

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "E" BENCH: NEW DELHI**

(THROUGH VIDEO CONFERENCING)

**BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER &
SHRI KUL BHARAT, JUDICIAL MEMBER**

**ITA No.3095/Del/2018
Assessment Year : 2012-13**

M/s Mark Exhaust Systems Ltd. 606, Vishal Bhawan, 95 Nehru Place, New Delhi-110019	vs	DCIT, Circle-16(1), New Delhi
PAN-AAACM1497Q		
APPELLANT		RESPONDENT
Appellant by	Sh. Sanjay Sood, CA	
Respondent by	Sh. Gaurav Pundir, Sr. DR	
Date of Hearing	13.09.2021	
Date of Pronouncement	11.10.2021	

ORDER

PER KUL BHARAT, JM :

This appeal filed by the assessee pertaining to assessment year 2012-13 is directed against the order of Ld. CIT(A)-33, New Delhi dated 28.02.2018. The assessee has raised following grounds of appeal:-

1. *THAT in the facts and circumstances of the case, the Learned CIT(A) erred in confirming the order of A.O. who had erred in making disallowance u/s 14A of Rs. 42,645/-.*
2. *THAT in the facts and circumstances of the case, the Learned CIT(A) erred in confirming the disallowance of interest, made by AO, of Rs. 1,29,63,747/-.*
3. *THAT in the facts and circumstances of the case and without prejudice to the order of AO in confirming the disallowance of interest of Rs. 1,29,63,747/- , the learned CIT(A) erred in not allowing the statutory deduction of depreciation on interest of Rs. 1,29,63,747/- held to be capitalized by the A.O.*
4. *THAT in the facts and circumstances of the case, the Learned CIT(A) erred in confirming the disallowance , made by AO, out of subscription and membership expenses of Rs. 3,62,992/-.*

5. *THAT the appellant craves leave to add, alter, amend or drop any of the above grounds at the time of hearing.*

2. Facts giving rise to the present appeal are that the assessee filed its return of income on 26.09.2012 through electronic mode declaring income of Rs.8,05,23,960/- after claiming the deduction of Rs.63,70,888/- under chapter VI-A. The case was selected for scrutiny and the assessment was completed u/s 143(3) of the Income Tax Act, 1961('the Act') vide order dated 17.03.2015. By framing the assessment, the Assessing Officer noticed that the assessee had claimed loss on exchange fluctuation of Rs.97,91,000/-. The assessee was asked as to why the claim should not be disallowed. In response thereto, the assessee filed its reply however, the reply of the assessee was not found acceptable, therefore, the Assessing Officer disallowed the claim of the assessee on exchange fluctuation of Rs.97,91,000/-. Further, the AO disallowed the expenses related to club subscription of Rs.3,62,992/-, disallowance u/s 14A of Rs.42,645/-, disallowance of interest on loan for capital expansion of Rs.1,29,63,747/- and made ad-hoc disallowance of Rs.93,562/- on travelling and conveyance of the directors.

3. Aggrieved against this, the assessee preferred appeal before Ld. CIT(A) who after considering the submissions and material on record, sustained the addition of Rs.1,29,63,747/- made on account of disallowance of interest on capital expenses, disallowance made by invoking the provisions of section 14A of the Act of Rs.42,645/-, and

deleted the ad-hoc disallowance made by AO and the addition made on account of claim of loss on account of fluctuation of foreign exchange.

4. Aggrieved against this, the assessee is in further appeal before this Tribunal.

5. Ground No.1 is against the sustaining the addition of Rs.42,645/- made on account of disallowance u//s 14A of the Act.

6. Ld. Counsel for the assessee submitted that the authorities below have made disallowance and sustained the same in mechanical fashion without appreciating the fact in the right perspective. He submitted that the Assessing Officer failed to appreciate the fact that the assessee had not incurred any expenditure for earning the exempt income. He submitted that the primary fact which needed to be ascertained was that whether any expenditure had been incurred in relation to earning of exempt income. He contended that there has to be some nexus between the earning of income and the expenditure so disallowed. In the absence of any relation of the expenditure qua the exempt income, no disallowance could be made. He submitted that the Assessing Officer considered the entire finance cost in making addition, without appreciating that the same consists of bank charges, as well as interest cost related to specific loans. He further contended that in the last para of the assessment order, the Assessing Officer had himself disallowed Rs.1,29,63,747/- out of this interest, being towards specific loans.

7. Per Contra, Ld.Sr.DR opposed these submissions and supported the orders of the authorities below.

8. We have heard the rival contentions and perused the material available on record and gone through the orders of the authorities below. Ld.CIT(A) in para 7 had decided the issue by observing as under:-

7. *Decision*

“I have considered the facts of the issue, basis of additions made by the Assessing Officer and the submissions of the appellant. From the perusal of profit and loss account, I find that the assessee has declared other income amounting to Rs.46.22 lakhs which consists of interest from bank deposits amounting to Rs.41.19 lakhs and dividend income from long term investments at Rs1.16 lakhs besides profit on sale of fixed assets at Rs.3.87 lakhs. Thus, it may be seen that the assessee has earned long term capital gain, eligible for deduction u/s 10(38) of the Act. The Assessing Officer has rightly worked out disallowable expenses as per the provisions u/s 14A r.w.Rule 8D of I.T.Rules, 1962. Therefore, the disallowance made by the Assessing Officer is confirmed. The Assessing Officer has apportioned interest expenditure for the investments in the shares. The ground of appeal is dismissed.”

9. We find that the Ld.CIT(A) has mechanically confirmed the findings of the Assessing Officer, without adverting to the submissions of the assessee that no expenditure was incurred for earning of exempt income when it was categorically contended on behalf of the assessee that no expenditure was incurred on earning of exempt income. Ld. Counsel for the assessee submitted that the assessee had subscribed to shares of its bankers in an earlier Assessment Year a long time back. It was further stated that investment had been continuing as the initial amount of investment was Rs.9,49,000/- since these equity shares were held in DEMAT account and

therefore, dividend of Rs.1,16,000/- was also credited to assessee's bank account. It is further stated that the Assessing Officer erroneously considered the entire finance cost, bank charges as well as interest cost related to specific loans. Undisputedly, the assessee had invested a sum of Rs.9,44,000/- in the shares of two banks namely Corporation Bank of Rs.2,48,000/- and State Bank of Travancore of Rs.6,96,000/-. During the year under consideration, the assessee has earned dividend income of Rs.1,16,000/- on this investment which is an exempt income. Undisputedly, section 14A of the Act empowers the Assessing Officer to disallow the expenditure incurred in relation to earning of exempt income. It is contention of the assessee so far interest expenditure claimed by the assessee is concerned that related to specific loans and did not relate to the investment out of which the assessee had earned dividend income. It is well settled law that for making disallowance u/s 14A of the Act, there has to be an expenditure related to the exempt income which has been charged in P & L Account by the assessee. In the present case, it is the contention of the assessee that so far interest expenditure is concerned, **firstly**, it related to specific loans and were not related to exempt income and **secondly**, the investment was made way back in the share of bankers of the assessee, such shares were kept in DEMAT account. So far, the administrative expenses i.e. are concerned, there is no dispute with regard to the fact that Rule 8D of the Income Tax Rules, 1962 is in operation for Assessment Year under consideration. Therefore, looking to the facts and circumstances of the case, we restrict the disallowance to the extent of the administrative expenses one-half percent of the average of the value of

investment as on the first day and the last day of the previous year i.e. Rs.9,44,000/- i.e. 4,720/-. Thus, Ground No.1 raised by the assessee is partly allowed.

10. Ground Nos.2 & 3 are inter-related and are against the disallowance of interest of Rs.1,29,63,747/- and not allowing the depreciation thereon which was treated by the Assessing Officer being incurred on capital expansion.

11. Ld. Counsel for the assessee reiterated the submissions as made before the authorities below. It was contended that the Assessing Officer mis-directed himself by not appreciating the facts correctly. He submitted that the Assessing Officer stated in the assessment order that loan which was taken from Mizuho Corporate Bank Ltd. was payable in half yearly installment as per their amortization schedule starting from 31.10.2013 to 30.04.2016. It was further contended that the Assessing Officer then proceeded to make disallowance of Rs.1,29,63,747/- being the interest on such loan on the basis that loan was unsecured from Mizuho Corporation Bank Ltd. and the interest expenditure did not relate to Financial Year under consideration and the amount of loan had been expended for capital expansion. Thus, as per Assessing Officer, the interest expended was needed to be capitalized. Ld. Counsel for the assessee submitted that the details of interest were furnished before the authorities below. A perusal of the details indicate that interest was on two different loans from Mizuho Corporate Bank. One loan was taken in the year ended 31.03.2006 and other of Rs.17,79,60,000/- was obtained during the year under

consideration. The interest of Rs.1,29,63,747/- included the interest on the older loan of Rs.9,73,060/- which was for capital expansion and the interest of Rs.1,19,90,687/- on the new loan which was taken during the year under consideration and the same was only for the needs of its day to day operations. The first loan in Foreign Currency was obtained in March, 2006 from Mizuho Corporate Bank equivalent to USD 3 million. The principal amount of the loan was repaid in two installments viz 4th/5th year, after the receipt of the loan. Such loan was repaid as on 31.03.2012. He submitted that the loan was used to incur capital expenses. The assets etc. installed using such funds, were put too use soon thereafter and depreciation etc. was allowed by Department. The interest on the loan has also been allowed in the past as revenue expenditure. No disallowance on account of interest was made in the earlier assessment years. The second loan in Foreign Currency was obtained in May, 2011 from Mizuho Corporate Bank equivalent to USD 4 million and interest was 9.96% per annum. This loan was due and outstanding as on 31.03.2012 and stood at Rs.17,79,60,000/-. The interest on such loan was claimed as expenditure by the assessee. It was further contended that the timing of the repayment of the principal amount of the loan has no relationship with the interest accrued on the loan. The Assessing Officer concluded that the interest was not to be considered in this Financial Year under consideration. It was contended that the interest would accrue over the period of the loan and interest upto 31.03.2012 would accrue as an expenditure for the assessee. He further submitted that the Assessing Officer treated the loan as obtained for capital expansion which is factually incorrect, it was only the

first loan which was taken for capital expansion. He submitted that the Assessing Officer did not bring any evidence demonstrating that the loan was utilized for capital expansion.

12. Ld.Sr.DR opposed these submissions and supported the orders of the authorities below.

13. We have heard the rival contentions and perused the material available on record and gone through the orders of the authorities below.

Ld.CIT(A) has confirmed the addition by observing as under:-

11.2. "Whereas the DCIT has given a finding that Note 5 of the balance sheet states that the assessee has taken unsecured loan from Mizuho Corporation Bank which is payable in half yearly installment as per their amortization schedule which is going to start from 31.10.2013. As the expenditure does not relate to the period under consideration i.e. 01.04.2011 to 31.03.2012, the same is not allowable for the period under consideration.

11.3. Thus, it is evident the assessee has made a provision of interest on loans taken from Mizuho Corporation Bank, Japan for the assessment year 2012-13 and that the said interest was not paid to the said Bank. It has also been noted that the said foreign bank has branches in India and is duly on the list of Reserve Bank of India. Thus, the interest on loan is also subjected to the provisions of Section 43B of the Income Tax Act. But the interest is payable in foreign exchange subject to the Provisions of DT AA which says that such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that Contracting State. But if the recipient is the beneficial owner of the interest, the tax may be charged (a) @ 10 per cent of the gross amount of the interest if the beneficial owner is a

bank and (b) @ 15 per cent of the gross amount of the interest in all other cases.

11.4. In this manner the assessee has not followed the provisions of section 195 read with DTAA by not deducting TDS @ 10% of the amount payable and section 43B of the Income Tax Act. Therefore, I hold that the assessee is not eligible to claim interest expense of Rs.1,29,63,747/- for the assessment year 2012-13 and the disallowance, therefore, is hereby confirmed.”

14. From the above, it is clear that Ld.CIT(A) confirmed the disallowance altogether on the different basis without putting the assessee on notice. The ground taken for allowance of depreciation on capitalization of interest was rejected on the basis that before the Assessing Officer, such ground could not have been taken without claiming it in the return of income. In support of this, Ld.CIT(A) has placed reliance on the judgement of Hon'ble Supreme Court rendered in the case of *Goetze India Ltd. vs CIT reported in [2006] 204 CTR 0182*. Ld.CIT(A) has mis-directed himself as the judgement of the Hon'ble Supreme Court does not put fetters on the power of the appellate authority below for entertaining such claim. Therefore, considering the totality of the facts and material placed before us, we deem it proper and in the principle of natural justice to restore this ground to the file of Ld.CIT(A) to decide the issue afresh after providing a reasonable opportunity to the assessee. Thus, Ground Nos. 2 & 3 raised by the assessee are allowed for statistical purposes.

15. Ground No.4 is against the confirming the addition made on account of disallowance of subscription and membership expenses of Rs.3,62,992/-.

16. Ld. Counsel for the assessee reiterated the submissions as made before Ld.CIT(A). It was contended on behalf of the assessee that the subscription fees for DLF Golf Club and Panchshila Club. Such facilities are provided to the senior managerial personnel to meet senior executives of the assessee and customers etc. in a relaxed settings. It was further contended that such meetings develop relations which are useful for the running of business smoothly. It was further contended that the amount was expended in furtherance of the company's business hence, no disallowance ought to have been made. It was further contended that the expenditure was incurred wholly and exclusively for business expediency.

17. On the contrary, Ld. Sr. DR submitted that before the authorities below, the assessee failed to discharge its onus regarding the expenditure being incurred for business expediency. Ld. Sr. DR further submitted that only such expenditure which was incurred for the business and for furtherance of the business, was allowable. The assessee did not prove that the expenditure was incurred wholly and exclusively for the purpose of business.

18. We have heard the rival contentions. The contentions of the assessee are, firstly, the expenditure was incurred for business expediency and secondly, the disallowance is highly excessive. We find that the expenditure is related to subscription or membership fee and expenditure incurred for business meetings. It is the contention of the assessee that the facility was provided to senior managerial personnel of the company under the terms of employment for having meetings with senior executives

and probable customers. We find merit in this contention of the assessee that such membership is used for furthering social relationship and also develop business communication. Therefore, the disallowance made by the Assessing Officer is not justified. Hence, same is hereby deleted. This ground of assessee's appeal is allowed.

19. In the result, the appeal of the assessee is partly allowed.

Above decision was pronounced on conclusion of Virtual Hearing in the presence of both the parties on 11th October, 2021.

Sd/-

(R.K.PANDA)
ACCOUNTANT MEMBER

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

Amit Kumar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI