

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'C' : NEW DELHI)

**BEFORE SH. G.S.PANNU, HON'BLE PRESIDENT
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.3487 /Del/2018
(Assessment Year : 2014-15)

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| Jetair Pvt. Ltd. 13, Community Centre, Yusuf Sarai, New Delhi- 110016 PAN : AAACJ0121C | Vs. | ACIT Special Range-5 New Delhi |
| (APPELLANT) | | (RESPONDENT) |

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|-------------|--------------------------------|
| Assessee by | Sh. Pratap Gupta, CA |
| Revenue by | Sh. Vijay Kumar Kataria Sr. DR |

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| Date of hearing: | 06.01.2023 |
| Date of Pronouncement: | 21.02.2023 |

ORDER

PER ANUBHAV SHARMA, JM:

The appeal has been preferred by the assessee against the order u/s 250(6) of Income Tax Act, 1961 (hereinafter referred to as "The Act") dated 09.03.2018 of the Commissioner of Income Tax (Appeals)-36 (hereinafter referred to as "the Ld. First Appellate Authority or FAA") whereby the appeal filed by the assessee against the order u/s 143(3) passed by Additional CIT, Special Range 05, New Delhi (hereinafter

referred to as the “Ld. Act”) dated 9.12.2016 was dismissed and the order of Ld. AO was upheld.

2. The brief facts are assessee had filed return of income of Rs. 35,93,33,030/-. The assessee company is a General sales Agent of various International and domestic airlines for their passengers and cargo sales and is entitled to GSA commission from these Airlines. Notice u/s 143(2) of the Act was issued followed by another notice u/s 142(1). The assessee company had for the assessment year 2014-15 shown loans to body corporate to the tune of 25.95 crores. The Assessing Officer had called assessee to explain commercial expediency of equity investment and advances to group companies.

3. The assessee company had submitted that it immediately recovers its commission as a result of fast movement of funds availed against overdraft and CC facilities. It was submitted that funds were lent to subsidiaries out of surpluses funds.

4. However, the Ld. AO observed in para no. 3 of its order following as under :-

“Assessment year 2014-15

| Liabilities | Amount (Rs. Crore) | Assets | Amount (Rs. Crore) | Availability |
|---------------------|-----------------------|---|-----------------------|--|
| Reserves & surplus | 67.65 | Current assets | 126.17 | It shows that entire loans to body corporate can not be lent out of reserves & surplus |
| Current liabilities | 123.04 | Non-current assets (other than Loans to Body corporate) | 49.33 | |
| Total | 190.69 | Total | 175.50-A | |
| | | Loans to Body corporate (AY 2014-15) | 25.95-B | |
| | | A+B | 201.45 | |

“Assessment year 2013-14

| Liabilities | Amount (Rs. Crore) | Assets | Amount (Rs. Crore) | Availability |
|---------------------|-----------------------|---|-----------------------|--|
| Reserves & surplus | 41.37 | Current assets | 98.29 | It shows that entire loans to body corporate can not be lent out of reserves & surplus |
| Current liabilities | 129.60 | Non-current assets (other than Loans to Body corporate) | 57.26 | |
| Total | 170.97 | Total | 155.55 | |
| | | Loans to Body corporate (AY 2013-14) | 26.66 | |
| | | | | |

5. It was also observed by Ld. AO that this table reveals that assessee company did not have enough funds to lend to the subsidiaries as bulk of its borrowed funds were invested in fixed assets, investment and debter and that is business activities. It thus, rejected the argument that the funds were lend to the subsidiaries out of surplus funds and went on to make addition, disallowing 60% of the interest and guarantee charges of Rs. 39,31,000/- amounting to Rs. 23,58,600/- adding it to the assessed income.

6. Assessee had challenged the same before the Ld. First Appellate Authority. It was specifically pointed by assessee before the Ld. First Appellate Authority that the disallowance of expenses on account of finances cost had also arisen in the appellant in case in the assessment year 2010-11 to 2013-14 and that Ld. CIT(A), New Delhi had sustained the submissions of assessee and deleted the entire additions. In para no. 4.2.3.2., the Ld. First Appellate Authority had made following observations :-

“4.2.3.2, *The appellant has submitted that the appellant has provided the loans an^Kadvances to body*

corporates of Rs. 25,95,96,095/- and loans and advances :o related party of Rs. 16,71,35,999/-, totaling to Rs. 42,67,32,094/- which are in the nature of interest-free temporary trade advances, repayable on demand. The appellant has the following interest free funds available:

| | |
|----------------------------------|-----------------------|
| <i>Share Capital</i> | <i>2,98,80,000</i> |
| <i>Reserves & Surplus</i> | <i>67,65,53,881</i> |
| <i>Payable to Airlines</i> | <i>79,61,54,324</i> |
| <i>Total Interest Free Funds</i> | <i>1,50,25,88,205</i> |

The Appellant has stated that these advances have been provided by the appellant to subsidiaries and other concerns out of commercial expediency. The The Appellant has therefore argued that sufficient interest free funds were available with the appellant to provide interest free loans and advances subsidiaries and other concerns and it is for the appellant to take a business decision with regard to the applicability of funds. Further, it is submitted that this issue of disallowance of expenses on account of Finance Costs has also arisen in the appellant's own case in A.Y. 2010-11 to 2013-14 and the then Hon'ble CIT(A), New Delhi, after considering the above submission, while deciding the appellant's appeal for the aforesaid years, deleted the entire addition on this ground. In this order, I beg to differ from the decision of the Ld. CIT's(A) cited by the Appellant, as the observations made by the AO in the assessment order are found to be convincing.”

7. Now before the Tribunal assessee has raised following grounds of appeal :-

“Ground No. 1

The Ld. Commissioner of Income Tax (Appeals) - 36, New Delhi {hereinafter referred to as ‘Ld. CIT(A)’}, has erred in law and on the facts and in the circumstances of the case in upholding the various additions / disallowances made in the Assessment Order dated 09.12.2016.

Ground No. 2

The Ld. CIT(A) has erred in law and on facts and in the circumstances of the case in confirming the addition of Rs. 23,58,600/- under the head ‘Interest Free Loans and advances given to subsidiaries’ u/s 36(1)(iii) of the I.T. Act.

Hence, the appellant prays that the above mentioned addition of Rs. 23,58,600/- upheld by the Ld. CIT(A) should be deleted.

Ground No. 3

The appellant craves leave to add, amend, alter or omit any of the above grounds of appeal as the circumstances may warrant on or before the date of hearing.”

8. The arguments of Ld. Counsel for the assessee and ld. Sr. DR were heard and the record has been perused.

9. On behalf of the assessee, Ld. Counsel contended that without giving any reason to distinguish the Ld. CIT(A) had not followed the orders of Ld. CIT(A) in appellant’s own case. It was submitted the Ld. CIT(A) failed to appreciate that in para no. 3 of its order, the Ld. AO had mentioned of loans to body corporate for the assessment year 2014-15 to the tune of 25.95 crores and at the same time in the liabilities column

reserves and surplus have been mentioned at 67.65 crores but in a casual manner mentioned in the last column under the remark availability – “it shows that entire loans to body corporate cannot be lent out of reserves and surplus”. It was submitted by the Ld. Counsel for the assessee that in regard to the assessment years 2010-11 to 2012-13, the revenue appeals preferred against the order of Ld. CIT(A) bearing ITA No. 2712, 2713 and 6884/Del/2015 have been dismissed on 17.09.2018. Copy of which is placed on record. Ld. Counsel relied upon the following judgments to contend that if no interest disallowance is made for loans given in earlier years, the same cannot be made in subsequent years.

- “1) *CIT v Sridev Enterprises* [192 ITR 165 (Kar)]
- 2) *CIT v. Industrial Cables (India) Ltd* [209 CTR 167 (P&H)]
- 3) *Escorts Ltd. v. ACIT* [104 ITD 427 (Del)]
- 4) *Malwa Cotton Spg. Mills v. ACIT* [89 ITD 65 (TM)(Chd)]
- 5) *ITO v. J.M.P. Enterprises* [101 ITD 324 (SMC)(Asr)]
- 6) *Sushee Hi Tech Construction Pvt. Ltd. v. DCIT* (33 taxman.com 236) (Hyd)
- 7) *Virendra R. Gandhi v. ACIT* (Tax Appeal No. 20 of 2004 with Tax Appeal No. 124 of 2005) dated 27.11.2014 (Gujarat High Court)”

10. Ld. Sr. DR took the Bench through the findings of ld. AO and Ld. First Appellate Authority supporting and standing by them.

11. On appreciation of the contentions and matter on record it can be observed that in para no. 3 of its order, the Ld. AO has mentioned and admitted existing reserve and surpluses of 67.65 crores in the assessment year 2014-15 and loans to body corporate 25.95 crores. If that is admitted case then Ld. Tax Authorities below failed to follow the settled proposition of law as held by Hon'ble Bombay High Court in the case of **CIT Vs. Reliance Utilities CIT Vs. Reliance Utilities reported in 313 ITR**, where in it is held :

*"10. If there be interest free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest free funds available. In our opinion the Supreme Court in East India Pharmaceutical Works Ltd. (Supra) had the occasion to consider the decision of the Calcutta High Court in Woolcombers of India Ltd. (supra) where a similar issue had arisen.. Before the Supreme Court it was argued that it should have been presumed that in essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business and in these circumstances the appellant was entitled to claim the deductions. The Supreme Court noted that the argument had considerable force, but considering the fact that the contention had not been advanced earlier it did not require to be answered. It then noted that in Woolcomber's case (Supra) the Calcutta High Court had come to the conclusion that the profits were sufficient to meet the advance tax liability and the profits were deposited in the over draft account of the assessee and in such a case it should be presumed that the taxes were paid out of the profits of the year and not out of the overdraft account for the running of the business. It noted that to raise the presumption, there was sufficient material and the assessee had urged the contention before the High Court. **The principle therefore would be that if there are funds available both interest free and over draft and/or loans taken, then a presumption would arise that investments would be out of the interest free fund generated or available with the company, if the interest free funds were sufficient to meet the investments. In this case this presumption is established considering the finding of fact both by the C.I.T. (Appeals) and I.T.A.T"**. This decision of Hon'ble Bombay High Court was*

confirmed by the Hon'ble Supreme Court in the case of **CIT Vs Reliance Industries Limited reported in 410 ITR 466 (SC)** .

12. Further after going through the impugned order of Ld. First Appellate Authority it is very apparent that while making an observation of not following the decision of CIT(A) in the case of assessee for the previous assessment years 2010-11 to 2013-14 not a word in the form of reasoning has been mentioned.

13. Furthermore, it can be observed that the assessee was issued notice u/s 142(1) to explain commercial expediency in giving interest free funds to its subsidiary but the Ld. Assessing Officer failed to take cognizance of the nature of work and fund flow of the company of assessee as being in business of being agent of international and domestic airlines so it had fast movement of funds, due to recovery of commission. Thus, the finding of the Ld. AO that assessee company did not have enough funds to lend to the subsidiaries as bulk of its borrowed funds were invested in fixed assets, investments and debtors, so lending of funds to subsidiaries out of surplus fund, is not sustainable and is a finding not backed by any valid reasons.

14. As a matter of fact, these loans to body corporate and two subsidiaries were not new but were part of previous assessments. The commercial expediency, factor has to be examined at the initial stage when money is lend and there cannot be year to year basis explanation of commercial expediency of giving interest free funds, to its subsidiaries, by assessee.

15. The fact that the revenue appeals stand dismissed in regard to the assessment years 2010-11 to 2012-13 by this Tribunal further, bolsters the findings of this Bench that the question of commercial expediency of

the interest free loans attaining finality for previous assessment years, then for the present assessment year of 2014-15, the question of commercial expediency require no further adjudication.

16. That being so, the order of Ld. First Appellate Authority and of the Ld. AO are liable to be set aside. The appeal of assessee is allowed. The Assessing Officer is directed to delete the addition of Rs. 23,58,600/- under the head 'Interest Free Loans and advances given to subsidiaries', u/s 36(1)(iii) of the Act.

Order pronounced in the open court on 21st February, 2023.

Sd/-
(G.S.PANNU)
PRESIDENT

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Date:- 21.02.2023
Binita, SR.P.S

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI