IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F' : NEW DELHI
(Through Video Conferencing)

BEFORE MR. JUSTICE P.P. BHATT, HON'BLE PRESIDENT AND
SHRI G.S. PANNU, HON'BLE VICE PRESIDENT

ITA No.2767/Del/2017
Assessment Year : 2012-13

Assistant Commissioner of Income Tax, Circle-21(2), New Delhi.	**Vs.**	**M/s RattanIndia Wind 2 Private Limited, (Formerly known as M/s Mallow Real Estate Pvt.Ltd.), M-62 & 63, 1st Floor, Connaught Place, New Delhi – 110 001. PAN : AAGCM7141R.**
(Appellant)		(Respondent)

Appellant by : Ms. Rakhi Vimal, Senior DR.
Respondent by : Shri Ajay Wadhwa, Advocate.

Date of hearing : **17.06.2020**
Date of pronouncement : **21.08.2020**

ORDER

PER G.S. PANNU, VP :

This appeal is preferred by the Revenue against the order of the learned CIT(A)-6, Delhi dated 2nd February, 2017 pertaining to assessment year 2012-13.

2. The only Ground raised by the Revenue reads as under:-

> *"The Ld.CIT(A) has erred in deleting the addition of Rs.21,67,22,122/- made by the AO by disregarding the factual matrix and the detail reasoning advanced by the AO and the absence of any commercial expediency in the*

transactions which are in the nature of accommodation of funds."

3. Briefly put, the relevant facts are that the respondent assessee is a company incorporated under the provisions of the Companies' Act 1956 and for the assessment year under consideration, it filed a return of income declaring a loss of Rs. 10,222/-. The return of income so filed was selected for scrutiny assessment under CASS with the reason 'large increase in unsecured loans'. In the course of assessment proceedings, the Assessing Officer noted that the unsecured loans outstanding at the close of the year was Rs.235,28,00,000/- as against an amount of Rs. 204,98,00,000/- as at the beginning of the year; and, the said unsecured loan was received interest-free from M/s Oleander Real Estate Pvt. Ltd., the assessee's holding company.

4. The Assessing Officer further noted that the assessee had invested Rs.205,00,00,000/- in .001% Optimally Convertible Debentures (in short OCDs) of Rs.10/- each in India Best Buy Pvt. Ltd. The said OCDs were convertible into equity shares @ Rs.25,000 per equity share. It was also noted by the Assessing Officer that the investee company i.e. India Best Buy Pvt. Ltd. was not related with the assessee or any of its associates in any manner. The Assessing Officer also noted that during the year, the only revenue from operations was a sum of Rs. 20,500/- on account of interest income.

5. From the aforesaid, the Assessing Officer deduced that though the main Objects of the assessee were to carry out real estate activities, whereas in actuality, it was only carrying out 'NBFC activities'. In support, the Assessing Officer also referred to the financial highlights of assessee's holding company i.e. M/s Oleander Real Estate Pvt. Ltd. as well as the holding company of M/s Oleander Real Estate Pvt. Ltd. i.e. M/s IICL. The relevant discussion is contained

in the assessment order. The emphasis of the Assessing Officer is that the funds received as interest-free unsecured loans from the holding company were, in turn, invested in India Best Buy Pvt. Ltd either by way of subscribing to the OCDs or advanced by way of unsecured loan free of interest. As per Assessing Officer, the assessee was indeed carrying on NBFC activities, and not the activity of real estate. The Assessing Officer required the assessee to furnish details/documents/explanation/information with regard to the transaction of investment in 0.001% OCDs in order to verify the genuineness of the transaction. The relevant discussion in the assessment order also reveals that notices u/s 133(6) of the Act were also issued to M/s Best Buy Pvt. Ltd., the investee company, calling for information. The Assessing Officer further notes that though there was no response to the notice u/s 133(6) of the Act to the investee company, the notices issued to the Directors of the investee company were responded to and certain details/information were furnished.

6. In para 6 of the assessment order, the Assessing Officer records that in response to the queries raised, the assessee company as well as the investee company reiterated that the investment in the 0.001% OCDs as well as amount advanced as interest free loan to the investee company "*were made on account of commercial expediency (though not recorded)*". The Assessing Officer did not accept the plea of commercial expediency as, according to him, it was not a prudent act of a reasonable person engaged in the trade to advance interest free loan and also to invest in 0.001% OCDs which are to be converted into equity share @Rs.25,000 per equity share of a company whose book value was otherwise less than Rs. 500/- per share. In sum and substance, the Assessing Officer deduced that there was no commercial/economic benefit flowing to the assessee from the transaction of the assessee receiving funds as interest-free unsecured

loans from its holding company and investing/advancing the same to an unrelated entity either without any interest or for any insignificant business purposes. As per the Assessing Officer, such transactions showed that assessee was not carrying on activities relating to its main objects, i.e. real estate and instead, assessee was carrying out activities, which are akin to NBFC activities. The Assessing Officer further inferred that the impugned transactions were "*for supplementing the accommodation of funds without deriving any benefit out of it in such a manner which is a pernicious practice and is highly prejudicial to the interests of the Revenue*".

7. As per the Assessing Officer, assessee was liable to be assessed for interest income commensurate to the prevailing bank rate; and, accordingly, he took into consideration the total of the amount invested in the OCDs as well as the amount advanced as interest free unsecured loan and computed interest income @ 10% p.a., thereby resulting in an addition of Rs.21,67,22,122/- in the hands of the assessee. The rate of interest applied corresponded to the prevailing bank rate.

8. Against such an addition, the assessee carried the matter in appeal before the learned CIT(A), who allowed relief to the assessee. Before the CIT(A), assessee raised multiple pleas, both on facts and in law. Firstly, on facts, the plea of the assessee was that the addition made by the Assessing Officer on account of interest income was on mere presumptions without any factual support. It was canvassed by the assessee that such an addition was not based on any provision of the Act and that bringing to tax a notional income was unsustainable in law. Furthermore, it was sought to be explained that the impugned investments were made in a concern which was also in real estate sector and, that, it was intended for expansion of market opportunities in real estate sector. The CIT(A) has reproduced the varied submissions

put forth by the assessee in his order. The CIT(A) has made certain pertinent findings which we are tempted to reproduce hereinafter. Firstly, the factual findings with regard to the nature of the transaction has been summed up in the following words:

> *"The appellant is a wholly owned subsidiary of OREPL and deals in real estate business directly and indirectly with group companies and others, in same business activities. The investment in debentures was made in F.Y. 2010-11 and in accordance with law. Appellant was not carrying on NBFC activities as there was no public deposit in the company. Nothing has been brought on record by AO otherwise during the course of assessment proceedings.*
>
> *I have seen the audited balance sheet of the appellant company and found that the advance was given out of interest free funds taken from its holding company and no interest is charged/debited in profit and loss account. Therefore there is no question of loss to the revenue in the case of appellant."*

9. Furthermore, on the issue of charging of notional interest, the CIT(A) concluded as under:-

> *"In view of the above observations I am satisfied from the submission of the appellant that the AO is not justified in making the addition of Rs.21,67,22,122/-. The addition on account of notional interest is without any valid and proper reason as the AO has failed to bring on record any material finding that the appellant has actually received or accrued any income on account of interest. He has also failed to bring on record any provision of the Act under which notional income is chargeable to tax."*

10. Against the action of the CIT(A) in deleting the addition of Rs.21,67,22,122/-, the Revenue is presently in appeal before us as per the aforestated Grounds of Appeal. The primary plea of the Revenue before us is based on the discussion in the assessment order, whereby it is sought to be pointed out that though the assessee was

incorporated for carrying out the business of real estate development, but the financial statements reveal that no such activity was carried out and instead, interest free funds were raised from the holding company and the same were invested/advanced in an unrelated entity without any business purpose and/or without substantial return of income. Notably, a sum of Rs. 30,30,00000 was advanced as unsecured loan to M/s India Best Buy Pvt. Ltd. and Rs. 205 crore was invested in .001% OCDs of M/s India Best Buy Pvt. Ltd., which were convertible into equity shares @ Rs. 25,000 per equity share on a later date.

11. According to the learned DR, the business prudence does not justify such a transaction and, therefore, the Assessing Officer was quite justified in bringing to tax the impugned sum being interest corresponding to the bank rate from such investment/advance to M/s India Best Buy Ltd.

12. On the other hand, the learned representative for the assessee has primarily defended the order of the CIT(A) by placing reliance on the findings contained therein and reiterating the plea that the aspect of investing/advances to M/s India Best Buy Ltd. was on account of commercial expediency and that the transaction of receiving interest free funds from the holding company and, thereafter, advancing/investing in another unrelated concern for a return which is not found adequate by the Assessing Officer, cannot be subjected to tax on a notional basis. It was pointed out that the entire transaction stood verified and that there was no reason to doubt the genuineness of the transactions. It was also pointed out that the entire addition is based on mere conjectures and surmises and that income in question did not correspond to any real income earned by the assessee.

13. We have carefully considered the rival submissions. The factual matrix of the transaction, which has been subjected to taxation by the Assessing Officer, has already been succinctly noted by us in the earlier part of this order, and the same is not being repeated for the sake of brevity. It would suffice to say at this point that the basic premise of the Assessing officer is that the deployment of funds by the assessee by way of investment in the OCDs of M/s India Best Buy Ltd. and advancing of interest-free unsecured loan of Rs. 30,30,00,000 to M/s India Best Buy Ltd. was an imprudent business decision as there was absence/inadequacy of return of income. In other words, according to the Assessing Officer, the assessee ought to have invested/used his funds in a manner which, according to him, would fetch higher income. Ostensibly, this prompted the Assessing Officer to bring to tax a sum of Rs. 21,67,22,122/- , an amount which corresponded to 10% rate of interest on such funds. Be that as it may, without going into the merits of adopting the rate of 10% per annum and estimation of income by the Assessing Officer, the moot question is as to whether the facts and circumstances of the instant case, justify such an action? Admittedly, there is no case made out by the Assessing Officer that the assessee has received or has any right to receive any income qua the amounts invested/advanced to India Best Buy Pvt. Ltd. , which is over and above the amount declared by the assessee. The finding of the CIT(A) in this regard, which we have extracted above, clearly shows that there is no material led by the Assessing Officer to point out that the assessee has actually received or accrued any income corresponding to the interest in question. Before us also, the Department has not led any material or evidence which would enable us to interfere with the aforesaid finding of the CIT(A) and, therefore we hereby affirm the same. On the point of law, the CIT(A) made no mistake in relying on the judgment of the Hon'ble Delhi High Court in the case of Shivanndan Buildcon Pvt. Ltd. vs CIT

233 Taxman 297 (Delhi) to say that the Assessing Officer is not entitled to bring to tax any notional interest income without demonstrating that the assessee had, in fact, received such interest income or that the concern to whom the loan was given had, in fact, paid any such interest to the assessee. It is a trite law that income tax cannot be levied on the ipse dixit of the Assessing Officer, and, that too on a hypothetical income, which is a step away from real income. Thus, on facts as well as in law, the impugned addition computed by the Assessing Officer is merely hypothetical and notional and has been rightly set aside by the CIT(A).

14. Another aspect of the matter relates to the plea of the assessee that the impugned investment in the OCDs was based on commercial expediency. In this regard, the learned representative pleaded that such investment was made with a future perspective that on conversion of debentures into equity shares of the investee company, the assessee would own the investee company which was also in the similar business of real estate. It was explained by the assessee that by making investment in the convertible debentures, the assessee was in a position to closely observe the investee company, its financial affairs and its ability to run the real estate business. In sum and substance, the plea of the assessee is that since the investee company is also in the same line of business i.e. real estate, it was prudent for the assessee to acquire ownership in the investee company with a view to promoting its main objects of real estate business.

15. Although we have affirmed the decision of the learned CIT(A) of deleting the addition in earlier paras, we may briefly touch upon the instant plea of the assessee. Before us, the learned DR appearing for the Revenue pointed out that the plea of commercial expediency was not canvassed before the lower authorities and that in any case, the investment agreement between the assessee and the investee

company dated 31.3.2011 which has been considered by the CIT(A) was not before the Assessing Officer. In this manner, the aforesaid aspect has been sought to be negated by the learned DR before us.

16. We have carefully considered the aforesaid aspect and find that the plea of the learned DR is quite misconceived. As noted by us in the earlier part of this order, the Assessing Officer in para 6 of his order has referred to the plea of the assessee that the impugned investment and advancing of interest free loan was for commercial expediency. To the similar effect is the position before the CIT(A) whereby the following discussion by the CIT(A) is relevant:-

> *"Applying the above analogy, the AR strongly contended that the appellant, as a prudent businessman, has invested the interest free borrowed fund into India Best Buy Private Limited to expand its market opportunity in real estate sector and want to have a deep interest in the investee company so the appellant invested in optionally converted debenture. Thus, the appellant has made investment and loans to India Best Buy Private Limited out of commercial expediency/prudence."*

17. In fact, in operative part of his order in para 3.1.3, the CIT(A) again notes the stand of the assessee that the investment in M/s India Best Buy Private Limited was in the course of business activity and that such investment was made in the immediately preceding Financial Year 2011-12. It is also noted by the CIT(A) that the assessee is a wholly owned subsidiary of Oleander Real Estate Private Limited dealing in real estate business. No doubt, the CIT(A) has referred to the investment agreement between the assessee and M/s India Best Buy Private Limited dated 31.3.2011 and such a reference is conspicuous by its absence in the assessment order. Be that as it may, the same does not turn much, inasmuch as the analysis of the nature of the arrangement, being a transaction carried out in the course of the business activity has been consistently canvassed by the assessee,

and also noted so by the lower authorities. Thus, the plea of the learned DR to effect that such plea was not before the lower authorities, is not merited. Considering the entirety of circumstances, on this aspect of the matter also, the order of learned CIT(A) is well-founded and does not require any interference from our side.

18. In order to impart completeness, before parting, we may also touch upon the observations made by the Assessing Officer, which we have noted earlier in paragraph 6 of this order, to the effect that the impugned transactions were for supplementing the accommodation of funds of the recipient entity, and that the same was prejudicial to the interests of the Revenue. In our considered opinion, after having gone through the assessment order as well as the order of the First Appellate Authority and the material on record, there is nothing referred to by the Revenue to justify the aforesaid observation of the Assessing Officer. In fact, learned CIT(A) has concluded (which we have noted and reproduced in paragraph 8 earlier) that there was no loss to the Revenue on account of the impugned transaction. On this aspect also, in our view, the observation of the Assessing Officer is a mere bland assertion, devoid of any factual support.

19. In the final analysis, we hereby affirm the decision of the learned CIT(A) and find no merit in the appeal of the Revenue.

20. In the result, the appeal of the Revenue is dismissed.

Decision pronounced on 21st August, 2020.

Sd/-	Sd/-
(JUSTICE P.P. BHATT) **PRESIDENT**	**(G.S. PANNU)** **VICE PRESIDENT**

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Copy forwarded to: -

1. Appellant : **Assistant Commissioner of Income Tax, Circle-21(2), New Delhi.**

2. Respondent : **M/s RattanIndia Wind 2 Private Limited, (Formerly known as M/s Mallow Real Estate Pvt.Ltd.), M-62 & 63, 1st Floor, Connaught Place, New Delhi – 110 001.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar