

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'B' NEW DELHI**

**BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
I.T.A. No. 6265/DEL/2014 (A.Y. 2006-07)**

DCIT Circle- 1(1),  Gurgaon  <b>(APPELLANT)</b>	Vs.	M/s. DLF Cyber City Developers Ltd. 3 <sup>rd</sup> Floor, B-Wing Shopping Mall, Arjun Nagar, DLF City, Phase-1 Gurgaon PAN-AACCD3572H <b>(RESPONDENT)</b>
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**C.O. No. 183/Del/2015, (A.Y. 2006-07)**

M/s. DLF Cyber City Developers Ltd. 3 <sup>rd</sup> Floor, B-Wing Shopping Mall, Arjun Nagar, DLF City, Phase-1 Gurgaon PAN-AACCD3572H <b>(APPELLANT)</b>	Vs.	DCIT Circle- 1(1),  Gurgaon  <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Sh. R.S.Singhvi, Satyajeet Goel, CA's</b>
<b>Respondent by</b>	<b>Sh. Surendra Meena, Sr.DR</b>

<b>Date of Hearing</b>	<b>07.08.2019</b>
<b>Date of Pronouncement</b>	<b>10.10.2019</b>

**ORDER**

**PER SUCHITRA KAMBLE, JM**

This appeal is filed by the Revenue and the cross objection is filed by the assessee in respect of order dated 26.09.2014 passed by the CIT(A), Faridabad for A.Y. 2006-07.

2. The grounds of appeal are as under :

**ITA NO. 6265/DEL/2014 Revenue's appeal**

1. *“Whether Ld. CIT(A) is justified in allowing the interest expenses from income from house property ignoring the fact that the borrowed funds amounting to Rs.368.17cr. were used for CWIP, advance for land and loan given to sister concerns all totaling to Rs.404.58cr. and not for construction of let out buildings?”*
2. *Whether Ld. CIT(A) is justified in allowing the interest expenses from income from house property without appreciating the fact that no evidence could be furnished by the assessee that whole of the current liabilities were used for CWIP only?*
3. *Whether Ld. CIT(A) is justified in allowing the interest expenses from income from house property ignoring the fact that the assessee could not file any evidence w.r.t its claim that the term loan has been utilized for construction of Building’?*
4. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in holding that there was no requirement to file any evidence that the ‘Term Long’ had been utilized for construction of building.*
5. *That the appellant craves for the permission to add, delete or amend the grounds of appeal before or at the time of hearing of appeal.”*

**CO. NO.183/DEL/2015 Assessee's Cross objection**

1. *That on the facts and circumstances of the case and under the law, the reassessment is illegal, arbitrary and without jurisdiction in the absence of tangible material and recording of proper satisfaction.*
- 2(i)*That the original assessment was completed u/s 143(3) and the reassessment is based on change of opinion in total disregard to principle laid down by Supreme Court in the case of Kelvinator of India Ltd 320 ITR 561 and as such the assessing officer has no jurisdiction to initiate proceedings u/s 147.*

*(ii) That all the details regarding interest expenses were duly placed before assessing officer in the original assessment proceedings and as such the reopening is only on the basis of change of opinion.*

*(iii) That even otherwise, audit objection cannot be a basis for assuming jurisdiction u/s 147 in the absence of any fresh material or evidence.”*

3. The assessee filed return of income u/s 139(1) of the Income Tax Act, 1961 on 30.11.2010, declaring total income at Rs. 1,32,13,198/-. The assessment was completed vide order u/s 143(3) dated 31.12.2008 at the returned income of Rs. 1,32,13,198/-. After completion of regular assessment the assessee was served with notice u/s 148 of the Income Tax Act, 1961 on 21.03.2011 requiring the assessee to furnish a return of income as the Assessing Officer had reason to believe that income escaped assessment in the present assessee's case. In response to notice u/s 148 of the Act, the assessee vide letter dated 19.04.2011, requested that the return filed u/s 139(1), declaring the income at Rs. 1,32,13,198/- be treated as return of income filed, in response to Section 148 of the Act. Thereafter, upon the request of the assessee, the reasons recorded for initiation of proceedings u/s 147 of the Income Tax Act were provided, as under:

*“Assessment in this case was completed u/s 143(3) on 31.12.2008 at an income of Rs. 1,32,13,198. Now it has been discovered that income under the head “Income from House Property”, deduction of Rs. 105.81 Lakhs on account of interest paid to bank and other was allowed. Borrowed funds amounting to Rs. 36817.89 Lakhs raised from bank and others were utilized by assessee company on capital work in progress, advance for land and interest free loan granted to sister concern as under:-*

<i>1. Capital Work in Progress</i>	<i>Rs. 35958.75 Lakh</i>
<i>2. Advance for land</i>	<i>Rs. 400.04 Lakh</i>
<i>3. Loan</i>	<i>Rs. 4100.16 Lakh</i>
<i>Total:</i>	<i>Rs.40458.95 Lakh</i>

*Since, the borrowed fund were not used for construction of building which have been let out, hence, deduction of Rs. 105.81 Lakhs is not allowable u/s 24(i)(vi).*

*Therefore, in view of the above facts, I have reason to believe that income to extent of Rs.105.81 Lakhs for the A.Y. 2006-07 has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961 and this is a fit case for issuance of Notice u/s 148 of the Income Tax Act, 1961.”*

Accordingly, the re-assessment was framed in the assessee's case, and assessment was passed on 29.12.2011 by enhancing the original income of Rs. 1,32,13,198/- to Rs. 2,37,94,580/- thereby disallowing the interest claimed u/s 24(b) of the Act at Rs. 1,05,81,381/-.

4. Being aggrieved by the Assessment Order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. The Ld. DR submitted that the interest claimed on house property which was from borrowed fund from ICICI Bank as per the Assessee's contentions was not supported by any evidence before the Assessing Officer and there is no nexus shown by the assessee that the same is connected with the building constructed. The Ld. DR further submitted that the borrowed funds amounting to Rs.368.17cr. were used for CWIP, advance for land and loan given to sister concerns all totaling to Rs.404.58cr. and not for construction of let out buildings. Therefore, the Ld. DR submitted that the CIT(A) erred in holding that there was no requirement to file any evidence that the 'Term Long' had been utilized for construction of building.

6. The Ld. AR submitted that the reasons recorded for reopening the completed assessment are arbitrary and are not based on facts available on record and were objected before the Assessing Officer. The Ld. AR further submitted that all material facts had been available with the then Assessing Officer right through the assessment. The impugned notice was issued without properly verifying the facts on record and it is against the facts on record. Mere

change of opinion cannot form the basis for reopening of the assessment. The Ld. AR further submitted that when the primary facts necessary for the assessment are fully and truly disclosed, it is not open to the Assessing Officer to commence proceedings for reassessment. The Ld. AR submitted that during the assessment proceedings it was explained that the interest which is pertaining to the properties from where the rent is received has been claimed by the assessee and this fact has been acknowledged by the then Assessing Officer as the assessment was framed by him accepting the submissions of the assessee. Thus, the Ld. AR relied upon the order of the CIT(A). As regards the Cross objection is concerned the Ld. AR submitted that the original assessment was completed u/s 143(3) and the reassessment is based on change of opinion in total disregard to principle laid down by Supreme Court in the case of Kelvinator of India Ltd 320 ITR 561 and as such the assessing officer has no jurisdiction to initiate proceedings u/s 147 as well as all the details regarding interest expenses were duly placed before assessing officer in the original assessment proceedings and as such the reopening is only on the basis of change of opinion. Further the Ld. AR submitted that even otherwise, audit objection cannot be a basis for assuming jurisdiction u/s 147 in the absence of any fresh material or evidence.

7. We have heard both the parties and perused all the relevant material available on record. The CIT(A) held as under:

*“17. While comparing the balance sheet of the firm and the appellant it is observed that there is no doubt about the fact that these “Secured/ Term loans” were utilized for acquiring/ constructing fixed assets of Rs. 292.02 Crores as evident from the very nomenclature of the loan in the accounting and banking terminology ie term loan. There are CWIP of Rs.359.58 Cr (in the shape of land and under construction buildings) which has to be necessarily sourced partly from current liabilities of Rs. 334.96 Lacs and to the residual effect from “Secured loans”.*

18. There is no doubt that three buildings have already been constructed and put in to use, ie on which Rental income was received during the year. There is also no doubt that Term loans from banks have been taken in the preceding years and utilized for constructing these buildings therefore, interest, to the extent of cost of these buildings, can be claimed as Revenue expenditure. The cost of Four "buildings including Interiors" have been shown at Rs. 265.10 Cr against which Loans of Rs. 155.17 Cr taken from ICICI and Rs. 8.69 Cr pertains to liabilities of erstwhile partners aggregating to Rs. 163.86 Cr. The applicant's own funds are merely Rs. 1.84 Cr. The applicant received rent from three buildings only therefore the funding of these buildings (proportionate cost of three buildings would be Rs. 198.85 Cr) can only be met out of the funds borrowed from ICICI Bank amounting to Rs. 155.17 Cr, credit balance of two partner amounting to Rs. 8.69 Cr and partly from current liabilities since the own funds of the appellant are negligible. It's also a fact that the current liabilities amounting to Rs. 335 cr, comprise of Rs 241 cr, as balance payable to erstwhile partners of the firm. These balances have been shown as unsecured loans in the balance sheet of the erstwhile firm. The applicant is eligible to charge interest cost to the extent of funding of Rs. 198.85 Cr whereas it has charged "Interest" cost only on Rs. 163.86 Cr, which is on the lower side.

19. On the other hand the only logic that can be deduced from the order of the AO would be, that the entire loans taken by the appellant amounting to Rs. 368 Crores have gone out towards the CWIP of Rs. 359 Crores. The entire cost of the constructed building of Rs. 292 Crores has been met only and only from the current liabilities of Rs. 335 Crores. To substantiate this finding the AO has not given any concrete reasons or arguments, probably because the argument itself is not sustainable.

20. In the assessment order, while making disallowance the AO, has observed that no evidence have been filed by the applicant to substantiate its

*claim. The said observation of the AO does not have any merit firstly, as there is no as such requirement to file any evidence that the "Term loan" have been utilized to construct "Buildings" and secondly, the "Buildings" were constructed at the time when it was a "Firm" and there is no fresh addition in the "Building" during the year under consideration.*

21. *The AO has also observed that the assessee on one side is stating that borrowed funds have been utilized for constructing Buildings and CWIP while on the other side it is stating that Current Liabilities were utilized for CWIP, which are contradictory in nature. The said observation have already been answered above in which it was observed that against the CWIP of Rs. 359.59 Cr, there are Current Liabilities of Rs. 334.96 Cr which along with the borrowings (term loans) have been utilized for the purposes of meeting the expenses on CWIP. The fact that some part of the borrowings (term loan) have been utilized towards CWIP is not in dispute at all, since the appellant has himself capitalized the interest on that account. Moreover, current liabilities includes balance payable to erstwhile partners of the firm whose balances were earlier in the firm's Balance Sheet have been shown as unsecured loan. These unsecured loans were earlier used for the purposes of construction of buildings in the earlier year and CWIP.*

22. *The AO also stated that the appellant has made "advances for purchase of land" for Rs. 4 Crores and Rs. 41 Crores as "Interest free advances" and has assumed that borrowings have been utilized for the same and, therefore, interest claimed as revenue needs to be capitalized. The AR of the appellant vide its submissions has strongly rebutted to the observations of the AO and has explained that out of the total advance of Rs. 41 Crores, Rs. 14.61 Crores were interest bearing on which interest income of Rs. 8,51,802/- has accrued to the appellant. The rest of the advances of Rs. 20.31 Cr are in the nature of "business advances" and not in the nature of "Loans". Loans may be interest bearing but "Advances" are not. The rest of Rs. 6.08 Cr*

*pertains to amount receivable from erstwhile partners. "Advances for purchase of land" for Rs.4 Cr is of the nature of Business advance which could not be interest bearing. Therefore, the observations of the AO does not have any merit.*

23. *On the facts of the case, it is observed, that the appellant has merely followed the method of accounting as adopted by the erstwhile firm upto 01.03.2006, wherein also there has been claim of interest against 'Property Income' in the case of firm for the A.Y. 2006-2007 (for a period of 11 months). Also, similar method adopted by the appellant, has been accepted by the department in the A.Y. 2007-2008.*

24. *The contention and emphasis of the AR on 'Rule of Consistency' cannot be overlooked. The Hon'ble Delhi High Court in its decision reported as 245 ITR 492 in the case of Commissioner of Income Tax Vs. Neo Poly Pack Ltd. observed that the doctrine of resjudicata does not apply to income tax proceedings since each assessment year is independent of the other but where an issue has been decided consistently in particular manner for earlier as well as for subsequent assessment years, for the sake of consistency the same view should continue to prevail unless there is a managerial change in the facts or that which has been proved by the AO by bringing on record such material contrary to that of the appellant. It is observed that in the case of the appellant the facts remain unchanged*

25. *The AO is, therefore, directed to allow the claim of the appellant as per the provisions of the law u/s 24(b) of the Act. This ground of appeal is accordingly allowed."*

From the perusal of the records it can be seen that against the CWIP of Rs. 359.59 Cr, there are Current Liabilities of Rs. 334.96 Cr which along with the borrowings (term loans) have been utilized for the purposes of meeting the expenses on CWIP. The finding of the CIT(A) that some part of the borrowings

(term loan) have been utilized towards CWIP is not in dispute appears to be correct from the records, since the assessee has itself capitalized the interest on that account. Besides this, current liabilities includes balance payable to erstwhile partners of the firm whose balances were earlier in the firm's Balance Sheet have been shown as unsecured loan. These unsecured loans were earlier used for the purposes of construction of buildings in the earlier year and CWIP. These facts have not been contradicted by the Ld. DR during the hearing. The assessee demonstrated before the Assessing Officer as well as the CIT(A) that out of the total advance of Rs. 41 Crores, Rs. 14.61 Crores were interest bearing on which interest income of Rs. 8,51,802/- has accrued to the assessee. The rest of the advances of Rs. 20.31 Cr are in the nature of "business advances" and not in the nature of "Loans". The rest of Rs. 6.08 Cr pertains to amount receivable from erstwhile partners. "Advances for purchase of land" for Rs.4 Cr is of the nature of Business advance which could not be interest bearing. These crucial aspects were ignored by the Assessing Officer. Therefore, the CIT(A) has rightly allowed the said issue after going through all the details which was already produced before the Assessing Officer. Hence, the appeal of the Revenue is dismissed. As regards the Cross Objection of the assessee is concerned the same was categorically discussed and finding was rightly given by the CIT(A). Therefore, Cross Objection of the assessee is dismissed.

8. In result, appeal of the Revenue and Cross Objection of the assessee is dismissed.

**Order pronounced in the Open Court on 10<sup>th</sup> October, 2019.**

Sd/-

**(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER**

Sd/-

**(SUCHITRA KAMBLE)  
JUDICIAL MEMBER**

Dated: 10/10/2019

*\*Binita\**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	07.08.2019
Date on which the typed draft is placed before the dictating Member	07.08.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	