

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'B' : NEW DELHI)  
BEFORE SH. N.K.BILLAIYA, ACCOUNTANT MEMBER  
AND  
SH.ANUBHAV SHARMA, JUDICIAL MEMBER  
ITA No. 7339/Del/2019, A.Y. 2016-17**

ACIT, Special Range-3, New Delhi	Vs.	M/s. Ebony Retail Holdings Ltd. F-2/1, Khanpur Extension, New Delhi-110062 PAN : AAACD0207B
Appellant		Respondent

**C.O. No. 66/Del/2022  
(arising out of ITA No. 7339/Del/2019, A.Y. 2016-17)**

M/s. Ebony Retail Holdings Ltd. F-2/1, Khanpur Extension, New Delhi-110062 PAN : AAACD0207B	Vs.	ACIT, Special Range-3, New Delhi
Appellant		Respondent

Assessee by	Sh. G.S.Grewal, CA and Sh. Jaspal Sahni, CA
Revenue by	Sh. Vivek Kumar Upadhyay, Sr. DR

Date of hearing:	17.07.2023
Date of pronouncement:	17.07.2023

**ORDER**

**Per Anubhav Sharma, JM :**

The appeal has been preferred by the Revenue against the order dated 25.06.2019 of CIT(A)-34, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal no. 174/18-19 arising out

of an appeal before it against the order dated 26.12.2018 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the ACIT, Spl. Range-3, New Delhi (hereinafter referred as the Ld. AO) and C.O. no. 66.Del.2022 has been filed by the Assessee.

2. The brief facts of the case are that the appellant company is engaged in the retail business. It was operating various retail show rooms across North India in the name of 'Aboni'. The assessee filed its return of income declaring a loss of Rs. 1,03,17,179/- and book profit of the loss at Rs. (-) 85,08,756/- u/s 115 JB of the Act calculating the tax payable at Nil. The case of assessee was selected for scrutiny. Ld. AO made addition of Rs. 76,72,527/- on account of employee cost.

2.1 Ld. AO observed that the employee's benefits were disproportionate to the revenue from operation. The salary paid to Vice President (Finance and Accounts) was found to be not justified and allowable u/s 37(1) of the Act as the same was not found wholly and exclusively for the business of the assessee. Ld. CIT(A) however considered the same justified and with following observations in para no. 4.3 and 4.4 held as follows ;

*“4.3 I have considered the facts of the case, finding of the AO and submissions of the appellant. The AO has disallowed the employee benefit expenses of Rs.76,72,527/- as appellant has not carried out worthwhile business activity during the year under consideration, whereas it has paid huge salary to its employees which includes salary to Vice President at Rs.42 lacs. It is held by the AO that expenses are not incurred wholly and exclusively for business purposes therefore he has disallowed the same. The appellant has submitted that in spite of gradual reduction, the appellant still pursue its operations and possesses valued inventory (Rs.1,73,39,757/- as on 31<sup>st</sup> March, 2016) which is still retailed to customers in the open market. The appellant has earned revenue from operations at Rs.83,19,948/- whereas AO has considered the figure of sales only. There is reduction in scale of*

*operation as well as consequent reduction in revenue, led to substantial reduction in direct cost to the appellant like purchases, electricity and water, repair and maintenance, employee benefit expenses etc. but it did not bring Employee Benefit Expenses to NIL. The appellant has to maintain minimum staff for continuously scouts for opportunities and business ventures, compliance of legal obligations and settlement of account with supplier etc. The retained business of the appellant still in existence and has an operational cum rental agreement with Pantaloons. During the year purchases return amounting to Rs.66,27,746/- was made to vendors post settlement, these settlements were carried out by VP (Finance and Account). VP (Finance and Account) also handle matters related to direct and indirect tax cases for assessment and litigation. The Vice President of the appellant company possesses an experience of more than 20 years and representing various litigation matters related to company before VAT authorities. His services is also being utilized to oversee any and every potential opportunities including the investment in Sandur bypass. Administrative staff is retained to look after day to day routine and other administrative work of the appellant. The Employee Benefit Expenses were accepted by the AO in the case of the appellant in the AY 2014-15 & 2015-16. The AO has not brought any evidence on record that expenditure to prove that expenses are not incurred wholly and exclusively for business purpose and they are excessive in nature. The appellant has been a pioneer in setting up of multi branded retail trading stores and had retained the bare minimum necessary staff, that are required by it for performing such functions and operations.*

*4.4 It is observed that appellant has shown revenue from operations at Rs.83,19,948/- and it has furnished the details of the establishment expenses and it is evident from the details that besides the salary paid to Vice President, other persons whom salaries paid, are handling accounts and administrative work of the appellant company. The appellant has debited the establishment expenses of Rs.90,94,708/- in the preceding year which was allowed by the AO in the scrutiny assessment. The AO has disallowed the establishment expenses by making general*

*observation that expenses are not incurred wholly and exclusively for business purposes, whereas appellant has brought sufficient evidences on record that business activity which includes purchase returns, investment in other sectors, sub letting the properties, handling litigation matters of the appellant in different proceedings etc. were undertaken during the year. Services of the VP is utilized in business for different business activities i.e. disposing of the closing stocks of the appellant company, exploring new avenues of the business and handling litigation matters who is having vast experience of 20 years of handling different business matters of the appellant company. Considering the above facts, addition made by the AO by disallowing establishment expenses at Rs.76,72,527/- is not sustainable as expenses incurred wholly and exclusively for the business purposes and. appellant has established that business activities are carried out during the year. Moreover, no addition was made in the case of the appellant on identical facts in the AY 2013-14 and 2015-16 on this issue, thus on the principle of consistency Employee Benefit Expenses claimed by the appellant is allowable and addition made by the AO at Rs. 76,72,527/- is hereby deleted.*

3. Further, Ld. AO had made disallowance of finance cost Rs. 6,25,07,054/- comprising of interest on loan taken by assessee company from Lakshmi Vilas Bank. Ld. AO observed that the loan was used for the purpose of investment in Sandur Bypass Projects Ltd. to the extent of Rs. 2,55,00,000/-. Refund of share application money to Mr. H.S. Narula to the extent of Rs. 6,28,90,000. Repayment of old loan of Standard Chartered Bank of Rs. 3,30,000,981/- and advance given to company under the same management of Rs. 99,67,248/-.

3.1 Ld. CIT(A) deleted the proportionate disallowance of interest costs of Rs. 5,72,22,087/- pertaining to utilization of loan for refund of share application money and repayment of the loan to Standard Chartered Bank. However, he confirmed the disallowance of interest in respect of investment made by assessee in Sandur Bypass Project Ltd. and interest on Rs. 99,67,248/- advances

given by appellant to its related party ((DSC Ltd.). Thus, Ld. CIT(A) confirmed disallowance of proportionate interest on loan Rs. 52,84,966/- and deleted disallowance and proportionate interest of Rs. 5,72,22,087/- out of total addition of Rs.6,25,07,054/-.

4. Lastly, Ld. AO made an addition of business income from rent treating the same as income from other sources. This was confirmed by Ld. CIT(A) with following findings in para 6.2 as reproduced as below ;

*“6.2 I have considered the facts of the case, finding of the AO and submissions of the appellant. The appellant has sub let the property to Pantaloons Retail India Ltd. alongwith furniture and fixture and plant and machinery. Such inseparable sub letting is income from other sources as held by **Hon'ble Delhi High Court in the case of Garg Dying and Processing Industries Vs ACIT (2013) 212 taxmann 160 (Delhi)** that "the inseparable letting is assessable as income from other sources only." Similar view is taken by the Hon'ble Madras High Court in the case erf CIT, Vs Smt. P. Andal Ammal (2000) 243 ITR 751 (Mad.). Considering the above facts and decisions of the judicial authorities, AO has correctly assessed the rental income as income from other sources in place of income from business and profession. Thus addition made by the AO treating the rental income as income from other sources at Rs. 6,06,60,000/- is hereby **confirmed.**”*

5. The Revenue is in appeal vide ITA no. 7339/Del/2019 raising following grounds ;

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the disallowance of Employee benefit Expenses of Rs. 76,72,527/- made by the AO without considering the fact that there was no evidence to show that huge expenses incurred were to facilitate the earning or at least protecting the income of the assessee.*

2. *On the facts and in .the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance of financial*

*cost of Rs. 5,72,22,087/- made by the AO without considering the fact that significant amount of interest bearing funds had been given as interest free loans/ advances to the companies under same management or the persons related to the management, which is simply the diversion of the resources of the assessee company.*

3. *The appellant craves leave to add, amend or forego any ground(s) of appeal at any time before or during the hearing of this appeal.*

5.1 While the assessee has raised following grounds in the cross objections ;

*“1. On the facts and in the circumstances of the case and in the Law, the Ld. CIT(A) has erred in upholding the disallowance of Rs. 52,84,966 made by Ld. AO under section 37(1) of the Act holding that the expenses are not incurred wholly and exclusively for the purpose of business.*

*2. On the facts and in the circumstances of the case and in the Law, The Ld. CIT has erred upholding the treatment of the business income of the assessee as income from other sources.”*

6. Heard and perused the record. The ground wise findings are as follows.

**Ground No. 1 in appeal of Revenue;**

7. Ld. DR submitted that the low electricity and water expenditure and other expenditures were rightly relied by Ld. AO to conclude that there was no business operations and still substantial expenditures was made for employee benefit expenses. Ld. AR has countered the same by submitting that the entity is existence and has lot of assets and liabilities which were managed by the Vice President (Finance and Accounts).

8. In regard to this it can be appreciated that during the year company had reported revenue from operations at Rs. 5,33,384/-. Note 16 of the balance

sheet, mentions the same was by way of sales. At the same time, note 17 shows other income Rs. 7,23,08,417/-, including 'other business income from operations' of Rs. 11,58,868/- and rent income Rs. 6,21,00,000/-, were also earned and reported during the year. So it is not a case of assessee was not having business operations. Infact when during the year there was so much restructuring of bank loan and other investments they required a responsible managerial person. Ld. CIT(A) has prudently examined the issue that there were sufficient evidence on record that the business activity of the company was still subsisting and the service of the Vice President are indispensable. Ld. CIT(A) has also taken into consideration the fact that no addition was made in case of assessee on identical facts in A.Y. 2013-14 and 2015-16. The Bench is of considered view that findings of Ld. CIT(A) require no interference. Accordingly, ground no. 1 arising out of appeal of Revenue is decided against the Revenue.

**Ground no. 2 in appeal of Revenue and Ground no 1 of Cross objections;**

9. Ld. DR has relied the findings of Ld. AO and submitted that Ld. CIT(A) failed to consider there was diversion of resources of the assessee company. As this ground is countered as ground no. 1 in cross objections filed by the assessee, Ld. AR defended the deletion of proportionate disallowance of interest cost arising out of refund of share application money to Sh. H.S. Narula by submitting that the appellant company had received share application money Rs. 6,28,90,000/- from Mr. H.S.Narula in earlier years and share were not allotted so the amount was refunded in the year under consideration in compliance with the provisions of the Companies Act. It was submitted that as the share application money was consumed as working capital over the years and stood as a liability in the books of accounts the same was repaid by way of loan taken from Lakshmi Vilas Bank of Rs. 42 crores.

10. It can be appreciated that Ld. CIT(A) has examined this issue and concluded that repayment of share application money is for the purpose of reducing the business liability of the assessee. The Bench is of considered view that once it is established that the share application money was used over the years as working capital and was shown as standing in the current liabilities in the financials, its repayment has to be considered to be for the purpose of business and no interest disallowance is called on the loan amount used for this purpose. There is no error in findings of Ld. CIT(A).

11. Ld. AR pointed out that as with regard to repayment of loan of Standard Chartered Bank, deleted by Ld. CIT(A), out of Rs. 42 crores loan taking from Lakshmi Vilas Bank the earlier loan of Rs. 33 lakhs was repaid. Ld. AR relied copy of fourclosure statement from Standard Chartered Bank made available at page no. 98 of the paper book. It was also pointed out in the audited financial statements the fact of re-scheduling of term loan facility from Standard Chartered Bank to Lakshmi Vilas Bank was disclosed. It was also pointed out that in the A.Y. 2014-15 and 2015-16 no addition has been made on account of interest on loan taken from Standard Chartered Bank and in A.Y. 2018-19 also no addition was made thus, interest on loan has been allowed in the past and also in the future.

11.1 In this context, the Bench is of considered view that the repayment of loan is certainly a part of business purpose and on principle of consistency interest on loan taken to repay another loan deserves to be allowed. There is no error in findings of Ld. CITA(A).

12. Coming to the disallowance made by Ld. CIT(A) on an investment in Sandur Bypass Project Ltd. it was submitted by Ld. AR that the loan sanctioned by Lakshmi Vilas Bank carried a condition that the overdue in the associate company Sandur Bypass Project Ltd should be cleared immediately and the

same was a principle condition laid by the bank for giving the loan to the appellants and thus appellant had to invest Rs. 2,55,00,000/- in Sandur Bypass Project Ltd. on the instructions of bank. It was submitted that Sandur Bypass Project Ltd. was a special purpose vehicle of the Group concern of the company DSC Ltd. and which is engaged in the construction and operation of the Sandur Bypass Project which offers assessee an opportunity to commercialize the entire Sandur highway. It was submitted that investment of Sandur Bypass project Ltd. was made with intention to benefit from its businesses.

13. The Bench is of considered view that accepting business liability of another entity, which may be part of the group cannot be considered to be an investment for business purposes without establishing with evidence as to how the assessee was to benefit. The assertion that in order to have loan from Lakshmi Vilas Bank, the investment was made in Sandur Bypass Project Ltd. merely amounts to siphoning of the loan by the assessee company without any evidence of the benefit drawn from the same. Findings of Ld. CIT(A) with regard to finance cost related to Sandur Bypass Project Ltd., thus, require no interference.

14. As with regard to issue of diverging interest bearing funds to company under the same management Ld. AR submitted that the amount of Rs. 99,67,248/- was advanced to DSC Ltd. on account of its commercial expediency and the same was out of refund of income tax. It was submitted that out of loan taken from Lakshmi Vilas Bank, no amount was advanced to DSC Ltd. In this context, letter dated 21.12.2018 available at page no. 99 to 115 of the paper book was relied by which Ld. AO was informed that no part of loan taken from Lakshmi Vilas Bank was transferred to the company under the same management. It was submitted that Ld. CIT(A) has erroneously observed the amount was advanced out of loan taken from the Lakshmi Vilas Bank. The Bench is of considered view that taking interest bearing loan for repayment of

loan to Standard Chartered Bank and giving advances to party cannot be considered to be having any justification. Thus, the findings of Ld. CIT(A) require no interference. The grounds of appeal and cross objection here in discussed are dismissed.

**Ground no 2 in the cross objections;**

15. The ground arises from the fact that Tax Authorities have treated the business income of the assessee as income from other sources. It was submitted by Ld. AR that the assessee had entered into Collaborative Operational cum Rental Agreement with Pantaloons Retail (India) Ltd. which entitled the appellant to earn income as percentage of net sales made by Pantaloons Retail India Ltd. and during the year under consideration assessee earned Rs. 6,21,00,000/- from this Collaborative Operational cum Rental Agreement. It was submitted that experienced staff of the assessee actively participated in display of goods and apparels to be sold in the store and promotional activities. In return, the appellant earned income from Pantaloons Retail (India) Ltd. as percentage on the sales made. It was submitted that Ld. AO has erred in observing that as assessee has not claimed depreciation in its computation of income so the income not allowable as business income. It was submitted that the appellant has taken property on lease so depreciation is not claimed. It is also submitted that Ld. AO had fallen in error in relying judgments in case of *Garg Dying and Processing Industries Vs. ACIT (2013) 212 taxmann 160 (Delhi)* and *CIT vs. Smt. P. Andal Ammal (2000) 243 ITR 715 (Mad)*. It was submitted that the properties in these cases were given out under direct lease and not under sub-lease.

16. In this context, it can be observed that the appellant has sublet the property along furniture and fixture and plant and machinery. What Ld. AR says was business income was merely a composite rent for the premises let out and

other infrastructure and personnel facility being provided. Such inseparable sub letting is income from other sources and the Ld. Tax Authorities have rightly relied judgment of Hon'ble Jurisdictional High Court in the case of ***Garg Dying and Processing Industries( supra)*** where upholding the order of Tribunal, Hon'ble High Delhi High Court has held "*The real test which has been applied by the Tribunal, and rightly so is to see whether the letting is a composite or inseparable letting and if it is so, the rent falls for being assessed under the residual head of income and not under the head "property"*". The conclusion of Ld. CIT(A) requires no interference. The ground is not sustainable.

**17. Consequently, the appeal of Revenue and Cross-objections of Assessee are dismissed.**

**Order pronounced in the open court on 17<sup>th</sup> July, 2023.**

**Sd/-**

**(N.K.BILLAIYA)  
ACCOUNTANT MEMBER**

**Sd/-**

**(ANUBHAV SHARMA)  
JUDICIAL MEMBER**

*Date:- 17.07.2023*

*\*Binita, SR.P.S\**

Copy forwarded to:

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

**ASSISTANT REGISTRAR  
ITAT, NEW DELHI**