

आयकर अपीलीय अधिकरण, दिल्ली न्यायपीठ "बी", नई दिल्ली में

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

सुश्री सुषमा चावला, न्यायिक सदस्य एवं डॉ. बी. आर. आर. कुमार, लेखा सदस्य के समक्ष

**BEFORE MS. SUSHMA CHOWLA, JUDICIAL MEMBER &
DR. B.R.R.KUMAR, ACCOUNTANT MEMBER**

आयकर अपील सं. / ITA Nos. 615 to 618/Del/2013

निर्धारण वर्ष / Assessment Years: 2005-06, 2007-08 to 2009-10

C-1 India Pvt.Ltd.,
D-5, Defence Colony,
New Delhi.

PAN-AABCC4078L

.....अपीलार्थी / Appellant

vs

ACIT,
Central Circle-13,
New Delhi.

..... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 418/Del/2015

निर्धारण वर्ष / Assessment Year: 2009-10

ACIT,
Central Circle-13,
New Delhi.

..... प्रत्यर्थी / Respondent

vs

C-1 India Pvt.Ltd.,
D-5, Defence Colony,
New Delhi.

PAN-AABCC4078L

.....अपीलार्थी / Appellant

अपीलार्थी की ओर से / Appellant by : Sh. Ajay Wadhwa, Adv.

प्रत्यर्थी की ओर से / Respondent by : Ms. Nidhi Srivastava, CIT DR

सुनवाई की तारीख / Date of Hearing : 09.10.2019	घोषणा की तारीख / Date of Pronouncement: 22.10.2019
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

Out of this bunch of appeals, the assessee is in appeal against the order of CIT(A)-1, New Delhi dated 06.12.2012 relating to assessment years 2005-06, 2007-08, 2008-09 & 2009-10 respectively passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act'). Further, the Revenue has filed an appeal against the order of CIT(A)-1, New Delhi dated 17.11.2014 relating to Assessment Year 2009-10 passed under section 271(1)(c) of the Act.

2. This bunch of appeals were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The assessee in Assessment Year 2005-06 has raised the following grounds:-

1. *"The order of the learned Commissioner of Income-tax (Appeal) is bad in law and in facts.*

2. *That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeal) has erred in upholding the disallowance of Rs. 5,22,238/- being 20% of fee paid to ROC as capital expenditure."*

4. The issue which arises in the present appeal is whether in the absence of any incriminating document found during the course of search in the premises of the searched person, any proceedings can be initiated against the assessee u/s 153C of the Act.

5. Briefly the facts and circumstances of the case are that search and seizure operation u/s 132 of the Act was carried out in Suresh Nanda Group of cases on 28.02.2007. In the said operation, residential premises of Sh. Vivek Agrawal, the President and Chief Operating Officer of the assessee company was also covered. Thereafter, notice u/s 153C of the Act was issued to the assessee company after recording satisfaction. In response thereto, the assessee filed return of income declaring NIL income. The case of the assessee was taken up for scrutiny. The Assessing Officer vide para 3 notes that on perusal of return of income and other documents, it was observed that the assessee had charged expenditure as preliminary expenses and pre-operative expenses of Rs.4,26,862/- & Rs.9,38,187/- respectively. The assessee was asked to furnish the details. The Assessing Officer on its perusal noted that ROC charges were to be capitalized. Accordingly, disallowance of Rs.5,22,238/- was made. Next addition made in the hands of the assessee was on account of pre-incorporation expenses wherein the assessee had claimed 1/5th as written off during the year. The Assessing Officer also made addition on account of 1/5th pre-operative expenses being capital in nature. The CIT(A) has confirmed the said addition in the hands of the assessee.

6. The assessee before us has raised an additional ground of appeal which reads as under:-

“That the assessment made u/s 153(C) read with section 143(3) of the Act was bad in law because of the reason that the impugned assessment year was completed assessment on the date of search

and there was no incriminating material found/seized relating to the disallowance of Rs.5,22,238/0 being 20% fees paid to ROC for increase in authorized share capital meaning thereby the issue is squarely covered by the judgement of Hon'ble Delhi High Court in the case Kabul Chawla 380 ITR 573.”

7. The Ld.AR for the assessee stated that the issue raised in the additional ground was purely legal and did not require any investigation into facts. Hence, the same may be admitted.

8. We find merit in the plea of the assessee in this regard and the additional ground of appeal is admitted for adjudication. Coming to the issue raised vide additional ground of appeal, the case of the assessee is that in the absence of any incriminating material found/seized relating to disallowance of 20% fee paid ROC of Rs.5,22,238/-, no assessment could be made u/s 153C of the Act. In this regard, reliance was placed on the decision of Hon'ble Supreme Court in the case of Sinhgad Technical Education Society [2017] 397 ITR 344 and the decision of Hon'ble Delhi High Court in the case of Kabul Chawla 380 ITR 573.

9. The Ld.DR for the Revenue placed reliance on the orders of the authorities below.

10. We have heard rival contentions and perused the record. The issue raised vide additional ground of appeal is against the exercise of jurisdiction by the Assessing Officer u/s 153C of the Act, in the absence of any incriminating material found from the premises of searched person. Nature of addition which is made in the hands of the assessee is

20% fee paid to ROC for increase in share capital. The disallowance has not been made on the basis of any incriminating material found during the course of search. In absence of the same, the Assessing Officer cannot exercise his jurisdiction u/s 153C of the Act for the captioned Assessment Year. We place reliance on the ratio laid down by the Hon'ble Apex Court in the case of Sinhgad Technical Education Society(supra) and Hon'ble Delhi High Court in the case of Kabul Chawla (supra). Hence, the assessment order passed by the assessee u/s 153C r.w.s. 143(3) do not stand. The additional ground raised by the assessee is thus allowed.

11. Since we have held the assessment to be bad in law, there is no need to go into the merits of the issue raised.

12. Now, coming to the appeal of the assessee for Assessment Years 2007-08 & 2008-09 wherein the similar issues have been raised. The grounds of appeal raised by the assessee in Assessment Year 2007-08 read as under:-

1. *"The order of the learned Commissioner of Income-tax (Appeal) is bad in law and in facts.*

2. *That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeal) has erred in upholding the disallowance of interest of Rs. 55,12,800/- on the ground that loan of Rs. 9,77,60,000/- taken from M/s Y2K Systems International Ltd, Mauritius was treated as unexplained and added to the income of the appellant for A.Y. 2003-04 without appreciating the written submissions filed before him and order of the ITAT dated 24.07.2012*

in appellant's own case in ITA Nos. 1424 to 1427/Del/2012 for A.Ys. 2001-02 to 2004-05."

13. The issue raised in Assessment Year 2007-08 is against the disallowance of interest paid to Y2K System, on the ground that the loan taken from Y2K System, was treated as unexplained in Assessment Year 2003-04. The Ld.AR for the assessee at the outset pointed out that the interest was disallowed as the loan was held to be unexplained. He pointed out that Tribunal in Assessment Year 2003-04 vide para 23 has held the loan received from Y2K System is genuine and the addition has been deleted vide order dated 01.07.2019. He also pointed out that another ground on which the said interest was disallowed in the hands of the assessee was that upto 31.03.2005, no interest was being paid on the said loan and now interest was made charged @ 6 %. In this regard, he referred to the agreement between the parties which was w.e.f. 01.04.2006 under which it was agreed that for term of four years, interest would be charged @ 6 %. The Ld.AR for the assessee also explained that the assessee was following mercantile system of accounting and hence expenditure was debited; but since the assessee was incurring losses, the parent company i.e. Y2K System agreed to reverse the interest, which was reversed in Assessment Year 2009-10 in which year the assessee paid taxes on its reversal. In this regard, reliance was placed on the ratio by the Hon'ble Supreme Court in the case of CIT vs M/s. Excel Industries Ltd. in Civil Appeal No.125 of 2013 dated 08.10.2013.

14. The Ld. DR for the Revenue placed reliance on the order of CIT(A) with special reference to para 3.4.

15. We have heard rival contentions and perused the record. The issue which arises in the present appeal is against the claim of interest expenditure of Rs.52,12,800/-, payable on loan advanced by Y2K System of which the assessee was 100% subsidiary. The said loan was advanced to the assessee on 16.03.2002 as per the loan agreement entered into between the parties. It was acknowledged that Y2K System was the holding company of the assessee company and the loan was advanced to meet the general corporate expense and working capital requirements and also to repay existing overdraft loan. The loan was US dollars 2 million. The loan had to be repaid after three years from the date on which the assessee received the funds or such later dates as may be mutually agreed in writing. The said loan was provided interest free to the assessee. The copy of the agreement is placed at page 32 to 39 of the paper book. The agreement was for a period of four years i.e. upto 31.03.2005. The assessee entered into agreement dated 04.10.2006 under which the earlier agreement ending on 31.03.2005 was extended upto 31.03.2010. In the said agreement, interest @ 6 % was to be charged w.e.f. 01.04.2006. The case of the authorities below is that the interest was disallowable in the hands of the assessee as the loan received by the assessee in Assessment Year 2003-04 was held to be unexplained. In this regard, Ld.AR for the assessee has pointed out that the Tribunal in ITA No.5854/Del/2014, relating to Assessment Year 2003-04 with lead

order in ITA No.5852/Del/2014, order dated 01.07.2019 has accepted the case of the assessee. Consequently, the interest paid on such loan is to be allowed as an expenditure in the hands of the assessee. We find merit in the plea of the assessee.

16. We may also note that the case of the Revenue is also on the ground that earlier the said loan was interest free and now the loan bears interest which was not allowable in the hands of the assessee. Admittedly, the said loan which was raised vide loan agreement dated 16.03.2002 was advanced to the assessee was interest free for a period of four years. Thereafter, the earlier agreement came to an end and a fresh loan agreement was entered into between the parties, under which it was agreed that the interest @ 6 % would be charged. There is no dispute of the aforesaid stand of the assessee. The only question is whether by a subsequent agreement between the parties, interest free loan can be converted to interest bearing loan. The answer to the same is 'yes'. The parties in the first go had agreed that the loan would be non interest bearing but later on lender had demanded interest @ 6 % w.e.f. 01.04.2006 which was agreed upon by the borrower of the assessee company. In these circumstances, the interest claimed by the assessee was to be allowed in its hands in its entirety.

17. Now coming to the next statement of the assessee that since it had losses, the interest expenditure was reversed back in Assessment Year 2009-10 on which taxes were paid in the said year. The said fact is again not disputed and while deciding the present appeal, we consider the

facts for the present year and decide the issue on its merit. Accordingly, we allow the claim of the assessee vis-à-vis the interest expenditure. Thus, this ground of appeal raised by the assessee is allowed.

18. The Ld.AR for the assessee fairly pointed out that the issue in Assessment Year 2008-09 was similar to the issue raised in Assessment Year 2007-08. Following the same parity of reasoning, we allow the claim of the assessee in Assessment Year 2008-09.

19. Let us take the appeal of the assessee for Assessment Year 2009-10 wherein the assessee has raised the following grounds in this appeal:-

1. *“The order of the learned Commissioner of Income-tax (Appeal) is bad in law and in facts.*

2. *That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeal) has erred in upholding the disallowance of foreign exchange loss of Rs. 2,20,90,211/- on the ground that loan of US\$ 20,00,000 obtained from M/s Y2K Systems International Ltd, Mauritius, was treated as unexplained in A.Y. 2003-04 and increase in loan amount due to foreign exchange loss cannot be allowed in A.Y. 2009-10.*

2.1 *That the Ld. CIT(A) has erred in upholding the disallowance of foreign exchange loss without considering the submissions made before him and order of the ITAT dated 24.07.2012 in appellant's own case in ITA Nos. 1424 to 1427/Del/2012 for A.Ys. 2001-02 to 2004-05.*

3. *That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in upholding the disallowance of Rs. 32,935/- made u/s 14A of the Income-tax Act, 1961 ignoring the decision of Bombay*

High Court in CIT v. Reliance Utility and Power Ltd 178 Taxman 135 (Bom)."

20. The first issue raised in the present appeal is against the disallowance of foreign exchange loss of Rs.2,20,90,211/-. The second issue raised is against the disallowance made u/s 14A of the Act of Rs.32,935/-.

21. Brief facts relating to Ground Nos. 2 & 3 are in relation to the loan raised by the assessee are from Y2K System. The said loan was received in US dollars and since the loan was raised for the working capital requirements, it was treated as business loan. The assessee from year to year was determining the value of the loan as on the close of the year and the gain/loss on such foreign loan was offered deducted, as the case may be, in the returns of the income. The assessee has filed a tabulated chart which is available on record. The Assessing Officer however disallowed the loss claim on diminution in value of foreign exchange loan to the extent of Rs.2.22 crores during the year under consideration. The case of the Assessing Officer was that the said loan was treated as unexplained loan/credit in Assessment Year 2003-04 and also on the ground that it was not a business loss. The CIT(A) upheld the order of Assessing Officer.

22. The case of the assessee before us is that the loss suffered by the assessee was an item of expenditure to be allowed u/s 37(1) of the Act. In this regard, reliance was placed on the ratio laid down by the Hon'ble Supreme Court in the case of CIT vs Woodward Governor India Pvt.Ltd. [2009] 312 ITR 254(SC) and various other decisions.

23. The Ld.DR for the Revenue on the other hand, placed strong reliance on the orders of the authorities below and stressed that it was notional loss on the loan received and hence, it was a capital loss.

24. We have heard the rival contentions and perused the record. The assessee had raised loan in Assessment Year 2003-04, which during the assessment proceedings was held to be non-genuine. However, the Tribunal vide order dated 01.07.2019 has accepted the case of the assessee and held that the loan was raised by the assessee from its holding company in order to meet its working capital requirement. The interest paid on such loan has been allowed by us as revenue expenditure in the paras above for Assessment Years 2007-08 & 2008-09. During the year under consideration, the issue which arises is in respect of the diminution in value of foreign exchange loan. The loss on re-statement of the foreign exchange loan was claimed as deductible in the hands of the assessee. As per the Standard AS-11 of Accounting principles, such re-statement of foreign exchange loan is the requirement of accounting principles. On such re-statement, the loss or gain arising there from is to be allowed as a deduction or added as income in the hands of the assessee, as the case may be. The assessee has filed tabulated chart in this regard wherein in Assessment Year 2005-06 loss arises in the hands of the assessee of Rs.17,20,000/-, which has been allowed as a deduction. Further, the gain arising in all the other years has been added in the hands of the assessee. Following the similar principle of accounting, the assessee in the year under consideration had debited

expenditure of Rs.2.22 crore, which merits to be allowed as revenue expenditure. Accordingly, we hold so. We also find that the said issue stands covered by the ratio laid down by the decision of Hon'ble Supreme Court in the case of CIT vs Woodward Governor India Pvt.Ltd. (supra). Hence, Ground Nos. 2 & 3 raised by the assessee are allowed.

25. Now coming to the next issue that the disallowance made u/s 14A of the Act wherein no exempt income has been earned by the assessee during the year. Following the ratio laid down by the Hon'ble High Court in the case of Cheminvest Ltd. vs CIT [2015] 378 ITR 33 (Del.), we hold that no disallowance in such cases is to be made in the hands of the assessee. Hence, Ground No.4 raised by the assessee is thus allowed.

26. The last appeal filed by the Revenue is against the deletion of penalty levied u/s 271(1)(c) of the Act relating to Assessment Year 2009-10. The Revenue has raised following grounds in this appeal:-

1. *"The order of Ld. CIT (A) is not correct in law and facts.*
2. *On the facts and circumstances of the case the Ld. CIT(A) has erred in law in deleting the penalty u/s 271(l)(c) of the IT Act, 1961 of Rs. 75,76,443/- imposed by AO on the basis of disallowance of foreign exchange loss of Rs.2,22,90,211/-."*

27. The Assessing Officer had levied the aforesaid penalty on the ground on disallowance of foreign exchange loss of Rs.2.22 crore and the disallowance made u/s 14A of the Act. The CIT(A) deleted the penalty against which the Revenue is in appeal. We have in paras above already deleted the disallowance made in the hands of the assessee both on

account of foreign exchange loss and addition u/s 14A of the Act. Hence, there is no basis for levy of any penalty for concealment of income u/s 271(1)(c) of the Act. Accordingly, we hold so. Thus, grounds raised by the Revenue in this appeal are dismissed.

28. In the result, all the four appeals filed by the assessee are allowed and the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 22nd day of October, 2019.

Sd/-

(B.R.R.KUMAR)

लेखा सदस्य/ACCOUNTANT MEMBER

दिल्ली / दिनांक Dated : 22nd October, 2019.

** Amit Kumar **

Sd/-

(SUSHMA CHOWLA)

न्यायिक सदस्य/JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, दिल्ली / DR, ITAT, Delhi
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आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

सहायक रजिस्ट्रार, आयकर अपीलीय अधिकरण ,दिल्ली
Assistant Registrar, ITAT, Delhi