both the parties and perused material available on record. The assessee has incurred various revenue expenses like rent, salary and other perquisites to staff, travelling expenses, power and fuel and other day to day expenses towards expansion of its existing business by setting up more retail shops in various part of the country. The assessee has capitalised said expenses in its books of account under the head, 'work-in-progress'; however, claimed it as revenue expenditure in the statement of total income u/s 37(1) of the Income-tax Act, 1961. The AO disallowed revenue expenses claimed in the statement of total income on the ground that an expenditure cannot enjoy dual status of being capital in books of account and revenue for the purpose of income-tax. The AO further observed that the assessee itself in its books of account treated the same to be capital in nature and accordingly capitalised under the head 'pre-operative expenses'. It is the contention of the assessee that expenditure incurred under the head 'pre-operative expenses and treated as capital work-in-progress are in the nature of revenue expenditure being rent, salary and other general

overhead expenses, which are incurred in connection with running of day to day business of expansion of its existing business by acquisition of new outlets, therefore, merely for the reason that the assessee has given different treatment for the same in its books of account and in the statement of total income for the purpose of computation of income cannot be a reason for disallowing said expenses.

9. Having heard both the sides, we find that expenses incurred under the head, 'pre-operative expenses' are in the nature of revenue expenses, which are incurred in connection with running of day to day business activity of the assessee. Although, the said expenditure has been incurred in connection with expansion of its existing business to set up more retail outlets, but the fact remains that the business activity of the assessee has already been commenced and once the business activity of the assessee has been commenced, whatever revenue expenditure is incurred, whether such expenditure has been incurred in connection with running of day to day business activity or expansion of its existing business, the same needs to be allowed as revenue expenses while computing income from business or profession. What is important for an expenditure to be treated as revenue or capital in nature is the nature of expense, but not treatment given by the assessee in its books of account. This proposition is supported by the decision of

Hon'ble Bombay High Court in the case of of CIT vs Kothari Auto Parts Manufacturing Ltd (supra) and the decision of Hon'ble Gujarat High Court in the case of CIT vs Alembic Glass Industries Ltd (supra). This proposition is further supported by the decision of co-ordinate bench of ITAT, in the case of Reliance Footprint Ltd, wherein the Bench, after considering the ratio laid down by the Hon'ble Supreme Court in the case of Kedarnath Jute Mfg Co Ltd 82 ITR 363 (SC), held as under:-

“6. We have heard both parties and their contentions have carefully been considered. There is no dispute to the fact that the assessee has shown a turnover of Rs.4.75 crores in relation to its stores which were made operational during the year at Bangalore and Hyderabad. Before the AO it was the case of the assessee that it is in the process of expansion of its business and thus this expenditure has been incurred in relation to expansion of business. It was also submitted that the expenditure which are in the nature of salary, electricity, audit fee etc. are essentially incurred for expansion of existing line of business that is setting up of more number of stores/speciality stores under planned format or for maintenance of already established stores. These submissions were made before the AO and have not been controverted by the AO and disallowance is made mainly on the ground that the assessee can not give dual status to these expenditures i.e. as "capital" in books of account and as "revenue" for Income tax purposes. However, such view of the AO can not be upheld in view of the decision of Hon'ble Supreme Court in the case of Kedarnath Jute Mfg Company Ltd, (supra) wherein it has been held that the issue whether the assessee is entitled to a particular deduction will depend upon the provisions of law relating thereto and not on the view which the assessee might take of his rights, nor can the existence or absence of entries in his books of account be decisive or conclusive in the matter.

6.1 From the submissions made by the assessee before the AO it is also clear that opening of stores at various places was one composite business of the assessee and in that course the assessee had started operation of its stores at Bangalore and Hyderabad. It was the contention of the assessee that operations of these stores at various locations is one composite business and once business had been started then the expenditure cannot be linked only to the stores which became operational during the year under consideration. Such submission of the assessee has not been controverted by the AO. All these details were submitted before the AO and it is not the case of the AO that assessee had not incurred such expenditure for its business. In the letter submitted by the assessee before AO it is clearly mentioned that when the expenditure is incurred for the purpose of expansion of business which is already in existence and, which is in the nature of revenue, then the same is allowable as revenue expenditure irrespective of the treatment given by the assessee to such expenditure in its books of account. No

material has been brought on record by the AO to negate such submissions made by the assessee. These propositions put forth by the assessee before AO are supported by the decision of the Hon'ble Bombay High Court in the case of CIT vs. Kothari Auto Parts Manufacturers Pvt. Ltd. (supra), and the decision of Hon'ble Gujarat High Court in the case of CIT vs. Alembic Glass Industries Ltd. (supra). Therefore, it has to be held that these expenditures incurred by the assessee are for the purpose of expansion of its business and those expenditure are in the nature of revenue (being mostly paid to employees). These are allowable in the year itself as per ratio of aforementioned decision of the Hon'ble Bombay High Court in the case of CIT vs. Kothari Auto Parts Manufacturers Pvt. Ltd. (supra) and Hon'ble High Court of Gujarat in the case of CIT vs. Alembic Glass Industries Ltd. (supra). These expenditures did not create, any asset and also did not provide enduring benefit to the business of the assessee so as to say that the expenditure was capital in nature. Therefore, we hold that expenditure are allowable in the year under consideration irrespective of the fact that assessee has given dual status to such expenditure in its books of account vis-a-vis computation of income filed alongwith return.

6.2 So far as it relates to the observations made by Ld. CIT(A) in his order that assessee vide his letter dated 28/6/2011 has merely given the name, designation and amount paid with reference to salary paid without giving any proof of work actually being done, we may mention that we have carefully gone through the details filed by the assessee before Ld. CIT(A) as mentioned earlier, were filed before us. We find that assessee in the details so filed has mentioned job description of each of the employees alongwith amount paid to him describing also that how much TDS has been deducted. For example job description is described as sourcing product design and development; sourcing and procurement; category management, marketing communication, marketing consumer behaviors; distribution and logistic, sourcing and procuring; talent acquisition buyer etc. etc. In the note which has been filed along with the details, it is clearly mentioned that the assessee has employed these persons for carrying out market research work such as to contact various manufacturers and suppliers of the footwear and other accessories; getting base price and delivery schedules as well as comparing the products of various manufacturers of unbranded products with the price and quality of branded products, preparing various reports for this purpose, planning, distribution and logistic, sourcing, designing products, inventory planning discussing consumer preferences for various product range etc. The submissions made by the assessee before Ld. CIT(A) matches; with the job description of all the employees. Therefore, it cannot be said that assessee did not provide the necessary details. By furnishing these details, the assessee had placed on record prima facie material to substantiate the query raised by Ld CIT(A). Without pointing out any defect and without bringing any adverse material on record, Ld CIT(A) has observed that assessee has failed to prove that the expenditure was made wholly and exclusively for the purpose of business of the assessee. Thus there is no basis for recording such finding. Therefore, even for the additional reasons described by Ld CFT(A), the disallowance cannot not be upheld.”

10. The Hon'ble Bombay High Court has upheld the decision of ITAT,

Mumbai in the case of Reliance Footprint Ltd in Income-tax Appeal

No.892 of 2014 vide its order dated 05-07-2017. The relevant portion of

the order of the High Court is extracted below:-

“6] We have considered the submissions canvassed by the learned counsel for the respective parties.

7] It is not relevant as to how the Assessee shows a particular income or expenditure in the books of account. In the present case, the Commissioner (Appeals) and the Tribunal has specifically on appreciation of factual matrix arrived at a conclusion that the expenditure are directly identifiable with the operations and maintenance of the existing stocks i.e. with regard to the payment of salary, travelling and conveyance allowance, telephone expenses, professional fees paid, audit fee and other miscellaneous expenses.

8] In view of the specific finding of fact arrived at by the Commissioner (Appeals) and the Tribunal, the Tribunal have held the expenditure to be revenue expenditure. In case of *Kothari Auto Parts Manufacturers Pvt. Ltd.* (supra), this Court had specifically observed that separate computation of income and expenditure would be justified only when several distinct business are carried on, and not when the separate business activities were carried out by some person and when one set of account is maintained for all set of activities.

9] In the present case also, one set of account is maintained for the business activity by the Assessee. The Assessee had incurred expenditure on account of expansion of business and the Assessee had commenced the business as per the findings of the Commissioner (Appeals) and the Tribunal. The said findings are findings of the fact.

10] In view of the above, no substantial question of law arises. These Appeals, as such, stand dismissed. No costs.”

11. In this view of the matter and respectfully following the decision of Hon'ble Bombay High Court in the case of *M/s Reliance Footprint Ltd* (supra), we are of the considered view that the AO was erred in disallowing revenue expenses claimed by the assessee in the statement of total income, but treated as pre-operative expenses to be capitalized under the head, 'capital work-in-progress' in books of account.

Therefore, we direct the AO to delete addition made towards disallowance of expenses.

12. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 27th July, 2018.

Sd/-

sd/-

(Mahavir Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 27th July, 2018

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Sr.PS, ITAT, Mumbai