

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "B": DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA.No.2825/Del./2014
Assessment Year 2008-2009

The Dy. CIT, Circle-11(1), Room No.405, C.R. Building, New Delhi.	vs.,	M/s. Ebony Retail Holdings Ltd., F-2/1, Khanpur Extension, New Delhi – 110 062. PAN AAACD0207B
(Appellant)		(Respondent)

For Revenue :	Shri Jagdish Singh, Sr. D.R.
For Assessee :	Shri S. Krishnan, Advocate

Date of Hearing :	19.08.2020
Date of Pronouncement :	20.08.2020

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Revenue has been directed against the Order of the Ld. CIT(A)-XXIII, Delhi, Dated 24.02.2014, for the A.Y. 2008-2009.

2. We have heard the Learned Representatives of both the parties through video conferencing and perused the material on record.

3. The appeal is decided as under.

4. Ground No.1 is as under :

“On the facts and circumstances of the case and in law, the CIT(A) has erred in deleting the disallowance of Rs.67,46,470/- made on account of forfeiture of security deposit being treated as capital loss.”

4.1. The A.O. disallowed the impugned amount on account of forfeiture of security deposit treating the same as capital expenditure. The assessee agitated the addition before the Ld. CIT(A) and placed reliance upon the following decisions :

“Pyoginam Vs. ACIT reported in 130 TTJ 7 (Del)

Forfeiture of earnest money deposit for non fulfillment of the export quota in neither a penalty nor capital expenditure but is in the nature of business loss allowable as a deduction.

CIT Vs. Ahmedabad Cotton Mfg. Co. Ltd. & Ors

reported in 205 ITR 163 (SC)

Payment though referred to as penalty, but in fact made in exercise of option available under statutory scheme, in course of assessee's business, is allowable business expenditure.

Thackers H.P. & Co. Vs. CIT reported in 134 ITR 21

(MP)

The contract for purchase of tendu leaves was in the course of the same business which was then carried on by the assessee and could not be said to be commencement of a new business. The deposit of security amount was made as business expenditure and its forfeiture was a business loss. Security amount deposited under a contract is not for obtaining the contract but for due performance. Hence the forfeiture of security deposit was a revenue loss.

CIT Vs. Balaii Chitra Mandir reported in 154 ITR

111 (AP)

Security deposit forfeited by the assessee due to default in payment of rent by the lessee pursuant to the lease agreement entered into during the course of assessee's business, the termination which did not result in loss of the source producing income is taxable as a revenue receipt."

4.2. The Ld. CIT(A) considering the material on record noted that the security deposit for the premises in Lucknow, Indoor and Delhi were forfeited as the assessee-company could not manage to open the stores. The impugned amount was treated as revenue loss and debited in the books of account of the assessee. The Ld. CIT(A) directed the A.O. to submit a remand report on the submissions of the assessee made at the appellate stage. The A.O. submitted in the remand report that additional ground may not be admitted. However, no comments were offered on merits on the submissions of the assessee. The Ld. CIT(A) noted that the

facts makes it clear that security deposit was given for hiring commercial premises to run business of the assessee. Thus, the forfeiture of the earnest money deposit has occurred during the course of business activities carried on by the assessee-company and hence, it is a case of business loss. The Ld. CIT(A) relied upon Judgment of the Hon'ble Madhya Pradesh High Court in the case of Thackers H.P. & Co. Vs., CIT 134 ITR 21 (M.P.) as well as Order of ITAT, Delhi Bench in the case of Pyoginam vs., Addl. CIT 130 TTJ (supra). The Ld. CIT(A) in view of the above held that *“security deposit was forfeited during the course of business activity, hence, it is a business loss and allowable under section 37(1) of the I.T. Act, 1961”*. The addition was accordingly deleted.

4.3. The Ld. D.R. referring to the written submissions relied upon the Order of the A.O. and submitted that the Ld. CIT(A) has not considered that assessee-company is not doing any business of real estate or rental. Therefore, security advance given to the lessor is capital expenditure. The Ld. D.R. also relied upon Orders of ITAT, Bangalore

Bench Dated 15.11.2017 in the case of M/s.GXS India Technology Centre Pvt. Ltd., DCIT, Circle-11(3), Bangalore in Appeal No. IT(TP)A.No.1041/Bang./2016 for the A.Y. 2010-2011 in his written submissions.

4.4. On the other hand, Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that the allegations of the A.O. were that assessee did not file documentary evidences in support of the contention which fact is incorrect. He has referred to the replies filed before A.O, copies of which were filed in the paper book along with copies of the agreements and submitted that since assessee did not continue with the rental property, therefore, security deposit given were forfeited. He has also referred to the notice given by the owner, copy of which, is filed in the paper book before forfeiture of the security deposit and reply of the assessee in which assessee has surrendered the possession of the tenanted property prior to the lease period. Therefore, security deposit was forfeited.

4.5. We have considered the rival submissions and perused the material on record. It is not in dispute that assessee has given security deposit for taking the premises on lease. Learned Counsel for the Assessee referred to various replies filed by assessee-company at assessment stage which shows that assessee-company filed all the documentary evidences and explanation before A.O. on the matter in issue. Learned Counsel for the Assessee rightly contended that the security deposit was refundable on completion of the period of the lease. The agreement to this effect was executed and was further supplemental agreements were also entered into and ultimately the assessee-company did not continue with the period of their lease and hence, the security deposit was forfeited by the owner/landlord. These facts clearly show that assessee-company filed sufficient documentary evidences before A.O, which have not been properly considered and at the appellate stage the A.O. did not rebut the submissions of the assessee-company to prove that security deposit was forfeited which is a business loss as the same was arising

out of the business activities of the assessee. The Ld. CIT(A), therefore, correctly following the material on record in proper perspective, rightly deleted the addition. We do not find any infirmity in the Order of the Ld. CIT(A) in deleting the addition. Ground No.1 of the appeal of the Revenue is dismissed.

5. Ground No.2 reads as under :

“On the facts and circumstances of the case and in law, the CIT(A) has erred in deleting the disallowance of interest expenses of Rs.17,27,516/- made u/s 36(1)(iii) of the Income Tax Act.”

5.1. The A.O. disallowed the impugned interest on interest free loans and advances. The assessee submitted before the Ld. CIT(A) that A.O. could disallow the impugned amount under section 36(1)(iii) when borrowed funds were not utilised for the purpose of business and were utilised for the purpose of interest free loans and advances for non-business purposes. The assessee has filed details of loans

and advances amounting to Rs.2,39,62,765/- outstanding as on 31.03.2008. The perusal of the same reveal that not all loans and advances were made during the year under assessment and those that were made were out of assessee company's own funds. The assessee filed documentary evidences for advances during the year to prove the nexus were also furnished to the A.O. The assessee also explained that most of the advances were given in earlier year, which have been accepted in earlier year and no disallowance have been made. Copy of the assessment order for preceding A.Y. 2007-2008 was also filed to substantiate the same. The details of the same are noted at Pages 9 and 10 of the appellate order to show that in assessment year under appeal assessee has given loans and advances in a sum of Rs.62,13,995/- and in preceding assessment year 2007-2008 loans and advances were given in a sum of Rs.1,77,48,770/-. The assessee also filed copy of the ledger account and copy of the assessment order for preceding assessment year in respect of the same allegations. It was submitted that even out of the amount given as loans and

advances, the amount of Rs.29,51,517/- is not in the nature of loan. The assessee also submitted that the amount in question have been given out of the amount available to the assessee as on the date of the loan. It was submitted that there is no nexus between the interest bearing funds and advances made by the assessee company. The details of the amount available to assessee and given on loan which also tabulated at pages 12 and 13 of the impugned order. The Ld. CIT(A) accepted the explanation of assessee that assessee-company had given its own funds on the dates when the advances at Rs.62,73,995/- were given to group companies. Therefore, there is no question of disallowing any interest in question. The Ld. CIT(A) accordingly deleted the addition.

5.2. The Ld. D.R. relied upon the Order of the A.O. as well as relied upon Judgment of Hon'ble Delhi High Court in the case of Punjab Stainless Steel Industries vs., Commissioner of Income Tax [2011] 324 ITR 396 (Delhi) and Judgment of Hon'ble Punjab & Haryana High Court in the

case of Abhishek Industries vs., Commissioner of Income Tax 286 ITR 1.

5.3. On the other hand, Learned Counsel for the Assessee reiterated the submissions made before the authorities below and referred to the balance-sheet of the assessee to show that sufficient funds are available to the assessee (PB-32) along with bank statement and submitted that Judgment in the case of Abhishek Industries (supra) have been overruled by Hon'ble Supreme Court in the case of Munzal Sales Corporation 298 ITR 298 (SC) and the issue is now covered by Judgment of the Hon'ble Supreme Court in the case of Commissioner of Income Tax vs., Reliance Industries Ltd., 410 ITR 466 wherein it was held that *"presumption is that advances are from own funds."*

5.4. We have considered the rival submissions and perused the material on record. The A.O. noted in the assessment order that assessee has given interest free loans and advances of Rs.2,39,62,765/- and made disallowance of the impugned interest on the same. This fact is incorrect because assessee has given complete details to show that

substantial loans and advances pertain to preceding A.Y. 2007-2008 and in assessment year under appeal i.e., 2008-2009, the loans and advances have been given to the extent of Rs.62,13,995/-. No evidence is before us to contradict the finding of fact recorded by the Ld. CIT(A). It is also a fact that as per balance sheet of the assessee company [PB-32], assessee-company was having sufficient own funds to give the impugned amount as loans and advances to group concerns in assessment year under appeal. Therefore, there is a presumption that assessee has not used any borrowed funds for giving the interest free loans and advances. The A.O. has not brought any evidence on record if borrowed funds have been used for advance, or non-business purpose or were given to the group concerns as interest free loans and advances. No disallowance have been made by A.O. in preceding A.Y. 2007-2008. Therefore, on the same set of facts, A.O. was not justified in making the disallowance which have been rightly deleted by the Ld. CIT(A). We do not find any infirmity in the Order of the Ld. CIT(A) in deleting

the addition. Ground No.2 of the appeal of the Revenue is dismissed.

6. Ground No.3 is as under :

“On the facts and circumstances of the case and in law, the CIT(A) has erred in allowing capital loss of Rs.1,71,60,922/- incurred by transferring the existing block of assets into a new block of assets but ownership over the assets remained unchanged.”

6.1. The A.O. disallowed capital loss of the impugned amount. The assessee filed written submissions before the Ld. CIT(A) to show that assessee is entitled for deletion of the addition and that on the similar facts no addition have been made in the preceding assessment year. The Ld. CIT(A) considering the issue in detail at page-18 held as under :

“The disallowance of capital loss made by the A.O. is, therefore, sustained.”

6.2. The Ld. CIT(A), however, considering the alternate claim of assessee in which the assessee

contended that if the claim of capital loss is not allowed, claim for depreciation may be allowed for the year and relied upon Judgment of the Hon'ble Delhi High Court in the case of Oswal Agro Mills Ltd., 341 ITR 467. Ld. CIT(A) following the above decision directed the A.O. to allow claim of depreciation of block of assets which were not used for the purpose of business, after verifying the various evidences filed during the course of proceedings.

6.3. The Ld. D.R. submitted that no depreciation is allowable to the assessee.

6.4. On the other hand, Learned Counsel for the Assessee submitted that the grounds of appeal of the Revenue is misconceived because the Revenue Department has challenged the Order of the Ld. CIT(A) in allowing the capital loss of Rs.1.71 crores which have been confirmed by the Ld. CIT(A). Therefore, there is no question of raising ground No.3 in this manner. He has further submitted that the Ld. CIT(A) has allowed the claim of assessee on alternative contention raised by assessee that in case capital loss is not allowed, then, depreciation may be

allowed, which the Ld. CIT(A) has allowed, subject to verification by the A.O. The Revenue has not raised any ground before the Tribunal to challenge the Order of the Ld. CIT(A) in allowing depreciation to the assessee on the block of asset.

6.5. We have considered the rival submissions and do not find any merit in this ground of appeal of the Revenue. The A.O. on this issue disallowed the claim of capital loss on new block of assets. The Ld. CIT(A), in principle, confirmed the Order of the A.O. in disallowing the capital loss claimed by the assessee. The Ld. CIT(A) has, however, allowed depreciation on block of asset on alternative contention of assessee, subject to verification by the A.O. Thus, it is a fact that the Ground No.3 raised by the Revenue is improper and is not tenable. No grievance have been shown in this ground of appeal because the Ld. CIT(A) has confirmed the disallowance of capital loss made by the A.O. Therefore, Ground No.3 raised by the Revenue is totally irrelevant and is liable to be rejected. There is no grievance raised by the Revenue in the ground of appeal because whatever A.O. has

done, has been confirmed by the Ld. CIT(A). Therefore, there is no question of challenging the Order of the Ld. CIT(A) in allowing capital loss, which fact itself is incorrect because capital loss have not been allowed by the Ld. CIT(A). The Ld. CIT(A) has allowed the depreciation on block of asset on this issue against which there is no ground of appeal raised by the Revenue. Since there is no challenge by the Revenue in allowing of the depreciation by the Ld. CIT(A), subject to verification by the A.O, therefore, no further contention can be raised by the Revenue/Ld. D.R. Further the Ld. CIT(A) has allowed the claim of depreciation on block of asset by directing the A.O. to verify the evidences filed during the course of proceedings. Thus, the matter was still with the A.O. to verify the claim of the assessee and allow depreciation as per Law. Therefore, there could not have been any grievance of the Revenue with regard to allowing depreciation on block of asset, subject to verification by the A.O. Therefore, there is no merit in Ground No.3 of the appeal of the Revenue and the same is accordingly dismissed.

7. In the result, appeal of the Revenue dismissed.

Order pronounced in the open Court.

Sd/-
(B.R.R. KUMAR)
ACCOUNTANT MEMBER

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 20th August, 2020

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT "B" Bench
6.	Guard File

// BY Order //

Asst. Registrar : ITAT Delhi Benches :
Delhi.