

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: A: NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER  
AND  
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.1333/Del/2022  
Assessment Year: 2004-05

The DCIT, Central Circle-20, Delhi	vs.	Avantha Realty Ltd., (Previous known as Janpath Investment & Holding Ltd.) 124, Thapar House, Janpath, Central Delhi 110001 <b>PAN AAACJ 8030 A</b>
(Appellant)		(Respondent)

ITA No.1196/Del/2022  
Assessment Year: 2004-05

Avantha Realty Ltd., (Previous known as Janpath Investment & Holding Ltd.) 124, Thapar House, Janpath, Central Delhi 110001 <b>PAN AAACJ 8030 A</b>	vs.	The DCIT, Central Circle-20, Delhi
(Appellant)		(Respondent)

For Assessee :	Shri Upvan Gupta, Adv.
Revenue For :	Shri Kanv Bali, Sr. DR

Date of Hearing :	14.03.2023
Date of Pronouncement :	09.06.2023

**ORDER**

**PER CHANDRA MOHAN GARG, J.M.**

These cross appeals have been filed against the order CIT(A)-27, New Delhi dated 29.03.2022 for A.Y. 2004-05.

2. The grounds of appeal raised by the assessee are as follows:-

1. *That on the facts and in the circumstances of the case, the Commissioner of Income-tax (Appeals) - 27, New Delhi [ CIT(A)] grossly erred in passing the impugned*

*appellate order and confirming the action of the assessing officer in making various additions/ disallowances in the assessment order for the relevant assessment year.*

*2. That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the action of the assessing officer in making an addition of INR 4,79,699 in the assessment order for the relevant assessment year on account of office and other expenses.*

*2.1 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that the expenditure under consideration was incurred wholly and exclusively for the purposes of business*

*2.2 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that the assessing officer has not doubted the fact of actual incurrence of the aforesaid expenditure for the purposes of business.*

*2.3 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that the statutory/ tax auditors of the assessee have verified the incurrence of aforesaid expenditure and no adverse observations were made by them in this regard.*

*2.4 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that the assessee, in order to protect its business interests, had discretion and right to re-incur a requisite expenditure.*

*2.5 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the action of the assessing officer in making an addition of INR 12,83,868 in the assessment order for the relevant assessment year on account of consultancy fee.*

*3. That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that the expenditure under consideration was incurred wholly and exclusively for the purposes of business.*

*3.1 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that the assessing officer has not doubted the fact of actual incurrence of the aforesaid expenditure for the purposes of business.*

*3.2 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that the statutory/ tax auditors of the assessee have verified the incurrence of aforesaid expenditure and no adverse observations were made by them in this regard.*

*3.3 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that the*

*assessee, in order to protect its business interests, had discretion and right to re-incur a requisite expenditure.*

*3.4 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that the assessee, in order to protect its business interests, had discretion and right to re-incur a requisite expenditure.*

*4. That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the action of the assessing officer in disallowing long term capital loss of IN 3,74,14,984 in the assessment order for the relevant assessment year incurred on account of transfer of land to Ballarpur Industries Limited.*

*4.1 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer on an incorrect basis that the land under consideration was sold by assessee to its holding company, viz., Ballarpur Industries Limited.*

*4.2 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that M/s Ballarpur Industries Limited is not the holding company of assessee, as has been accepted by the assessing officer as well in the assessment order for the relevant assessment year and the provisions of section 47(v) of the Income-tax Act, 1961 were not applicable in the present matter.*

*4.3 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that the transaction under consideration for transfer of land to Ballarpur Industries Limited was a genuine transaction, supported by evidences and documents.*

*4.4 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that the transaction under consideration for transfer of land to Ballarpur Industries Limited was not a sham/ colorable device.*

*4.5 That on the facts and in the circumstances of the case, the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that no evidences were furnished by the assessing officer to hold that the transaction under consideration for transfer of land to Ballarpur Industries Limited was a sham/ colorable device.*

3. The grounds raised by the revenue are as follows:-

*1. The Ld. CIT(A) has erred on facts and in law, by considering that exchange rate losses amounting to Rs.16,06,000 was incidental to the nature of business of the assessee by not considering that the facts of the instant case is similar to the case of The Commissioner of Income Tax (IT)-4 v/s. M/s. Siemens Nixdorf Information Systemse GmbH, wherein Hon'ble Bombay High Court held that a loss arising on the assignment of a loan granted by a foreign parent company to its Indian subsidiary is a capital loss within the meaning of section 2(14) of India's Income-tax Act, 1961.*

2. *The Ld. CIT(A) has erred on facts and in law by not considering the decision of Hon'ble Apex Court in the case of Bestobell(India), wherein the Hon'ble Apex Court had made distinction between exchange rate losses on capital account and revenue account.*

3. *The Ld. CIT(A) has erred on facts and in law in providing relief amounting to Rs.96,609/- by erroneously stating that the agreement between the assessee and the Ballarpur Industries Limited did not cover the expenses incurred on insurance and audit fees.*

4. *The Ld. CIT(A) has erred on facts and in law by deleting the disallowance of Rs.11,16,14,6371- made u/s 14A by placing reliance on the judgment on the decision of Hon'ble Delhi High Court in the matter of Joint Investments Private Limited wherein the Hon' ble High Court ruled that the disallowance u/s 14A cannot exceed exempt income,*

5. *The Ld. CIT(A) has erred on facts and in law by ignoring the CBDT circular no. 5/2014 dated 11.02.2014, which has been clarified by the amendment made in the section 14A of the Income-tax Act, 1961 by the Finance Act, 2022.*

6. *The Ld. CIT(A) has erred on facts and in law and in holding that since the liabilities shown in Provision for doubtful loans & advances', are 'certain in nature, therefore no upward adjustment us 115JB(2)(C) can be made in this regard, by ignoring the provisions contained in Explanation [1](c) to the section 115JB(2) which provides that amount set aside to provisions made for meeting liabilities, other than ascertained liabilities has to be increased for the purpose of computing book profit.*

#### **Appeal of assessee ITA No. 1196/Del/2022 for AY 2004-05**

4. Ground no. 1 of assessee is general in nature which does not require any specific adjudication. Apropos ground no. 2 the Id. counsel submitted that the CIT(A) grossly erred in confirming the action of the assessing officer in making an addition of INR 4,79,699 in the assessment order for the relevant assessment year on account of office and other expenses. Without appreciating that the expenditure under consideration was incurred wholly and exclusively for the purposes of business and the Assessing Officer has not doubted the fact of actual occurrence of aforesaid expenditure for the purpose of business and this fact was also verified by the statutory/tax auditor and no adverse observations have been made by them in this regard. The Id. counsel also submitted that the assessee incurred expenditure to protect its business interest and have discretion and right to re-incur any expenditure as per requirement of business under commercial expediency.

5. Apropos ground no. 3 the Id. counsel submitted identical and similar contentions as has been made for ground no. 2 and also submitted that the Id. CIT(A) has erred in upholding the addition and therefore ground no. 2 & 3 of assessee may kindly be allowed.

6. Replying to the above, the Id. Senior DR submitted that the Id. CIT(A) while partly allowing ground no. 3 of assessee rightly held that the office and other expenses and consultancy services amounting to Rs. 4,79,699/- and Rs. 12,83,868/- respectively are under

the nature of services to be provided by the M/s Ballarpur Industries Ltd. under the agreement with the appellant and therefore he rightly uphold the addition to this extent.

7. On careful consideration of above rival submissions, we note that the assessee has debited expenses on account of office & other expenses and consultancy fee and these expenses were covered under the agreement and suppose to be incurred by M/s. Ballarpur Industries Ltd. therefore the Assessing Officer was right in disallowing both the claim of expenditure on account of office & other expenses and consultation fee the Id. counsel could not show us any factual position to take a view that the assessee incurred expenditure under commercial expediency for the purpose of business and to protect its business interest. However, we note that the Assessing Officer has not doubted incurring of expenditure and quantum but for claiming such expenditure the assessee has to establish and discharge the onus that the assessee incurred expenditure wholly an exclusively for the purpose of business and to protect its business interest under commercial expediency. Therefore ground no. 2 & 3 of assessee being devoid on merits are dismissed.

**Ground No. 4 of assessee**

8. Apropos ground no. 4 the Id. counsel submitted that the CIT(A) grossly erred in confirming the action of the assessing officer in disallowing long term capital loss of IN 3,74,14,984 in the assessment order for the relevant assessment year incurred on account of transfer of land to Ballarpur Industries Limited. He also submitted that the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer on an incorrect basis that the land under consideration was sold by assessee to its holding company, viz., Ballarpur Industries Limited, without appreciating that M/s Ballarpur Industries Limited is not the holding company of assessee, as has been accepted by the assessing officer as well in the assessment order for the relevant assessment year and the provisions of section 47(v) of the Income-tax Act, 1961 were not applicable in the present matter. He also contended that the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that the transaction under consideration for transfer of land to Ballarpur Industries Limited was a genuine transaction, supported by evidences and documents and the transaction under consideration for transfer of land to Ballarpur Industries Limited was not a sham/ colorable device. He vehemently pointed out that the the CIT(A) grossly erred in confirming the aforesaid action of the assessing officer without appreciating that no evidences were furnished by the assessing officer to hold that the transaction under consideration for transfer of land to Ballarpur Industries Limited was a sham/ colorable device. Therefore he submitted that the Assessing Officer as well as Id. CIT(A) has grossly erred in disallowing and upholding the long term capital loss of Rs. 3,74,14,984/- incurred on account of transfer of land to M/s. Ballarpur Industries Ltd.

9. Replying to the above, the Id. Senior DR, supporting the order of the authorities below submitted that the assessee received a plot of land from Ballarpur Industries Led) vide the scheme of arrangement as approved by the Courts, mentioned supra, measuring 3.18 acres, at a book value of Rs.5,58,62,493/-. During the year, the same land was sold back to the same

Ballarpur Industries Ltd from whom the land was received, at an agreed consideration of Rs.4,07,25,000/-. Thus, a book loss of Rs.1,51,37,493/- was suffered by the assessee. The assessee after taking indexation benefit claimed a long term capital loss for Rs.3,74,14,983/-. The purchaser Ballarpur Industries Ltd, by all practical means had the right over the land through its once subsidiary, now held by another associate group company as holding company of the assessee. No valuation of the land was made prior to the sale and the assessed company agreed to sell the land at a lump sum consideration much below the book value price. There was no physical payment and neither any deed of conveyance was drawn and registered. The capital loss claimed is, therefore, disallowed. Thus, this transaction, entered into and executed through an agreement signed over a non judicial stamp paper of Rs.50/- only is treated as sham. Considering the principle laid down by the Apex Court in the case of McDowell & Co case reported in 154 ITR 148, the above transaction the Assessing Officer rightly treated the same as a colorable transaction to reduce taxable income of the assessee. He lastly pointed out that the Assessing Officer was right disallowing the claim of long term capital loss artificially created in the books of assessee.

10. On careful consideration of above submissions, and perusal of the relevant part of assessment order para 3.1 and para 7 to 7.4 of First Appellate Order, first of all, from the assessment order we note that the Assessing Officer after considering the relevant documents and facts and circumstances treated the transaction as sham and disallowed claim of long term capital loss to the assessee. From relevant paras of first appellate order we note that the Id. CIT(A) dismissed the claim of assessee of long term capital loss by observing that the transfer of capital asset by appellant company to its parent/holding company (in which appellant company is 100% subsidiary of its parent company i.e. BILT) therefore in view of provision of 47(v) of the Act the transaction of transfer of land from subsidiary to holding company is not covered u/s. 45 of the Act. We are in complete agreement with the findings arrived by the Id. CIT(A) based on section 47(v) of the Act and when the transaction does not fall within ambit of section 45 of the Act then any claim of long term capital loss/profit cannot be held as allowable. Accordingly, we are unable to see any reason to interfere with the findings of Id. CIT(A) and thus, we uphold the same. Accordingly, ground no. 4 to 4.5 of assessee are dismissed.

#### **Revenue Appeal in ITA No. 1333/Del/2022 for AY 2004-05**

11. Apropos ground no. 1 & 2 the Id. Senior DR, supporting the assessment order submitted that the Id. CIT(A) has erred on facts and in law, by considering that exchange rate losses amounting to Rs.16,06,000 was incidental to the nature of business of the assessee by not considering that the facts of the instant case is similar to the case of The Commissioner of Income Tax (IT)-4 v/s. M/s. Siemens Nixdorf Information Systemse GmbH, reported as (2020) 114 taxman.com 531 (Bom.) wherein Hon'ble Bombay High Court held that a loss arising on the assignment of a loan granted by a foreign parent company to its Indian subsidiary is a capital loss within the meaning of section 2(14) of India's Income-tax Act, 1961. He further submitted

that the Id. CIT(A) has granted relief to the assessee without any basis therefore the First Appellate Order may kindly be set aside by restoring that of the Assessing Officer.

12. Replying to the above, the Id. counsel supporting the First Appellate Order submitted that the appellant being a non-banking finance company giving loan is its main business and assessee charges interest on the loan which is offered to taxation. He further, submitted that the loss on fluctuation of foreign currency is a business loss as it is incidental to the nature of business therefore the Id. CIT(A) was right in allowing relief to the assessee. The Id. counsel also placed reliance on the judgment of the Hon'ble Bombay High Court in the case of **CIT vs. V.S Dempo & Co. (P.) Ltd. (1993) 115 CTR 163 (Bom.)**.

13. On careful consideration of above submission, first of all, we note that the Assessing Officer has not doubted the quantum and reason that the assessee sustained loss on fluctuation of foreign currency rates of Rs. 16,06,000/-. It is noted by the Assessing Officer that the assessee company is non banking financial company and it provided loan for earning interest which is offered for taxation. In such a situation the loss incurred to the assessee due to fluctuation in the foreign currency rate cannot be held as capital loss and the Id. CIT(A) was right in allowing the same to the assessee. Our conclusion also gets support with the order of Hon'ble High Court of Bombay in the case of CIT vs. V.S Dempo (supra). Accordingly, ground no. 1 & 2 of revenue are dismissed.

14. Apropos ground no. 3 the Id. Senior DR submitted that the expenses incurred on insurance and audit fees was to be born by Ballarpur Industries Ltd. and the assessee was not under obligation to make said payments. Replying to the above, the Id. Advocate submitted that the insurance charges and payment to auditors was as per agreement between the assessee and BILT therefore the same was rightly allowed.

15. On careful consideration of above, we note that the Id. CIT(A) after considering the agreement disallowed expenditure toward office & other expenses and consultation fee however he allowed the expenditures towards insurance charges and payment to the auditor which was not covered under the agreement and the same was the liability of assessee. On being asked by the bench the Id. Senior DR could not show us that how these payments are covered under the agreement and were to be incurred by the BILT. Therefore, we are unable to see any reason to interfere with the said findings of Id. CIT(A) and hence we uphold the same. Accordingly, ground no 3 of revenue is dismissed.

16. Apropos ground no. 4 & 5 the Id. Senior DR submitted that The Id. CIT(A) has erred on facts and in law by deleting the disallowance of Rs.11,16,14,6371- made u/s 14A by placing reliance on the judgment on the decision of Hon'ble Delhi High Court in the matter of Joint Investments Private Limited wherein the Hon'ble High Court ruled that the disallowance u/s 14A cannot exceed exempt income, by ignoring the CBDT circular no. 5/2014 dated 11.02.2014, which has been clarified by the amendment made in the section 14A of the Income-tax Act,

1961 by the Finance Act, 2022. Therefore he submitted that the assessment order may kindly be restored. The Id. counsel supported the first appellate order and submitted that the Id. CIT(A) was right in following the proposition of Hon'ble jurisdictional High Court of Delhi.

17. On careful consideration of above submissions, we note that the Hon'ble High Court of Delhi in the case of **PCIT vs. Era Infrastructure Ltd. reported as [2022] 141 taxman.com 289 (Del.)**, by referring its earlier judgment in the case of Cheminvest Ltd. vs. CIT (supra) held that the amendment made by Finance Act 2022 to section 14A of the Act by inserting a non-obstante clause and Explanation will take effect from 01.04.2022 and cannot be presumed to have retrospective effects thus in view of this preposition the amendment cannot be applied retrospectively to present AY 2004-05. Thus we are in agreement with the conclusion drawn by Id. CIT(A) that the disallowance u/s. 14A of the Act should be restricted to exempt income. Accordingly ground no. 4 & 5 of revenue being devoid of merits are dismissed.

18. Apropos ground no. 6 the Id. Senior DR submitted that The Ld. CIT(A) has erred on facts and in law and in holding that since the liabilities shown in Provision for doubtful loans & advances' , are 'certain in nature, therefore no upward adjustment us 115JB(2)(C) can be made in this regard, by ignoring the provisions contained in Explanation [1](c) to the section 115JB(2) which provides that amount set aside to provisions made for meeting liabilities, other than ascertained liabilities has to be increased for the purpose of computing book profit. Therefore he submitted that the First Appellate Order may kindly be set aside by restoring that of the Assessing Officer. Replying to the above the Id. counsel submitted that in the present case the liabilities were certain in nature therefore no upward adjustment was required to be made.

19. On careful consideration of above rival submissions and findings recorded by the Assessing Officer as well as Id. CIT(A) at the very outset, from the assessment order we note that the Assessing Officer has not given any reason for making upward adjustment u/s. 115JB while calculating the books profit for MAT purpose and despite this fact the Id. CIT(A) presume that Assessing Officer might have invoked provisions of section 115JB (2)(c) of the Act by treating the loans and advances which are actually return of as doubtful. However the assessee consistently submitting that the impugned loss is real and such loss has been debited to the P&L account under the head provision for doubtful loans and advances. It was further submitted that from the perusal of audited account it is clear that the same was return of in the account as irrecoverable though the nomenclature was used as provision. On being asked by the bench the Id. Senior DR could not show us any factual matrix which may lead us to take a view that the impugned amount was not certain and was merely a provision. Thus the Id. CIT(A) keeping in view the judgment of Hon'ble Supreme Court in the case of **Vijaya Bank vs. CIT 231 CTR 209 (SC)** held that the impugned amount was certain in nature and therefore upward adjustment as per clause (c) of explanation 1 to section 115JB (2) of the Act cannot be made as per provisions of the Act. Therefore we are unable to see any valid reason to interfere with the findings arrived by the Id. CIT(A) on this issue and hence we uphold the same. Accordingly, ground no. 6 of revenue is also dismissed.

20. Ground no. 7 of revenue is of general in nature which requires no specific adjudication.

21. In the result, the appeal of the assessee as well as of the revenue are dismissed.

Order pronounced in the open court on 09.06.2023.

Sd/-  
(DR. B.R.R. KUMAR)  
ACCOUNTANT MEMBER

Sd/-  
(CHANDRA MOHAN GARG)  
JUDICIAL MEMBER

Dated:09<sup>th</sup> June, 2023.

NV/-

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

// By Order //

Asstt. Registrar, ITAT, New Delhi