

**IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH, MUMBAI**

BEFORE SHRI PRASHANT MAHARISHI, AM  
AND  
SHRI RAHUL CHAUDHARY, JM

**ITA No. 2385/Mum/2022**

(Assessment Year: 2015-16)

The Dy. Commissioner of Income  
Tax,  
Central Circle-7(3),  
Room No,655, Aaykar Bhavan  
M.K. Road,  
Mumbai-400 020

**(Appellant)**

M/s Macrotech Developers Limited  
(Formerly known as Lodha  
Developers Pvt. Ltd.)(Successor of  
M/s Bellissimo Crown Buildmart  
Pvt. Ltd.)  
Vs. 412, 4<sup>th</sup> Floor, 17 G, Vardhman  
market, Cawasji patel Street, Fort  
Mumbai 400001

**(Respondent)**

**PAN No. AAACL1490J**

**Assessee by** : Shri Niraj Seth, Advocate  
**Revenue by** : Shri Manoj Kumar, CIT DR

**Date of hearing:** 20.09.2023

**Date of pronouncement** 05.12.2023

**ORDER**

**PER PRASHANT MAHARISHI, AM:**

01. This appeal is filed by The Dy. Commissioner of Income Tax, Central Circle, 7(3), Mumbai (the learned Assessing Officer) against the appellate order passed by The Commissioner of Income-tax (Appeals)-57, Mumbai [the learned CIT (A)] dated 20<sup>th</sup> June, 2022, wherein the appeal filed by the assessee against the assessment order passed by The Dy. Commissioner of Income Tax,

Central Circle 7(3), Mumbai (the learned Assessing Officer) under Section 143(3) read with section 144C of the Income-tax Act, 1961 (the Act) dated 18<sup>th</sup> December, 2019 for A.Y. 2015-16, was partly allowed.

02. The learned Assessing Officer has raised following 8 grounds of appeal:-

*"1. Whether on the facts and circumstances of the case and in Rs law, the Learned CIT(A) is justified in deleting the disallowance of interest expenses amounting to Rs.2,71,45,84,179/- without considering the fact that the auditor has allocated the said interest cost of Rs.2,71,45,84,179/- to cost of project.*

*2. Whether on the facts and circumstances of the case and in law, the Learned CIT(A) is justified in deleting the disallowance of interest expenses amounting to Rs.2,71,45,84,179/- by relying on the matching concept for revenue expenditure applies to the interest expenditure incurred during the financial year for the claim of deduction u/s 36(1)(iii) of the Act and ignoring the fact that assessee engaged in the business of real estate and following the percentage completion method for revenue recognition and all the expenses directly related to the project have to be carried over and debited to the cost of project.*



3. *Whether on the facts and circumstances of the case and in law, the Learned CIT(A) is justified in deleting the disallowance of Rs.6,26,101/- made u/s. 14A of the Act while computing the book profit u/s 115JB of the Act.*

4. *Whether on the facts and circumstances of the case and in law, the Learned CIT(A) is justified in deleting the disallowance of Rs.6,26,101/- made u/s. 14A of the Act in the light of CBDT Circular No. 5 of 2014 dated 11.02.2014.*

5. *Whether on the facts and circumstances of the case and in law, the Learned CIT(A) is justified in deleting the disallowance made on the Foreign Exchange loss of Rs.1,68,30,320/- by overlooking the fact that assessee is engaged in the business of real estate and following percentage completion method for revenue recognition and all the expenses directly related to the project have to be carried over and debited to the cost of project.*

6. *Whether on the facts and circumstances of the case and in law, the CIT(A) has erred in directing the AO/TPO by taking ALP OF Guarantee Commission at 0.3523% instead of 1.25%.*

7. *Whether on the facts and circumstances of the case and in law, the CIT(A) has erred in benchmarking the transaction of Corporate Guarantee Commission under other method making Interest Saving approach allocating the same equally between assessee & its AE (50% +50%) Without considering the fact that no FAR analysis has been done to allocate the interest saved.*

8 *Whether on the facts and circumstances of the case and in law, the CIT(A) has erred in accepting the benchmarking of corporate guarantee commission adopted by the assessee without appreciating the intrinsic flaws in arriving at the credit rating of the AE i.e. non availability of figures of sales growth and inventory to sales ratio.”*

03. Facts of the case show that assessee originally known as Bellissimo Crown Buildmart Pvt. Ltd. merged with Lodha Developers Limited and now known as Macrotech Developers Limited, a resident company, is engaged in the business of real estate Construction and development.
04. It filed return of income on 8<sup>th</sup> April, 2014 declaring total income as per normal computation of total income at ₹5,08,97,690/- and book profit under Section 115JB of the Income-tax Act, 1961 (the Act), at ₹330,91,37,656/-. The return of income was picked up for scrutiny.

05. The learned Assessing Officer found that assessee has entered into several other international transactions and therefore, reference was made to the Dy. Commissioner of Income Tax, Transfer Pricing, 3(1)(1), Mumbai, (the learned Transfer Pricing Officer) on 15<sup>th</sup> December, 2017, for determination of Arm's Length Price of international transaction. The order under Section 92CA (3) of the Act was passed on 31<sup>st</sup> October, 2018.
- i. Only Transfer pricing dispute is with respect to the determination of Arm's Length Price of corporate guarantee issued by the assessee for of security cum guarantee of 175 percent of 200 Million USD of Senior Notes issued by the Associated Enterprises. The assessee had an Associated Enterprises in Mauritius by the name of Lodha Developers International Limited which has raised bonds of 200 million USD, listed on the Singapore Stock Exchange. The assessee and its parent company along with its sister concerns had given joint and other guarantee to the bondholders on behalf of its Associated Enterprises.
  - ii. The assessee did not benchmark the above transaction stating that assessee is a shareholder of the Associated Enterprises on whose behalf the guarantee was given and therefore it is a shareholder activity. It was also contended that it is not an international transaction.
  - iii. The learned TPO questioned the assessee that why the adjustment to the extent of bank rate less 0.5% should not be considered as Arm's Length



Price of this international transactions as per the decision of Everest Kanto.

- iv. In reply to this, assessee submitted a benchmarking of this international transaction at the rate of 0.35%. The benchmarking methodology submitted by the assessee was 'other method' and computation was made by adopting interest saving approach. The assessee analyzed the guarantee transaction by determining the creditworthiness of the borrower from Moody's risk calc. The stand-alone credit rating of the Associated Enterprises was found to be B-3. The accepted default frequency of the Associated Enterprises was determined at 6.58% for one year. The search was made on deals scan database adopting period between, April 2014 to March 2015, the deal currency was considered as USD and interest rate of loans with floating base rate was selected. The total 851 deals were identified by applying the above filter. Out of the 851 deals, 839 deals were found to be without any guarantee and 12 deals were with respect to guarantees. The tenure of adjustment of 5 Yrs were made to average guarantee deals interest rate of 429.75 and therefore, tenure adjustment of 13.08 were reduced from the same. This resulted into interest differential of interest was derived at 399.67 base points. The difference between the guarantee deals and non guarantee deals resulted into average saving in interest of 70.46 bps. Based on various functions, assets and risks, this benefit was



shared at the rate of 50% between guarantor and the Associated Enterprises. Accordingly, Arm's Length Price of guarantee commission was determined at 0.35%.

- v. The learned Transfer Pricing Officer rejected all the contentions of the assessee stating that it is neither a shareholder activity and an international transaction which needs to be benchmarked. He adopted the CUP method and considered rates charged by banks for giving guarantees. He obtained bank guarantee rates from State Bank of India, Union Bank of India and City Bank and reached at the average bank guarantee rate of 1.66%. He further granted 0.5% of the deduction from the average rate based on the decision of the Hon'ble Bombay High Court in case of Everest Kanto and Glenmark Pharmaceuticals Ltd. Therefore, Arm's Length Price rate adopted for guarantee commission was 1.66%. The learned Transfer Pricing Officer converted the USD 200 million by adopting the bank of exchange rate of ₹62.53 per dollar which is ₹1,250 crores. As assessee is joint guarantors along with two other shareholder of the assessee was considered at ₹416 crores on which guarantee commission rate of 1.16% was applied resulting into total amount of guarantee commission for the whole year was considered at ₹4.83 crores. The start date of guarantee was 13<sup>th</sup> March, 2015 and it continued up to 31<sup>st</sup> March, 2015 for 19 days, he computed the Arm's Length Price of the guarantee

commission for the relevant period at ₹25,17,189/-

. Thus adjustment of Rs 25,17,189/- was made.

06. Accordingly, the order under Section 92CA(3) of the Act was passed on 31<sup>st</sup> October, 2018.

07. On the basis of the order of the learned Transfer Pricing Officer, the Id AO made the draft of assessment order

i. He incorporated TP adjustments

ii. During the assessment proceedings, the learned Assessing Officer also invoked the issue that amount of interest paid by the assessee is required to be capitalized to the work in progress. He stated that assessee is following Mercantile System of Accounting and following Percentage Completion Method of accounting. The assessee has borrowed loan and has also paid interest and therefore, the interest is required to be capitalized to the work in progress. He found that assessee has debited net interest expenditure of ₹278.85 crores and out of that assessee itself has capitalized ₹271.46 crores to work in progress but same has been claimed as deduction in the return of income. The assessee submitted that this interest cost has been claimed as deduction under Section 36(1)(iii) of the Act. The learned Assessing Officer was also shown the decision of the Hon'ble Bombay HC in case of Lokhandwala construction Industries Limited. The learned Assessing Officer stated that the decision stated by the assessee has no application and

made a disallowance of ₹271,45,84,179/-. This amount was added to the work in progress.

- iii. During the year, the assessee has not earned any exempt income, however, as there was an investment, so assessee was asked to show why no disallowance under Section 14A of the Act is made. Assessee's submission was that for interest disallowance its own funds are far in excess of investment made and even as such it has not earned any exempt income. The learned Assessing Officer applied the provision of Rule 8D of the Rules and computed the disallowance of ₹6,26,101/- under Section 14A of the Act. Addition was also made of the same amount under Section 115JB of the Act.
- iv. Assessee claimed the deduction of foreign exchange loss of ₹1,68,30,320/-. The same was due to the foreign exchange payment made for consulting charges of foreign parties. The learned Assessing Officer was of the view that the above expenditure should be allocated to the cost of the project. Assessee submitted that the above claim has been made in terms of accounting standard 11 on account of the fact of changes in foreign exchange rates. The learned Assessing Officer held that accounting standard 7 of construction contract is applicable to the assessee and therefore, same was disallowed and capitalized to the cost of the project. Accordingly, the draft assessment order under Section 143(3) read with section 144C(1) of the Act

was passed on 21<sup>st</sup> December, 2018, determining total income of the assessee at ₹401,72,21,219/- as per normal computation and the book profit was computed at ₹330,97,63,757/-.

08. Against the draft assessment order assessee did not file any objection before the learned Dispute Resolution Panel and therefore, final assessment order under Section 143(3) read with section 144C (13) was passed on 18<sup>th</sup> February, 2019.
09. Against the assessment order, the assessee preferred the appeal before the learned CIT (A). The learned CIT (A) passed the appellate order on 20<sup>th</sup> June, 2022.
- i. With respect to the adjustment of corporate guarantee commission of ₹25,17,189/-, the learned CIT (A) following his own decision for A.Y. 2016-17, wherein the same transaction was to be benchmarked and computed the guarantee fee of ₹0.3523%, directed for this year also the learned Assessing Officer to compute the guarantee fee at the same rate. He rejected other contentions of the assessee with respect to the shareholder activity, guarantee not being an international transaction and no cost incurred by the assessee on issue of guarantee. Accordingly, this ground was partly allowed.
  - ii. With respect to the disallowance of interest expenditure, he followed the decision of the Special Bench, in case of Wall Street Construction Ltd. 102 TTJ 505 and assessee's sister concern M/s MMR



Social housing Pvt. Ltd. in ITA No.1310/mum/2021, which was rendered after considering the decision of the co-ordinate Bench in case of CIT vs. National standard Pvt. Ltd in ITA No.3048/Mum/2019, dated 5<sup>th</sup> April, 2001, that decision was rendered following the decision of the Hon'ble Bombay High Court in case of CIT vs. Lokhandwala Construction Industries Pvt. Ltd. 200 ITR 579. He deleted the above interest disallowance. He further noted that in the several cases of the sister concern of the assessee identical issue has been decided by the co-ordinate Bench allowing the claim of the assessee. Therefore, he deleted the disallowance of interest expenditure.

- iii. With respect to the disallowance under Section 14A of the Act, following the decision of the Hon'ble Delhi High Court in Cham Invest Ltd. vs. CIT 61 taxmann.com 118 (Delhi), wherein it has been held that disallowance under Section 14A of the Act cannot be made when there is no exempt income earned by the assessee. Consequently, addition under Section 14A of the Act was deleted in the normal computation as well as in the book profit computation.
- iv. With respect to the disallowance of foreign exchange loss, he followed the decision of learned CIT (A) for A.Y. 2016-17, wherein following the decision of the Hon'ble Supreme Court in case of .... 179 taxman 376, as well as per provisions of accounting standard 11, deleted the disallowance.



He also took the support of identical issue in assessee's own case in ITA No.2349 and 2148/Mum/2018, which was decided by the co-ordinate benches in favor of the assessee. Accordingly, the appeal of the assessee was partly allowed.

010. The learned Assessing Officer aggrieved with that has preferred this appeal before us.
011. The learned Departmental Representative supported the order of the learned Assessing Officer and learned Transfer Pricing Officer.
012. The learned Authorised Representative submitted a chart stating that all the issues covered in the appeal of the learned Assessing Officer are already decided by the co-ordinate bench in assessee's own case by the orders of the co-ordinate Benches. He submitted the copies of those decisions of the co-ordinate benches.
013. We have carefully considered the rival contentions and perused the orders of the lower authorities. We have also carefully considered the decision of the coordinate bench in case of assessee for earlier and subsequent years covering the issues in appeal.
014. The first and second ground is with respect to the disallowance of interest expenditure. The issue involved in this appeal has been considered in ITA No.1893 for A.Y. 2014-15 dated 26<sup>th</sup> October, 2022, ITA No.1539 and 1594 for A.Y. 2015-16 dated 30<sup>th</sup> August, 2022 and further, in ITA No.2335 and 2387 /Mum/2019 for A.Y. 2014-15. We have not been shown any reason to deviate



from the above findings and further it is also not shown that there is any change in the facts and circumstance of the case. The order of the learned CIT (A) has considered the decision of the said bench in Wall Street Construction Ltd. 102 TTJ 505. The co-ordinate bench has also looked into the circular no.7 2003 dated 5<sup>th</sup> September, 2003, examining the impact of insertion of proviso to section 36(1)(iii) of the Act by the Finance Act, 2003, with effect from 1<sup>st</sup> April, 2004. Therefore, in earlier years the co-ordinate Benches have categorically held that interest expenditure is allowable as deduction to the assessee and should not be added to the cost of the work in progress.

015. Therefore, respectfully following the decision of the co-ordinate Bench in assessee's own case, for earlier year and subsequent year, we dismiss the ground no.1 and 2 of the appeal of the learned Assessing Officer.
016. With respect to ground no.3 and 4 regarding disallowance of expenditure under Section 14A of the Act in the normal computation of total income as well as addition to the book profit under Section 14A of the Act, it is an undisputed fact that assessee has not earned any exempt income during the year. Therefore, the learned CIT (A) following the decision of the Hon'ble Delhi High Court in case of Chem Investment Ltd. (supra) has deleted the disallowance. He found that when there is no exempt income, there is no question of making any disallowance under Section 14A of the Act. Further, the amendment made by insertion of an explanation with effect from 1<sup>st</sup> April, 2022, by the Finance Act, 2022, would also not apply to the impugned assessment year in view of the



decision of the Hon'ble Delhi High Court in case of Era Infrastructure Limited [2022] 141 taxmann.com 289 (Delhi)/[2022] 288 Taxman 384 [Del] . Accordingly, in absence of any exempt income, no disallowance can be made under normal computation of total income and consequently, no addition can be made under Section 115JB of the Act. Accordingly, ground nos.3 and 4 of the appeal are dismissed.

017. Ground no.5 of the appeal is with respect to the capitalization of foreign exchange loss to the work in progress and not allowing the same as deduction to the assessee. It was submitted that identical issue arose in the case of assessee in ITA No.2266 and 2239 for A.Y. 2017-18 and 2018-19, wherein the co-ordinate Bench while deciding ground no.3 of the appeal vide Para 36 has held that such foreign exchange loss should not be considered in the case of the project but should be written off as expenses in the profit and loss account. The co-ordinate bench held that as per accounting standard 2 monetary items cannot be carried to the cost of inventory. The foreign exchange fluctuation was considered as monetary item and therefore, same was held to be allowable as revenue expenditure and not part of the cost of the project. There is no change in the facts and circumstances of this issue of this year and therefore, respectfully following the decision of the co-ordinate Bench, we do not find any merit. Even otherwise, in assessee's own case other than that year it was also decided in favor of the assessee in ITA No. 3035/Mum/2017, for A.Y. 2012-13, dated 3<sup>rd</sup> June, 2019. Therefore, the identical issue is covered in favour of the

assessee by the decision of the co-ordinate Bench in earlier year and subsequent years. Accordingly, respectfully following the decision of the bench ground no.5 of the appeal of the learned Assessing Officer is dismissed.

018. Ground nos.6 to 8, are with respect to the transfer pricing adjustment of international transaction of corporate guarantee. The guarantee transaction was not benchmarked originally by the assessee stating that it is not an international transaction and even otherwise issuing the guarantee to its Associated Enterprises along with other two entities is merely a shareholder activity. However, during the course of assessment proceedings, the assessee benchmarked the transaction by adopting interest saving approach. The interest saving 0.70% was determined on the whole transaction considering the credit rating of Associated Enterprises, the tenure of the agreement, the interest saving computed on the basis of interest difference between guarantee deal and non guarantee deal. This was also based on finding creditworthiness of the Associated Enterprises by Mood'y calc risk method and further, applying a search by adopting filter on timeline, currency and tenure. The learned Transfer Pricing Officer rejecting the same computation over and above rejecting the other arguments of the assessee adopted the guarantee commission rate of 3 banks and thereafter, reducing it by half percent computed Arm's Length Price guarantee fee commission rate of 1.16%. Before the learned CIT (A), assessee similarly contended that issuance of guarantee is not an international transaction. As the same



instrument issued by the Associated Enterprises also considered as international transaction in subsequent years, the learned CIT (A) following his that decision upheld the guarantee commission rate at 0.35% at arm's length. This identical issue was also challenged by the learned Assessing Officer in assessee's own case for A.Y. 2018-19 and 2016-17. In ITA No.2266 dated 17<sup>th</sup> April, 2023, for A.Y. 2017-18 and 2018-19 vide paragraph no.19 to 30 the above benchmarking was upheld. As there is no change in the instrument as well as in the benchmarking methodology, we dismiss ground no. 6 to 8 of the appeal of the learned Assessing Officer.

019. In the result, ITA No.2385/Mum/2022 filed by the learned Assessing Officer for A.Y. 2015-16 is dismissed.

Order pronounced in the open court on 05.12. 2023.

Sd/-  
(RAHUL CHAUDHARY)  
(JUDICIAL MEMBER)

Sd/-  
(PRASHANT MAHARISHI)  
(ACCOUNTANT MEMBER)

Mumbai, Dated: 05.12. 2023

*Sudip Sarkar, Sr.PS*

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar  
Income Tax Appellate Tribunal, Mumbai