

**IN THE INCOME TAX APPELLATE TRIBUNAL
“H” Bench, Mumbai**

**Before Shri M. Balaganesh, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No. 6551/Mum/2017
(Assessment Year: 2013-14)**

M/s Hill Point Investment & Finance Pvt.
Ltd., 2nd Floor, Crystal Shopping Arcade,
S.V. Road, Santacruz (West),
Mumbai – 400077

Income Tax Officer 2(1)(4)
Maharshi Karve Marg,
Vs. Mumbai – 400020

PAN – AAACH1150M

(Appellant)

(Respondent)

Appellant by: Shri Rahul K. Hakani, A.R
Respondent by: Shri Abdul Hakeem M., D.R

Date of Hearing: 19.02.2020
Date of Pronouncement: 20.02.2020

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-6, Mumbai, dated 09.08.2017 which in turn arises from the assessment order passed by the A.O under Sec.143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 04.03.2016 for A.Y. 2013-14. The assessee has assailed the impugned order on the following grounds of appeal before us:

“(A) Assessment.

1. The learned Commissioner of Income Tax (Appeals)-6, Mumbai [CIT(A)]. Mumbai (ITO) erred on facts and in law in assessing the income of your appellant at Rs 1,45,57,210/- as against the return income of Rs 21.49,860/- by addition of Rs 1,24,57,207/- as disallowance of interest expenses u/s 57(iii) claimed against interest income.
2. The learned CIT(A) erred on facts & in law in not giving a reasonable & sufficient opportunity while assessing the income of the appellant at Rs 1,45,57,210/-.
3. The CIT(A) failed to appreciate that the appellant had correctly offered his income & that no disallowance of expense was called for to the returned income.

(B) **Disallowance of interest expenses of Rs 1,24,07,347/-**

4. The learned CIT-(A) erred on facts and in law in disallowing the interest expenses of Rs 1,24,07,347/- claimed against interest income.
5. The appellant prays that the disallowance of Rs.1,24,07,347/- made by the learned CIT(A) may be deleted & returned income of Rs 21,49,860/- may be accepted.
6. The learned CIT(A) failed to appreciate that the appellant had correctly offered his income & that no addition was called for to the returned income.

(C) **General**

7. The above grounds of appeal are without prejudice to one another and the appellant craves leave to add, alter, amend, delete or modify any of the above grounds of appeal.”

Apart from that, the assessee has also sought the leave of the Tribunal for raising the following additional grounds of appeal:

“(A) **Without prejudice not allowing interest u/s. 36(1)(iii)**

- (1) Without prejudice to the original grounds of appeal, the learned Commissioner of Income Tax (Appeals) erred on facts and in law in not allowing the interest disallowed by the AO of Rs. 1,24,07,347/- u/s. 36(1)(iii) of the Income Tax Act.
- (2) The appellant prays that if the interest of Rs.1,24,07,347/- is not allowable u/s. 36(1)(iii) the same may be allowed u/s. 36(1)(iii).

(B) **(General)**

- (3) The above Grounds of Appeal are without prejudice to the original grounds of appeal and without prejudice to the grounds herein and the appellant craves leave to add, alter, amend, delete or modify any of the above Grounds of appeal.”

2. Briefly stated, the assessee company had e-filed its return of income for A.Y. 2013-14 on 29.09.2013, declaring its total income at Rs.21,49,860/-. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings it was observed by the A.O that the assessee in its return of income had reflected its income under the various heads of income viz. (i) income from other house property; (ii) profits and gains of business or profession; and (iii) income from other sources. On a perusal of the details, it was observed by the A.O that the assessee had raised interest bearing loans aggregating to Rs.33,84,87,388/- from banks, and had claimed deduction for the correlating interest expenditure of Rs.2,97,77,635/- while computing its income for the

year under consideration. On being called upon to explain the allowability of the aforesaid interest expenditure, it was submitted by the assessee that the interest bearing borrowed funds were invested by it for earning of interest income on fixed deposit with the bank. As such, it was the claim of the assessee that as the aforesaid interest expenditure was incurred wholly and exclusively for earning of the interest income, therefore, the same was rightly claimed as a deduction while computing its income for the year under consideration. However, the A.O was not persuaded to subscribe to the aforesaid claim of the assessee. On a perusal of the details, it was noticed by the A.O that the assessee had diverted the interest bearing borrowed funds raised from the bank by way of interest free loans and advances to various companies. At the same time, taking cognizance of the fact that the assessee had during the year also deployed part of the interest bearing funds amounting to Rs.20 crore for a period of 7 months i.e from 16.04.2012 to 31.10.2012 by way of interest bearing deposits with the bank, therefore, the A.O worked out the pro rata interest expenses relating to the aforesaid funds which were utilised by the assessee for executing the FDR with the Bank at Rs.1,73,70,287/-. On the basis of his aforesaid observations, the A.O restricted the assessee's claim for deduction of interest expenditure to the extent of Rs.1,73,70,287/- i.e to the extent the interest bearing funds were utilised for earning of interest income during the year under consideration. Consequently, the balance amount of interest expenditure of Rs.1,24,07,347/- [Rs.2,97,77,635/- (-) Rs.1,73,70,287/-] was disallowed by the A.O within the meaning of the provisions of Sec.57(iii) of the Act. In the backdrop of his aforesaid deliberations, the A.O assessed the income of the assessee company at Rs.1,45,57,207/-.

4. Aggrieved, the assessee assailed the assessment order before the CIT(A). It was submitted by the assessee before the CIT(A) that as the interest bearing borrowed funds raised from the bank were either deployed for giving advances in the normal course of its business or advancing of interest bearing loans to certain parties, therefore, no disallowance of any part of the interest expenditure was called for in its hands. It was the

claim of the assessee that as part of the interest bearing funds were deployed for its business purposes, therefore, no disallowance of the interest attributable to the said funds was called for under Sec.36(1)(iii) of the Act. However, the CIT(A) holding a conviction that the assessee had in its return of income as well as in the course of the assessment proceedings raised a claim for deduction of the interest expenditure only under Sec. 57(iii) of the Act, therefore, his contention that the interest pertaining to the funds which had been deployed for business purposes was deductible under Sec. 36(1)(iii) of the Act could not be accepted. As such, the CIT(A) not finding favour with the contentions advanced by the assessee dismissed the appeal.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We shall first advert to the admission of the additional grounds of appeal raised by the assessee before us. As the assessee by raising the additional grounds of appeal has sought adjudication of a legal issue which is based on the facts available on record, therefore, considering the judgement of the Hon'ble Supreme Court in the case of National Thermal Power Company Ltd. Vs. CIT (1998) 229 ITR 383 (SC), we admit the same.

6. The Id. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted that the CIT(A) had erred in summarily rejecting the claim of the assessee as regards its entitlement for deduction of interest expenditure under Sec. 36(1)(iii) of the Act. Apart from that, it was averred by the Id. A.R that as the amount outstanding against one of the party viz. M/s Aristo Shelters Pvt. Ltd., amounting to Rs.72,81,370/- pertained to the outstanding interest that was due from the said party in respect of the advance which was given to it in the preceding years, therefore, no disallowance of any part of the interest expenditure in respect of the said amount was called for in the hands of the assessee during the year under consideration. As regards the advances which were provided by the assessee to the remaining 4 parties viz. (i) M/s Atiti Builders and Constructors Pvt. Ltd.; (ii) Ayyappa Developers Pvt. Ltd.; (iii) M/s Crystal City Mall Pvt. Ltd; and (iv) Rikki Ronie Developers, it was submitted

by the Id. A.R that the assessee in the normal course of its business had given advances to the aforesaid parties for booking of the under construction properties in their projects. In order to fortify his aforesaid claim, the Id. A.R had drawn our attention to the correspondence of the assessee with some of the aforementioned parties at Page 88 - 93 of the assesses 'Paper book' (for short 'APB'). Accordingly, the on the basis of his aforesaid contentions it was the claim of the Id. A.R that the CIT(A) was in error in not appreciating the contentions of the assessee in the right perspective.

7. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the Id. D.R that as the assessee had diverted part of the interest bearing funds for giving interest free loans/advances to third parties, therefore, the lower authorities had rightly disallowed the assesses claim for deduction of the corresponding interest expenses as was claimed in its return of income for the year under consideration. As such, it was the claim of the Id. D.R that as the appeal of the assessee was devoid and bereft of any force, therefore, the same did not merit acceptance and was liable to be dismissed.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. As is discernible from the orders of the lower authorities, we find, that they had observed that the assessee had diverted interest bearing loans which were raised by it from bank amounting to Rs.33,84,87,388/- for two fold purposes viz. (i) towards investment of an amount of Rs.20 crore in short term deposits with the bank for a period of 7 months i.e 16.04.2012 to 31.10.2012 ; and (ii) advancing of funds to certain third parties without charging any interest. As observed by us hereinabove, the assessee had claimed the entire amount of interest expenditure of Rs.2,97,77,635/- as a deduction as against the interest income which it had earned from the bank during the year under consideration. However, the A.O holding a conviction that only the interest expenditure correlating to the interest bearing borrowed funds of Rs.20 crore that was deployed by the assessee by way of an investment in a fixed deposit with the bank for a period of 7 months i.e from

16.04.2012 to 31.10.2012 was entitled for claim of deduction under Sec.57(iii) of the Act. As such, the A.O restricted the assessee's claim for deduction of the interest expenditure only to the extent of the funds which had been channelized into the FDR with the Bank.

9. We find that the assessee in the course of the proceedings before the CIT(A) had claimed that no part of the interest expenditure pertaining to the borrowed funds was liable to be disallowed in the hands of the assessee. On a perusal of the order of the CIT(A) we find, that it is the claim of the assessee that it had utilised its interest bearing funds for giving interest bearing loans to third parties. Also, as claimed by the assessee, it had provided advances to certain third parties in the normal course of its business. As observed by us hereinabove, the controversy involved in the present appeal hinges around the disallowance of the assessee's claim for deduction of the interest expenditure in respect of the amounts which were advanced by it to 5 parties viz. (i) Aristo Shelters Pvt. Ltd; . (ii) M/s Atiti Builders and Constructors Pvt. Ltd.; (iii) Ayyappa Developers Pvt. Ltd.; (iv) M/s Crystal City Mall Pvt. Ltd; and (v) Rikki Ronie Developers. On a perusal of the records, we find that the amount of Rs.72,81,370/- reflected against M/s Aristo Shelters Pvt. Ltd. pertains to the interest that was recoverable by the assessee from the said party. The assessee had way back in the month of December, 2010 given an interest bearing loan aggregating to Rs.25 crores to M/s Aristo Shelter Pvt. Ltd. Although, the aforesaid principal amount of loan was received back by the assessee in F.Y. 2011-12, but the amount of the interest of Rs.72,81,370/- had remained unpaid during the year and was subsequently received in the immediately succeeding year i.e on 09.10.2013. The aforesaid factual position can safely be gathered from a perusal of the copy of the account of M/s Aristo Shelter Pvt. Ltd. as appearing in the 'books of accounts' of the assessee company at Page 93 of the APB. In our considered view, as the amount of Rs.72,81,370/- that was recoverable by the assessee during the year under consideration from the aforesaid party had no nexus with the interest bearing funds which were borrowed by the assessee from the banks, therefore, on the said count itself no disallowance of any interest expenditure pertaining to the said amount was

called for under Sec. 36(1)(iii) of the Act. Independent of our aforesaid observations, we are of the considered view that as the assessee had advanced the loan of Rs. 25 crores to M/s Aristo Shelters Pvt. Ltd. on interest, therefore, no disallowance of any part of the interest expenditure in respect of the said interest bearing advance could have been validly made in the hands of the assessee. As such, we direct the A.O to vacate the disallowance of the interest expenditure in respect of the amount of Rs.72,81,370/- reflected against the aforesaid party i.e M/s Aristo Shelter Pvt. Ltd.

10. As regards the amounts advanced by the assessee to the remaining 4 parties, it has been the claim of the assessee before the CIT(A) that the same were in the nature of advances made in the normal course of its business. As such, the assessee had sought deduction of the interest expenditure pertaining to the aforesaid advances under Sec.36(1)(iii) of the Act. However, the CIT(A) being of the view that the assessee had in its return of income as well as in the course of the the assessment proceedings claimed deduction of the interest expenditure under Sec.57 (iii) of the Act, therefore, it was disentitled from raising the claim for deduction of the aforesaid amount under Sec. 36(1)(iii) of the Act. We have given a thoughtful consideration to the aforesaid observations of the CIT(A) and are unable to persuade ourselves to subscribe to the same. In our considered view, as the assessee had raised a claim for deduction under Sec. 36(1)(iii), based on the facts which were already available on record, therefore, the CIT(A) was well within his jurisdiction to have adjudicated upon the same. However, we find that the CIT(A) had summarily scrapped the aforesaid claim of the assessee, for the reason, that the same was raised for the very first time before him. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Pruthvi Brokers and Shareholders Pvt. Ltd.(2012) 349 ITR 336 (Bom). In the aforesaid case, the Hon'ble High Court had observed that assesses is entitled to raise an additional ground before the appellate authorities not merely in terms of legal submissions, but also additional claims to wit claims which were not made in the return of income filed by it. Accordingly, we are of the considered view that the CIT(A) ought to

have considered the assessee's claim for deduction of the interest expenditure under Sec.36(1)(iii) of the Act, specifically, when the same was being raised on the basis of the facts which were already available on record. As such, we are unable to persuade ourselves to concur with the declining on the part of the CIT(A) to consider the assessee's claim for deduction under Sec. 36(1)(iii) of the Act. Adverting to the merits of the claim of the assessee as regards its entitlement for deduction of the interest expenditure under Sec. 36(1)(iii) of the Act, we find, that it is the claim of the Id. A.R that as the aforesaid funds were deployed by the assessee in the aforesaid concerns in the normal course of its business, therefore, the correlating interest expenditure in respect of the same was allowable as a deduction under Sec.36(1)(iii) of the Act. In fact, the Id. A.R in order to drive home his claim as regards the entitlement of the assessee towards claim of the interest expenditure pertaining to the amounts advanced to the aforementioned parties, had therein submitted that the same was prompted by the principle of commercial expediency. In support of his aforesaid claim, the Id. A.R had drawn support from the judgment of the Hon'ble Supreme Court in the case of S.A. Builder Limited Vs. CIT(A) & Anr. (2007) 288 ITR 1 (SC). Also, our attention was drawn towards certain correspondence between the assessee and some of the aforementioned parties, which revealed that the amounts advanced by the assessee were towards booking of under construction properties in their projects. We find that as the CIT(A) had summarily rejected the assessee's entitlement for claim of deduction under Sec.36(1)(iii), therefore, there was no occasion for him to adjudicate upon the maintainability of such claim on merits. Accordingly, we are of the considered view that in all fairness the matter requires to be restored to the CIT(A), with a direction to verify the assessee's entitlement for claim of deduction under Sec. 36(1)(iii) of the Act in respect of the amounts which were advanced to the aforementioned 4 parties, viz. (i) M/s Atiti Builders and Constructors Pvt. Ltd.; (ii) M/s Ayyappa Developers Pvt. Ltd.; (iii) M/s Crystal City Mall Pvt. Ltd; and (iv) M/s Rikki Ronie Developers. Needless to say, the CIT(A) in the course of the 'set aside' proceedings shall afford a reasonable opportunity of being heard to the assessee, who

shall remain at a liberty to substantiate its aforesaid claim. Accordingly, the matter is restored to the file of the CIT(A) for fresh adjudication on the aforesaid limited aspect.

11. Resultantly, the appeal of the assessee is allowed for statistical purposes in terms of our aforesaid observations.

Order pronounced in the open court on 20.02.2020

Sd/-
(M. Balaganesh)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Mumbai;

Dated: 20/02/2020

Rohit, P.S.

Copy of the Order forwarded to :

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

BY ORDER,
//True Copy//
(Sr. Private Secretary)
ITAT, Mumbai