

IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 510/Mum/2021 (Assessment Year 2017-18)

ACIT-2(2)(1) Room No.545, 5 th Floor Aaykar Bhawan M.K.Road-400020	Vs.	Jayant Dattatray Mhaskar 410, Boomergang, Chandivali Farm Road Andheri(E) Mumbai-400 072 PAN : AABCJ8752C
(Appellant)		(Respondent)

Assessee by	Ms. Hema Katariya
Department by	Shri S.N.Kabra
Date of Hearing	02.02.2022
Date of Pronouncement	16.02.2022

ORDER

Per Shamim Yahya (AM) :-

This appeal by the revenue is directed against the order of learned Commissioner of Income-tax(Appeals)-53 dated 28.01.2021 and pertains to Assessment Year 2017-18.

2. Grounds of appeal read as under:-

1."Whether on the facts and the circumstances of the case and in law the La. CIT(A) erred in law in deleting disallowing interest of Rs. 72,30,564/- u/s. 36(1)(iii) of the Income Tax Act, 1961 without appreciating the fact that the assessee has failed to prove that the interest of OD charges for the purpose of business. "

2. "Whether on the facts and the circumstances of the case and in law the Ld. CIT(A) erred in law in deleting disallowing a sum of Rs. 3,34, 75,296/- u/s. 37(1) of the Income Tax Act without appreciating the fact that the assessee has failed to prove that the penal charges paid for business expenditure.

3. Whether on the facts and the circumstances of the case and in law the Ld. CIT(A) erred in law in deleting disallowing interest of Rs. 38,63, 736/- u/s. 24(b) of the 1. T.

Act without appreciating the fact that the assessee has failed to prove the genuineness of interest on borrowed capitals

3. Apropos ground No.1

Brief facts of the issue are that during the assessment proceedings, the AO observed that the appellant incurred interest of Rs. 72,30,564/- on overdraft facility from DNS Bank. That amount was reduced from the net profits in the computation of income as any other deduction. On query raised by the AO, the appellant replied that the deduction pertained to interest expenses on overdraft facility from DNS Bank and that assessee has a current account with DNS bank wholly and exclusively for the purpose of business.

The AO was of the view that that OD account was also used for advancing to family members and also for making investment in subsidiary companies of M/s ITIPL. That no details were provided as to how the opening debit balance of Rs. 7.38 Crore was for the purpose of business. What payments were made through OD account for the purpose of business in the earlier years have not been substantiated. Details of business transactions routed through the OD account were not provided. Apart from interest and transfer of funds to Mr. D. P. Mhaiskar no withdrawal were made. Therefore, AO held that interest on OD account was not for the purpose of business. Accordingly, interest on account of OD charges were disallowed u/s 36(1)(iii).

4. Upon assessee's appeal, Id.CIT(A) has observed as under:-

“The appellant has an OD facility granted by the Dombivali Nagari Sahakari Bank in the FY 2013-14. The funds were drawn for the purpose of making investments in subsidiaries and fellow subsidiaries of Idea! Toll Infrastructure Pvt Ltd in which the assessee has a controlling stake! The appellant had availed overdraft facility from bank in F.Y. 2013-14 and continues to avail of the facility. Interest was claimed on

this OD account in AY 2014-15, AY 2015-16, and AY 2016-17 and it was allowed. The appellant had furnished before the AO copy of account of OD account with Dombivali Nagari Sahakari Bank Ltd. From the bank statement it is seen that other than payment of Rs.1,00,00,000/- to DP.Mhaiskar no other payment to any person or for making investments in capital account has. been made through the OD account. Such investment made in subsidiary companies was held for the purpose of business in earlier years as investment in subsidiary /fellow subsidiary was for controlling stake. It therefore, follows, that appellant is a beneficiary of the investments. Therefore, OD funds were utilized out of commercial expediency.”

5. Thereafter, ld.CIT(A) referred to following case laws

1. Jayneer infrapower & Multiventures (P.) Ltd. v. DCIT 176 ITD
2. CIT vs. Tulip Star Hotels Ltd. 338 ITR 482 (Delhi)

6. Ld.CIT(A) concluded as under:-

“In the present case, the appellant had availed overdraft facility from bank in F.Y. 2013-14 and continues to avail of the facility. The funds from the OD account were used for making investment in subsidiary companies. The investment in subsidiary /fellow subsidiary was made for controlling stake. OD funds were utilized out of commercial expediency. Therefore, appellant is eligible for deduction of interest of Rs. Rs. 72,30,564/- u/s 36(1)(iii) of the Act "Accordingly, disallowance of interest u/s u/s 36(1)(iii) of the Act made by the AO is deleted.

However, the appellant has made payment of Rs. 1,00,00,000/- to Shri D. P, Mhaiskar on 27.09.2016 through the OD account and it was made for non-business purpose. It is submitted by the appellant that payment made to DP Mhaiskar was credited to- OD account either before the date of payment or after the dste of payment. There was opening debit balance in the OD account was Rs. 7,38,44,398/- and the closing balance as on 31.03.2017 was Rs. 7,10,77,041/-, It means that not only the interest has been serviced but also the payment of Rs. 1,00,00,000/- made to DP Mhaiskar has also been replenished in the OD Account. The appellant has made payment to Shri DP Mhaiskar which has been repaid also during the year. The purpose of the payment to Shri DP Mhaiskar was for non-business purpose. Therefore, the AO is directed to disallow proportionate interest from date of payment till date of repayment by Shri D.P. Mhaiskar.”

7. Apropos ground No.2

Brief facts of the issue are that during the assessment proceedings, the AO observed that in the P & L Account an amount of Rs. 3.34 Crores was debited as penal charges. On the query raised by the AO, the appellant submitted that the penal charges 'were' paid by the assessee to M/s. DS Enterprises on the basis of agreement between him and M/s. Jan Transport (proprietary concern of the assessee) and hence the penal charges paid are allowable expenditure. The AO was of the view that the expenditure on account of penal charges could not be said to have been laid out or expended wholly and exclusively for the purpose of the business. Considering that the business of the assessee was collection of toll charges on contract basis, there seems to be hardly any reason for the delay in the transfer of toll already collected. Further, amount spent as penal charges, was not an amount spent in the assessee's normal business activity and not an amount paid as an incidental expenditure on account of business. The breach of its contract with related parties was not in the normal course of business, and the liability the assessee had to discharge for such breach was not incidental to the business of toll collection that was carried on. The AO relied on the judgment of SC in the case of Haji Aziz & Abdul Shakoor Bros. v. CIT [1961] 41 ITR 350 (SC) and Madras HC in Mask and Co. vs CIT [11 ITR 454]. Accordingly, penal charges were disallowed by the AO u/s 37(1) of the IT Act.

8. Upon assessee's appeal, Id.CIT(A), he observed as under:-

“The facts are that M/s. Raima Toll and Infrastructure had awarded work of toll collection to M/s. D S Enterprises vide Agreement dated 13.09.2016 and M/s. D S Enterprises in turn subcontracted the work to Jan Transports, the proprietary concern of the appellant herein as per Agreement dated 17.09.2016. Toll collection was not remitted in time to M/s. D S Enterprises and has paid penal charges to M/s D S Enterprises and claimed said sum as allowable business expenditure.

The appellant is in the business of toll collection and the said activity is carried on under terms of agreement between the appellant and M/s Raima Toll and Infrastructure had awarded work of toll collection to M/s D S Enterprises, The copy of the said Agreement was furnished to the AO. As per clause 6 of Agreement dated 13.09.2016 entered between the appellant and D S Enterprises, D S Enterprises has

the right to levy penal charges for failure to remit daily collection timely. These Agreements has been accepted and placed on record by the AO. The veracity of the Agreement is not in doubt.

It is accepted commercial practice to provide for clauses in an Agreement to indemnify either party in the case of delay or losses. In the instant case a clause for penalty exists in the Agreement enabling the Principal party to impose and collect penal charges for failure to remit toll collection timely. It is a commercial necessity arising out of prudent business considerations. There has to be a punitive measure to hold the agent accountable for omissions. By no stretch of imagination can such a clause providing for penalty can be seen as a ruse. 'to make and get allowed such claims especially when its genuineness is not in doubt.

As per section 37 (1) an expenditure wholly and-'exclusively incurred for the purpose of business is allowable. On the facts of the case. it is, evident that the liability arose in the course of business and is incidental, to the business 'carried on. Further, as per Explanation (1) below section 37, it is any sum paid for an offence or for an infraction in law that is not allowable as deduction. Though the terminology used is penalty, the impugned payment is to compensate for delay in remittance of toll collection and payments made in recompense are not in the nature of penalty. The terminology used is not indicative of the nature of the payment. From the nature of the payment it is seen that 'the expenditure is not for a purpose which is an offence or which is prohibited by law. Though the terminology used in the Agreement is penal charges, but the same is not in the nature of penalty for infraction of law.”

9. Thereafter, he referred to following case laws

1. Mahalaxmi Sugar Mills Co 123 ITR 40 (SC)
2. DCIT v. Mahavir Multitrade(P.) Ltd. 180 ITD 370 (Delhi Tribunal)

10. He concluded as under:-

“In view of the above discussion and position in law, the penal charges Rs. 3,34,75,296/- paid by appellant is allowable as business expenditure as it is incidental to the business carried on and not for an offence or infraction of law.

Thus, disallowance of penal charges of Rs. 3,34,75,296/- made by the AO is deleted.”

11. Apropos ground No.3

Brief facts of the issue are that during the assessment proceedings, the AO observed that the appellant offered deemed rental income of Rs. 12,00,000/- in respect of the flat no. 1005, God Blessing Society, Pune. The appellant had also claimed the deduction of Rs. 38,63,736/- on account of interest payable on borrowed capital. On query raised by the AO, the appellant furnished the copy of bank account statement of ING Vysya Bank Limited and submitted that the interest on borrowed capital of Rs. 38.63.736/- being 1/5th of Rs. 1,93,18,680/- was claimed as deduction against the deemed rental income offered against the flat at Pune. The AO was of the view that on perusal of the bank account statement, it was not ascertainable whether such loan was acquired for acquisition of the said flat and how the total interest component was arrived at Rs. 1,93,18,680/-. According to the AO, the appellant failed to bring any cogent evidence to substantiate the genuineness of the deduction, therefore, the interest was disallowed u/s. 24(b) of the Act.

12. The Id.CIT(A) held as under:

“The appellant has offered deemed income of Rs. 12,00,000/- under House Property and claimed interest of Rs. 38,63,736/- being one fifth of Rs. 1,93,18,680/- paid on housing loan availed from ING Vysya Bank.

The appellant had acquired a flat at God Blessing Society, Pune. During the course of assessment proceedings before the AO, the appellant had furnished copy of loan statement of ING Vysya Bank for the period 31.10.2008 to 25.01.2011, copy of possession certificate dated 03.02.2014 and copy of ledger of housing loan in the books of account. The appellant took possession of the property on 03.02.2014. Therefore, the appellant has been claiming one fifth of interest expenditure since AY 2015-16. The documentary evidences indicate that the loan was taken for purpose of acquiring the said flat in Pune. It is not a case of the AO that the loan was utilized for the purpose other than acquiring housing property. Therefore, disallowance of interest u/s 24(b) of Rs, 38,63,736/- made by the AO is deleted.”

13. Against the order, assessee is in appeal before us.

14. We have heard both the parties and perused the records. As regards, the ground No.1 relating to disallowance of interest, we note that the said interest has been paid

to the bank for an overdraft facility obtained by the assessee Except for the advance of R. 1 crore during the year, there is no payment from the said overdraft account. The Id.CIT(A) has already confirmed the disallowance of interest on this part of the advance of Rs. 1 crore. Now, the issue remains that of interest on the opening balance of the overdraft account, which has remained outstanding during the year. Assessee's plea is that the amount was earlier used for making investment in subsidiaries to take controlling interests. That no disallowance has been made in the earlier years on this account. This submission has been accepted by the Id.CIT(A). We do not find any infirmity in the decision by the Id.CIT(A). It is settled law that unless, there is change in law or facts and circumstances of the case, contrary view cannot be taken on the issue that has attained finality in earlier assessment years and the fundamental aspect permeates in different years. It is duly supported by the decision of Hon'ble Supreme court in the case of Radha Swami Sastry vs CIT 193 ITR 321 and CIT vs Excel Industries 358 ITR 295.

15. Moreover, following case laws referred before Id.CIT(A) are germane and support the case of the assessee on merits

- i). Hon'ble Supreme court decision in S.A. Builders vs CIT 288 ITR 1 has interpreted that the expression "for the purpose of business" includes expenditure voluntarily incurred for commercial expediency and it is immaterial if a third party also benefits thereby. An individual will have a deep interest in the subsidiary /fellow subsidiaries of the holding company in which he has controlling stake and hence there is merit in the contention that it was as a measure of commercially expediency that investment in such entities was made. As long as the business of assessee is furthered by investment of borrowed funds, the same is for the purpose of business and is accordingly held so.
- ii). Hon'ble Supreme Court decision in Munjal Sales Corporation vs CIT 298 ITR 298. In this case, Hon'ble Supreme court reversed the order of Hon'ble Punjab and

Haryana High courts and held that interest free advances given to sister concern for purpose of business was allowable.

iii). Hon'ble Bombay High Court decision in Pr.CIT vs Sesa resources Ltd.40 ITR 707 has held that where assessee company borrowed funds and advanced the same to its sister concern, since amount was neither a donation nor loan was given to an individual or to a director for his personal use, same would be presumed to be advanced for commercial expediency, thus no disallowance could be made u/s 36(1)(iii) of the Act

iv) Hon'ble Delhi High Court decision in CIT vs Tulip star Hotels Ltd. 338 ITR 482 has held that a perusal of the orders passed by the Tribunal would reveal that it is noted by the Income-tax Appellate Tribunal that the assessee is in the business of owning, running and managing hotels. For the effective control of new hotels acquired by the assessee under its management it had invested in a wholly owned subsidiary, namely, M/s. Tulip Star Hospitality Services Ltd. On this ground, relying upon the judgment of the Supreme Court in the case of S. A. Builders Ltd. v. CIT (Appeals) [2007] 288 ITR 1 / 158 Taxman 74 the Tribunal has held that the assessee was entitled to the deduction of interest on the borrowed funds. The observations made by the Supreme Court in S. A. Builders Ltd. 's case (supra) were quoted by the Tribunal as under (page 10).

"....where it is obvious that a holding company has a deep interest in Us subsidiary, and hence if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans."

In these circumstances holding it to be expenditure incurred for business the same was allowed under section 36(1)(iii) of the income-tax Act by the Tribunal. The

Tribunal has a/so held that this expenditure would be allowed even under section 57(iii) of the Act. Though there may be some controversy as to whether the aforesaid expenditure is allowable under section 57(iii) of the Act or not, we have no doubt, in our mind, that the expenditure incurred under the aforesaid circumstances would be treated as expenditure incurred for business purposes and was thus allowable under section 36 of the Act Mr. O. S. Bajpai, learned senior advocate appearing for the assessee, has produced a copy of the memorandum of association of the assessee which, inter alia, specifies the following objects:

"To own, purchase, construct, acquire, equip, operate, manage, conduct or in any other manner and in all its aspects deal in hotels, motels, resorts, inns, guest houses, apartments, food courts, shopping plazas, commercial complexes, casinos, entertainment parks; water, parks, amusement centers, gaming centers, bowling alleys, wild life/ parks, restaurants, cafes, refreshment rooms, lodging houses of every kind and sort including all the conveniences, amenities and facilities adjunct thereto, in India or in any other part of the world and to act as consultants, advisors, experts, technical collaborators, valuers, surveyors, inventory analysts in all matters, pertaining to setting up of hotels, resorts, all form of lodging, touristic and leisure projects."

We are, thus, of the opinion that no question of law arises. These appeals are accordingly dismissed."

16. It is also noteworthy that AO is drawing adverse inference that assessee has not submitted the utilization of the overdraft in the earlier years. We note that this is not the case, where AO has any power to reopen the case of earlier years or that the AO has stepped into the shoes of Id.CIT and is exercising jurisdiction u.s 263 and that also for earlier year. No cogent rebuttal has been given on behalf of the revenue

against the finding given by Id.CIT. In this view of the matter Id.CIT(A) has taken the correct view of the mater. We do not find any infirmity in the same and accordingly we uphold the same.

17. As regards, ground No.2, we note that the issue is payment of a sum of Rs. 3.34 crores debited as penalty charges. The AO was of the opinion that this is a penalty charge and hence cannot be allowed. However, the facts recorded by Id.CIT(A) are that this was paid by the assessee in terms of the commercial agreement to another party, where assessee was obliged to remit the toll collection within a particular period and in case of default amount was to be paid for the default styled as penal charges. In substance, the penalty charges are interest charges payable, when there is delay in remitting the toll collection to the other party as per the contract. It is settled law that it is the substance that counts and not the form given to in the accounts of the party. The cases referred by the AO are in connection with payments under the penal provisions contained in a statutory provision. It is not at all the case here that the amount paid in the present case is due to any infringement of law. In this view of the matter, the decision of Id.CIT(A) is correct and duly supported by the case laws referred by him. These said reference may be gainfully referred as under;

“The Hon’ble Supreme Court in the case of Mahalaxmi Sugar Mills Co 123 ITR 40(SC) has laid down the basic principle for deciding whether a claim of enalty is allowable under section 37(1) of the I.T.Act. As long as the expenditure is genuine, is incidental to business carried on and is not illegal/unlawful, the same is allowable as business expenditure.

The relevant part of the decision is reproduced as under:

"... In our opinion, the interest paid under s. 3(3) of the Cess Act cannot he described as a penalty paid for an infringement of the law. As that is the only ground on which the Revenue resists the claim of the assesses to a deduction of the interest under s.10(2)(xv) of the Income-Tax Act the assessee is entitled to succeed. There Is no dispute that the payment of interest represents expenditure laid out wholly or exclusively for the purpose of the business. There is also no dispute that it is in the nature of revenue expenditure..."

18. In the background of aforesaid discussion and precedent, we uphold the order of Id.CIT(A).

19. As regards, ground No.3, the issue is claim of interest under section 24b. The AO had made the disallowance on the ground that from the bank statement furnished by the assessee is not clear whether the loan was for acquisition of the said flat and how the total interest component was arrived at. On the other hand, Id.CIT(A) has given the finding that assessee has duly submitted the statement of the bank, copies of possession certificates and ledger copy of housing loan. These evidences were found by the Id.CIT(A) to be justifying that the loan was utilized for the housing purposes. Ld.CIT(A) has also noted that it is also not the case of the AO that loan utilized have been utilized for any other purpose. In the paper book submitted before us statement of bank account has been attached which confirmed the view taken by the Id.CIT(A). The Id. DR could not rebut the aforesaid finding. In this view of the matter, we do not find any infirmity in the order of Id.CIT(A). Accordingly, we uphold the same.

20. In the result, the appeal by the revenue stands dismissed.

Pronounced in the open court on 16 .02.2022.

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 16 .02.2022

Thirumalesh, Sr.PS

Copy of the Order forwarded to :

The Appellant

1. The Respondent
2. The CIT(A)
3. CIT
4. DR, ITAT, Mumbai
5. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai