

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH “C” MUMBAI**

**BEFORE SHRI S.RIFAUZ RAHMAN (ACCOUNTANT MEMBER) AND  
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.2202/MUM/2018  
(Assessment Year: 2013-14)**

M/s Optical Disc Marketing  
(India) P. Ltd.  
(now merged with Disha Infin Consultants Pvt. Ltd.)  
702, 7<sup>th</sup> Floor, Samudra Setu,  
Near Parsi Agiary, Opp. Annand  
Bhavan, Opp. B.D. Desai Road,  
Mumbai – 400 026

The DCIT, Circle 13(1)(1)  
Vs. 2<sup>nd</sup> Floor, Aayakar Bhavan,  
Mumbai -

**PAN No. AAACO3254B**

**(Assessee)**

**(Revenue)**

Assessee by  
Revenue by

: Shri H.D. Shah, A.R  
: Ms. Shrikala Pardeshi, D.R

Date of Hearing : 24/08/2021  
Date of pronouncement : 29/09/2021

**ORDER**

**PER RAVISH SOOD, J.M:**

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-21, Mumbai, dated 31.01.2018, which in turn arises from the order passed by the A.O u/s 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 05.03.2016 for A.Y 2013-14. The assessee has assailed the impugned order on the following grounds before us:

- “1. That Id.CIT(A) has erred in law and facts by passing the order and therefore the learned AO are directed to adopt the income declared in the return of income and allow the claim made in the statement of total income and the return of income.
2. That the learned CIT(A) has erred in law and facts by considering the Business Income of Rs.97,48,764/- as "Income from Other source Income" and therefore the learned AO should be directed to treat the said income as Business income, while computing the total income and therefore expenses disallowed by the Ld. AO is to be allowed in full, while computing the total income of the company.
3. That Id.CIT(A) has erred in law and facts by confirming the disallowance of employee benefit expenses of Rs.10,71,000 and therefore, the learned AO should be directed to allow the same in full, while computing the total income.
4. That Id. CIT(A) has erred in law and facts by confirming the disallowance of legal and professional fees of Rs.5,84,745/- and therefore, the learned AO should be directed to allow the same in full, while computing the total income.
5. That the Id.AO be directed to calculate income tax and interest under section 234B and 234C of the Act.
6. That the appellant craves liberty to add, amend, alter and delete any grounds of appeal before the final hearing.”

2. Briefly stated, the assessee company had e-filed its return of income for A.Y. 2013-14 on 30.09.2013, declaring a total income of Rs.45,65,970/-. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee company which was engaged in the business of trading in cotton lines, foam insole, gel insole etc. had not reported any purchases and sales in its profit and loss account for the year under consideration. On a perusal of the profit and loss account it was noticed by the A.O that the assessee had therein credited consultancy income and interest income. Observing that the assessee company was neither a NBFC nor had a license of money lending, the A.O called upon it to explain as to why the interest income credited in the profit and loss account may not be brought to tax under the head “Other sources”. In reply, it was submitted by the assessee that it was during the year in question carrying on the business of finance and providing consultancy services. It was

further submitted by the assessee that even in the preceding years it was inter alia carrying on the business of finance. Elaborating its aforesaid claim, it was submitted by the assessee that as in the financial years 2010-11 and 2011-12 it had earned interest income of Rs.22,22,584/- and Rs.36,69,102/-, respectively, from its business of finance, therefore, it was incorrect to say that it had no finance activity during the year under consideration. It was further submitted by the assessee that assessment for both the aforementioned preceding years were framed u/s 143(3) of the Act and the interest income offered by the assessee as its business income was accepted. It was submitted by the assessee that as during the year under consideration its activity of trading in cotton liner, foam insole, gel insole etc. could not be carried out due to low margin in the said business activity, therefore, the activity of finance was substantially geared up and an interest income of Rs.97,39,102/- was earned from the business of finance. Backed by its aforesaid submissions, it was the claim of the assessee that it was not correct to say that it was not having any business activity during the year under consideration. However, the aforesaid explanation of the assessee did not find favor with the A.O. Observing, that the assessee company was neither a NBFC nor was in the business of taking and giving loans, the A.O held a conviction that the interest income earned by the assessee during the year was liable to be assessed under the head 'Other sources'. In order to fortify his aforesaid conviction the A.O had drawn support from the Bombay Money Lenders Act. It was observed by the A.O that as per the mandate of Sec. 5 of the Bombay Money Lenders Act no money lender could carry on the business of money lending without a license for the same. Also, it was noticed by the A.O that the assessee had not obtained any license from the Reserve Bank of India to act as a NBFC. It was further noticed by the A.O that no alteration was executed by the assessee in its Memorandum of Association i.e in the 'main object clause' within the meaning of Sec. 17 of the Companies Act, 1956. On the basis of his aforesaid observations the A.O subjected the interest income of

Rs.97,48,764/- to tax under the residuary head of income i.e 'Other sources'. Thereafter, the A.O allowing a deduction of the interest expenditure of Rs. 30,86,647/- u/s 57(iii) of the Act, therein, subjected the balance amount of interest income of Rs.66,62,117/- to tax under the head 'Other sources'. Apart from that, the A.O taking cognizance of the fact that the assessee in the course of the assessment proceedings had failed to substantiate on the basis of documentary evidence its claim for deduction of 'Employee Benefit Expenses' of Rs.10,71,000/-, thus, disallowed the same. Also, the assessee's claim for deduction of 'Legal and professional fees' of Rs.5,84,745/- was disallowed by the A.O, for the reason, that the assessee had failed to substantiate as to how the said expenditure was incurred wholly and exclusively for the purpose of its business. Backed by his aforesaid observations, the A.O vide his order passed u/s 143(3) dated 05.03.2016 assessed the income of the assessee company at Rs.67,90,330/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Insofar the aforesaid re-characterization of the business income as income from other sources and the aforesaid disallowances made by the A.O were concerned, the CIT(A) not finding favor with the contentions advanced by the assessee upheld the view taken by the A.O.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us.

6. We have heard the Id. authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements relied upon by them to drive home their respective contentions. We shall first deal with the sustainability of the view taken by the lower authorities that the interest income of Rs. 97.48 lac credited by the assessee in its profit and loss account was liable to be assessed

as its income from 'Other sources'. As observed by us hereinabove, the A.O being of the view that as the assessee company was neither a NBFC nor a Money lender within the meaning of the provisions of Sec. 5 of the Bombay Money Lenders Act, therefore, the interest income in question was liable to be brought to tax under the head 'Other sources'. On the contrary, it was the claim of the assessee that as during the under consideration it was engaged in the business of finance and consultancy, therefore, as in the earlier years the interest income clearly pertained to its business activities and was rightly offered for tax as business income.

7. Admittedly, the assessee company during the year under consideration was neither a NBFC nor a Money Lender within the meaning of Sec. 5 of the Money Lenders Act. However, we are of the considered view that as the assessee company was on a regular basis engaged in a systematic and organized activity of lending money, therefore, for the standalone reason that it did not have a license to conduct money lending business the interest income earned from its aforesaid activities could not have been declined from being assessed as its business income. Our aforesaid view is supported by the order of the ITAT, Mumbai in the case of B.N. Khandelwal Vs. ITO (2007) 16 SOT 343 (Mum). In its said order, it was, inter alia, observed by the Tribunal that as the assessee was engaged in granting of loans on a regular basis and was earning interest income, therefore, it could be said to be engaged in money-lending business even though it had no money-lending license. Reliance is also placed on the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Smt. Padma S. Bora (54 taxmann.com 319((Bom). In its said order, it was, inter alia, observed by the Hon'ble High Court that merely because the assessee did not have a license to conduct money lending business it would not mean that its claim of bad debts should be denied. Also, a similar view had been taken by the ITAT, Mumbai in the case of ITO Vs. Khyati Realtors Pvt. Ltd., ITA No.

6537/Mum/2017, dated 16.09.2019. Insofar the judgment of the Hon'ble High Court of Madras in the case of South India Shipping Corporation Ltd. vs. CIT (2000) 163 CTR 617 (Mad) is concerned, we find that as the issue before the Hon'ble High Court was in respect of assessing of the interest income on bank deposits, which is not the issue in the case before us, therefore, the same is distinguishable on facts. Also, the judgment of the Hon'ble High Court of Madras in the case of CIT Vs. Gimpex Pvt. Ltd. (2004) 268 ITR 377 (Mad) was rendered in context of interest income earned by the assessee on its surplus funds prior to the commencement of the assessee's business, therefore, the same being distinguishable on facts would also not assist the case of the revenue before us. Be that as it may, we find, that the fact that the interest income had been offered by the assessee in the immediately two preceding years i.e A.Y 2011-12 and A.Y 2012-13 as its business income, and the same after having been subjected to scrutiny assessment u/s 143(3) for both the said years had been accepted by the department, therefore, a departure from the said consistent view in the absence of any change in the facts during the year under consideration as against that of the said preceding years would not be permissible. In this regard, it would be relevant and pertinent to point out that the department had assessed the interest income as offered by the assessee as its business income in the immediately two preceding years, as under :

A.Y.	Interest Income	Remark
2012-13	3669102	143(3)
2011-12	2222584	143(3)

Backed by the aforesaid facts, we are of the considered view that as per the principle of consistency the department in the absence of any change in the facts could not be permitted to take inconsistent stands. Our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in the case of Radhasoami Satsang Vs. CIT (1992) 193 ITR 321 (SC). Accordingly, in the backdrop of our aforesaid observations we are unable to persuade ourselves to subscribe to the

view taken by the lower authorities that the interest income was liable to be brought to tax under the head 'Other sources'. We, thus, set-aside the order of the CIT(A) and direct the A.O to assess the interest income of Rs.97,48,764/- under the head 'Profits and gains of business or profession'. The **Ground of appeal No. 2** is allowed.

7. We shall now take up the grievance of the assessee that the CIT(A) had erred in law and the facts of the case in upholding the disallowance of the "Employee Benefit Expenses" of Rs.10,71,000/-. As is discernible from the assessment order, the A.O had called upon the assessee to furnish the details of the expenses booked under the aforesaid head. In reply, the assessee initially furnished with the A.O only the list of the employees. However, the A.O called upon the assessee to furnish further details as regards the employees i.e as to what work they have done, their designation, and as to how their expenses were related to its business. Observing, that there was a steep rise in the aforesaid expenses i.e from Rs.1,80,000/- in the immediately preceding year to Rs.10,71,000/- during the year under consideration, the A.O taking cognizance of the fact that the assessee had failed to furnish the complete details, therein, called upon it to explain that as to why its aforesaid claim for expenses may not be disallowed. Although, the assessee in compliance to the directions of the A.O had furnished certain details with respect to the aforesaid expense, i.e the names, assigned jobs, PAN numbers and the amount paid to the respective employees, however, he is stated to have failed to substantiate that the aforesaid expenses were incurred wholly and exclusively for the purpose of its business. In the absence of the requisite details which would prove to the hilt that the expenses claimed by the assessee were incurred wholly and exclusively for the purpose of its business the A.O disallowed the same. On appeal, the CIT(A) upheld the disallowance of the aforesaid expenses made by the A.O.

8. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record as regards the aforesaid issue in hand. As observed by the lower authorities, the assessee had failed to substantiate to the satisfaction of the A.O that the employee benefit expenses so claimed as a deduction were incurred wholly and exclusively for the purpose of its business. However, we find that the CIT(A) after perusing the reply of the assessee, had observed, that the aforesaid expenses were primarily incurred towards the monthly salaries of the employees of the assessee company who were rendering their services as marketing managers, manager and accountant. Observing, that the aforesaid employees were rendering services in the financial and marketing activity which was not the nature of business of the assessee company, the CIT(A) holding a conviction that the aforesaid expenses were not incurred for the purpose of the business of the assessee had disallowed the same.

9. We have given a thoughtful consideration and are unable to persuade ourselves to subscribe to the view taken by the lower authorities. As observed by us hereinabove, it is a matter of fact borne from the record that the assessee had in the course of the assessment proceedings furnished the requisite details in support of its aforesaid claim of employee benefit expenses, viz. names of the employees, assigned jobs, PAN numbers and the amounts that were paid to them. Only reason that had weighed in the mind of the A.O for disallowing the aforesaid expenses was that the assessee had failed to substantiate that the expenses in question were incurred wholly and exclusively for the purpose of its business. On the other hand, we find that the CIT(A) had observed that the expenses in question pertained to the monthly salaries which were paid by the assessee to its employees, viz. marketing managers, managers and accountant. Observing, that the expenses in question were incurred in respect of the employees who were engaged in the finance and marketing activity, which as per

the CIT(A) was not the business of the assessee company, the said expenses were disallowed by him. In our considered view both the lower authorities had failed to address the issue in hand in the right perspective. Insofar the A.O is concerned, we find that though the assessee had furnished complete details with respect to the employee benefit expenses, however, the same were rejected by him for the reason that the assessee had failed to prove that the said expenses were incurred wholly and exclusively for the purpose of its business. In our considered view, the A.O had neither sought any further details in respect of the aforesaid expenses nor carried out any independent inquiries before concluding as hereinabove. Neither is there anything discernible from the records which would reveal that the A.O after perusing the details that were furnished by the assessee had directed him to substantiate as to how the expenses therein incurred were wholly and exclusively for the purpose of its business, nor anything has been brought to our notice by the Id. D.R in the course of hearing of the appeal. Insofar the CIT(A) is concerned, we find that he had declined the assessee's claim for deduction of the aforesaid expenses, for the reason, that the same pertained to salaries that were paid to certain employees who were engaged in financial and marketing activities, which as were him was not the nature of business of the assessee company. At this stage, we may herein observe that as the assessee was apart from the business of rendering consultancy services and trading in cotton liner, foam insole and gel insole was also carrying on the business of finance, therefore, we are unable to persuade ourselves to subscribe to the view taken by the CIT(A) that the aforesaid employee benefit expenses could not be related to its business activities. We, thus, in the backdrop of our aforesaid deliberations vacate the disallowance of the assessee's claim for deduction of employee benefit expenses of Rs.10.71 lac. Accordingly, we herein set-aside the order of the CIT(A) and vacate the disallowance of the employee benefit expenses of Rs.10.71 lac made by the A.O. The **Ground of appeal No. 3** is allowed.

10. We shall now deal with the grievance of the assessee that the CIT(A) had erred in upholding the disallowance of legal and professional fees of Rs.5,84,745/- made by the A.O. As is discernible from the assessment order, the assessee's claim for deduction of legal and professional fees of Rs.5.84 lac was declined by the A.O, for the reason, that it had failed to substantiate as to how the aforesaid expenditure was incurred wholly and exclusively for the purpose of its business. On a perusal of the records, we find that the assessee had in the course of the assessment proceedings furnished the name of the professional a/w the copies of the bills. However, the A.O being of the view that the assessee had failed to substantiate with documentary evidence that the aforesaid expenditure was incurred wholly and exclusively for the purpose of its business, had thus, rejected its aforesaid claim. On appeal, it was observed by the CIT(A) that the details of the aforesaid expenditure incurred by the assessee pertained to the finance business of the company and the other regular legal matters (ROC, Income tax matter, return filing, VAT return, digital signature of the company). It was observed by the CIT(A) that the assessee company had dully deducted TDS on the aforesaid payments. However, the CIT(A) being of the view that as the interest income had not been recognized as the business income of the assessee, therefore, the expenditure incurred towards legal and profession fees pertaining to such activity was rightly disallowed by the A.O.

11. We have given a thoughtful consideration to the aforesaid issue and have perused the orders of the lower authorities and the material available on record. As we have held that the interest income was rightly reflected by the assessee as its business income, therefore, its claim for deduction of the legal and professional fees incurred in respect of the said business activity was rightly claimed by it as a deduction. Accordingly, we set-aside the order of the CIT(A) and direct the A.O to allow the assessee's claim for deduction of legal and

professional fees of Rs.5,84,745/-. The **Ground of appeal No. 4** is allowed in terms of our aforesaid observations.

12. The **Grounds of appeals Nos. 1, 5 and 6** being general are dismissed as not pressed.

13. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 29.09.2021.

Sd/-  
(S. Rifaur Rahman)  
ACCOUNTANT MEMBER

Sd/-  
(Ravish Sood)  
JUDICIAL MEMBER

Mumbai;  
Dated: 29.09.2021  
PS: Rohit

**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**