

आयकर अपीलीय अधिकरण “बी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VP AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing through Video Conferencing Mode)

आयकर अपील सं./ I.T.A. No.3048/Mum/2019
(निर्धारण वर्ष / Assessment Year: 2013-14)

DCIT-CC-7(3) Room No.655, 6 th Floor Aaykar Bhawan, M.K. Road Mumbai-400 020.	बनाम/ Vs.	M/s. National Standard Pvt.Ltd. 412, Vardhman Chamber Cawasji Patel Road, Horniman Circle, Fort, Mumbai-400 011.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAACN-9808-L		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)
Assessee by	:	Shri Niraj Sheth-Ld. AR
Revenue by	:	Shri Tharian Oommen- Ld. DR
सुनवाई की तारीख/ Date of Hearing	:	13/01/2021
घोषणा की तारीख / Date of Pronouncement	:	05/04/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by Revenue for Assessment Year 2013-14, contests the order of Ld. Commissioner of Income Tax (Appeals) - 49, Mumbai [in short CIT(A)], Appeal No.CIT(A)-49/IT-32/2016-17 dated 11/02/2019 on following grounds: -

- Whether on the facts and circumstances of the case and in law, the Ld CIT(A) erred in deleting the addition of Rs.4,39,49,000/- made by the Assessing Officer u/s 36(l)(iii) and capitalized the same to work in progress.
- Whether on the facts and circumstances of the case and in law, the Ld CIT(A) erred in deleting the addition of Rs.4,39,49,000/- relied upon the decision of the judgment of the jurisdictional High Court in the case of

Lokhandwala Construction Inds Ltd 260 ITR 579 the same were rendered before the proviso to section 36(I)(iii) has been inserted vide Finance Act 2003

3. Whether on the facts and circumstances of the case and in law, the Ld CIT(A), is right in directing the AO to allow to set off of brought forwarded losses?

2. We have carefully heard the rival submissions and perused relevant material on record including orders of lower authorities. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs. As evident, the revenue is aggrieved on two issues viz. (i) deletion of interest disallowance u/s 36(1)(iii); (ii) Set-off of brought forward losses.

3.1 The material facts are that the assessee being resident corporate assessee stated to be engaged in real estate was assessed u/s 143(3) on 30/03/2016 wherein it was saddled with interest disallowance for Rs.439.49 Lacs. During assessment proceedings, it transpired that the assessee was developing projects namely Lodha Supremus (Commercial) and Lodha Grandezza in Thane district. The assessee followed mercantile system of accounting and for the purpose of recognizing revenue from the projects; it was following percentage of completion method of accounting.

3.2 The assessee had borrowed funds from bank and group entities and paid aggregate interest of Rs.1887.29 Lacs. After adjusting interest income of Rs.1447.80 Lacs there-from, it claimed deduction of net interest of Rs.439.49 Lacs from business income in statement of computation of income on the reasoning that interest expenditure was periodic cost and hence, an allowable deduction u/s 36(1)(iii). Reliance was placed on the decision of

Hon'ble Apex Court in **Taparia Tools Pvt. Ltd (CA No.6366/2003)** as well as on the decision of Hon'ble Bombay High Court in **CIT V/s Lokhandwala Construction Ind. Ltd. (260 ITR 0579)** to support the said claim.

3.3 However, going by Accounting Standard 7 issued by Institute of Chartered Accountants of India (ICAI), Ld. AO opined that expenses directly related to the project were to be debited to cost of project and could be claimed as deduction only in the year in which corresponding income of the project was credited in Books of Accounts and offered to tax. Notably, the assessee allocated all other expenses to work-in-progress except interest. These expenses were also periodic cost and would be allowable as deduction in *toto* on assessee's logic. Relying upon the decision of Special Bench in the case of **M/s Wall Street Construction Limited (102 TTJ 505)**, which held that interest cost was to be allowed as deduction only in the year in which the corresponding income was offered to tax, the interest expenditure thus claimed was disallowed and added back to work-in-progress as reflected by the assessee in the books of accounts.

3.4 The second issue is with respect to set-off of brought forward losses of Rs.741.37 Lacs. Though the assessee claimed this loss but Ld. AO restricted the same to Rs.308.48 Lacs in view of the fact that losses of earlier years were disallowed in assessment order for AY 2010-11 since entire shareholding of the assessee changed hands. Though Ld. CIT(A), in AY 2010-11, allowed assessee's appeal on this issue but it was noted that the appeal was allowed on technical grounds and not on merits and therefore, the set-off

could not be granted to the assessee. Accordingly, in AY 2012-13, the claim of brought forward losses was restricted to Rs.308.48 Lacs while framing the assessment.

Appellate Proceedings before Ld. CIT(A)

4.1 The assessee contested the stand of Ld. AO before Ld. CIT(A) by way of elaborate written submissions, which have already been extracted in the impugned order. The assessee relied upon favorable appellate orders for AY 2014-15 in group concerns cases and also on the decision of Tribunal in Ashish Builders Pvt. Ltd. & Rohan Estate Private Ltd. The assessee also relied upon various other judicial pronouncements to buttress the submissions and pleaded that interest was allowable in terms of Sec. 36(1)(iii). The proviso to Sec. 36(1)(iii) as inserted by Finance Act. 2003 was stated to be applicable only in case the funds were utilized for acquisition of capital assets and not to stock-in-trade as held by Hon'ble Bombay High Court in the case of **CIT V/s Lokhandwala Construction Ind. Ltd. (260 ITR 0579)**. This decision was stated to be followed in subsequent decisions of various tribunals and courts as enumerated in assessee's written submissions and extracted in the impugned order. The case law of Tribunal Special Bench in **M/s Wall Street Construction Limited (102 TTJ 505)** was stated to be not applicable to the facts of the case.

4.2 The Ld. CIT(A), after noticing the ratio of decisions of Hon'ble Bombay High Court in **CIT V/s Lokhandwala Construction Ind. Ltd. (260 ITR 0579)**, decision of Tribunal in M/s. Ashish Builders Private Ltd. (ITA No.310/M/2012); Rohan Estates (ITA

No.7200/Mum/2010) & Pune Tribunal in M/s Kolte Patil Developers Ltd. concurred with assessee's submissions and held as under:-

5.7. From the above, it is evident that any amount of the interest paid in respect of capital borrowed for the business purposes constitutes an allowable deduction. The said clause (iii) of section 36(1) of the Act supports the assessee's claim in the present case. This view is upheld in the case of CIT vs Lokhandwala Construction Industries Ltd. (supra) as well as the decision of the Tribunal in the case of M/s. Ashish Builders Pvt Ltd. (supra) irrespective of the method of accounting of recognizing the income followed by the assessee. The present case involves the payment of interest of Rs.4,39,49,000/- the interest paid to debenture holders, Financial institutions, Unsecured loan etc. It is not the case of the Revenue that the interest claim of Rs.4,39,49,000/- and related capital borrowed was not utilized by the assessee for business purposes of the assessee.

5.8. The case of Wall Street constructions Ltd. (2006) 102 TTJ 505 is one where the assessee was following project completion method and therefore the ITAT held that the interest cost shall be debited to work in progress and allowed to be claimed as deduction only in the year in which the corresponding income is offered to tax. In the instant case, the assessee is following percentage completion method (POCM) and therefore the judgment of Wall Street constructions Ltd. is not applicable to this case. The assessee is following percentage completion and offers a part of the revenue every year depending upon the percentage of completion. The funds have been borrowed for the purpose of construction and have gone into the projects of the assessee which are stock in trade and not capital asset of the assessee. Therefore, the amendment brought in the Act with effect from 2003 by way of introducing the proviso to section 36 (1) (iii) also does not affect the facts of the case of the assessee. In view of the binding judgment of the jurisdictional High Court in the case of Lokhandwala constructions and also of the jurisdictional ITAT in the cases of Ashish Builders Private Ltd and Rohan Estate Private Ltd (supra) and also the various judicial pronouncements relied upon by the assessee, the interest expenditure claimed by the assessee is held to be allowable. Therefore, the AO is directed to delete the addition made of Rs.4,39,49,000/-. This ground of appeal is **ALLOWED**.

4.3 Regarding set-off of losses, it was observed that the provisions of Sec.79 denying set-off of losses in case of change in shareholders, were applicable only to a company, not being a company in which the public was substantially interested and therefore, the provisions of Sec.79 were not applicable to assessee which is a company in which public are substantially interested.

Therefore, Ld. AO was directed to set-off the eligible carry forward losses belonging to the assessee.

Our Adjudication

5. Upon due consideration of material facts, it is quite evident that the assessee was following percentage of completion method of accounting to recognize revenue from operations as against the case law of Tribunal Special Bench in **M/s Wall Street Construction Limited (102 TTJ 505)** which deal with a case wherein the assessee was following completed contract method and therefore, the said decision was not applicable to the facts of the case, as rightly held by learned first appellate authority.

6. Proceeding further, it is undisputed fact that the assessee was engaged in real estate construction and had borrowed capital for business purposes. No other diversion of income has been alleged by Ld. AO. As noted by Ld. CIT(A), the interest was paid to debenture holders, financial institutions as well as unsecured loan creditors and the loan was utilized for business purposes. The funds were borrowed for the purpose of construction and have gone into the projects of the assessee which constitute assessee's stock-in-trade and not capital asset. In view of these clear cut findings, the adjudication of Ld. CIT(A) could not be faulted with. Another important fact is that the assessee has followed consistent accounting treatment to charge interest expenditure in the accounts. Therefore, the ground thus raised by the revenue stand dismissed.

7. Ground No.2 relating to set-off of brought forward losses would also not survive in view of the fact that the provisions of

Sec.79 were not applicable to the assessee since assessee is a company in which public is substantially interested. This fact could not be controverted by revenue before us. Therefore, this ground also stands dismissed.

8. The appeal stand dismissed.

Order pronounced on 5th April, 2021.

Sd/-
(Mahavir Singh)
उपाध्यक्ष / Vice President

Sd/-
(Manoj Kumar Aggarwal)
लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 05/04/2021
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.