

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI**

**BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER**

**ITA No.6581/Del/2013
AY: 2009-10**

M/s SRS Ltd.
C/o M/s RRA Tax india
D 28, South Ex., Part I
New Delhi 110 049

vs. ACIT, Circle II
Faridabad

PAN: AAGCS 8846 R

(Appellant)

(Respondent)

Appellant by : Dr.Rakesh Gupta and Shri Somil Aggarwal, Advs.
Respondent by : Sh. P.Dam Kanunjna, Sr. D.R.

ORDER

PER J.SUDHAKAR REDDY, ACCOUNTANT MEMBER

This is an appeal filed by the assessee against the order of the Ld.Commissioner of Income Tax (Appeals)-II, Faridabad dated 12.11.2013 pertaining to the Assessment Year (hereinafter referred to as the A.Y.) 2009-10.

2.1. The sole issue in this appeal is disallowance of a claim for deduction of Rs.46,19,154/- being interest expenses claimed by the assessee on the ground that, the interest bearing funds were utilised for making investment in capital assets.

2.2. The assessee is a company and is engaged in the business of Mall cum Multiplex Activities, running of departmental stores, Food Court, retail chain, Cinemas, Club etc. under the name and style of M/s SRS Ltd.

2.3. The Assessing Officer (A.O.) during the course of assessment proceedings has observed that the assessee has shown advance for projects of Rs.84,46,70,506/- to M/s SRS Real Estate Ltd. The opening balance of the same as on 01.04.2008 was for Rs.78,20,73,079/- while the closing balance as on 31.3.2009 was Rs.81,16,42,385/-. The assessee has entered into an agreement with M/s SRS Real Estate Ltd. for the purchase of the proposed commercial complex to be constructed by M/s SRS Real Estate Ltd. at village Basalva, Sector 88, Faridabad. The super built up area was to be 2,70,000 sq.ft. The assessee has entered into the agreement to purchase the complex at rate of Rs.8,500/- per sq.ft. It was for this purpose the assessee has claimed to have made advance payment to M/s SRS Real Estate Ltd.

2.4. On being questioned, the assessee submitted that it has not used any borrowed funds for making these advances. It was further informed that, the advance was received back by the assessee in the subsequent year as the project did not materialize. The A.O. relied on the findings in the earlier A.Y. on the very same issue and disallowed this claim of the assessee. He held that the advance given to M/s SRS Real Estate Ltd. on various dates was for the purpose of purchase of capital asset in the form of proposed commercial complex. The A.O. was of the view that the assessee has utilized borrowed funds, from its mixed funds available, for the purpose of making these advance payments. He gave a factual finding that the net liquidity position of the assessee on the date of payment, excluding FDR's, is negative. However he accepted the claim of the assessee for set off of interest income, on the ground that the same source of funds which have been advanced for procurement of capital asset was also utilized for earning interest income.

3. The assessee carried the matter in appeal. The First Appellate Authority observed that similar disallowance for the A.Y. 2008-09 was accepted by the assessee. It was further observed that the assessee had withdrawn the appeal filed before the Ld.CIT(Appeals) in the earlier A.Y. The Ld.CIT(A) relied on the following judgements : (i) Nahar Polyfilm Ltd. vs. CIT (P&H) 201 taxman 304; (ii) CIT vs. Vardhman Polytex Ltd. (P&H) 299 ITR 152 wherein it was held that even in the case of same business, interest on capital borrowed for extension of the same business is not allowed as a revenue expenditure. He dismissed this ground of the assessee by upholding the findings of the A.O.

3.1. Further aggrieved the assessee is before us.

4. We have heard Dr.Rakesh Gupta, the Ld.Counsel for the assessee and Sh. P.Dam Kanunjna, Ld.Sr.D.R. on behalf of the Revenue.

5. The Ld.Counsel for the assessee relied on the decision of Hon'ble Calcutta High Court in the case of CIT vs. Indian Explosives Ltd. 192 ITR 144, 147 (Cal.) and submitted that the AO erred in treating the impugned advance, as that made out of borrowed funds for purchase of capital asset. He argued that the assessee has sufficient interest free funds and the presumption is that the interest free funds should have been utilized for giving interest free advances.

5.1. The Ld.D.R. on the other hand submitted that the assessee had accepted similar disallowance in the earlier A.Y. He submitted that the advance was given for purchase of a capital asset and hence the expenditure is not allowable as revenue expenditure. He relied on the order of the A.O. as well as the Ld.CIT(Appeals) and submitted that the assessee has failed to prove that the borrowed funds were not utilised for these advances.

6. Rival contentions heard. On a careful consideration of the facts and circumstances of the case and a perusal of the papers on record and the orders of the authorities below as well as case laws cited we hold as follows.

7. Undisputedly the fact is that the assessee is the business of “Mall cum Multiplex Activities, running of departmental stores, Food Court, retail chain, Cinemas, Club etc.” under the name and style of M/s SRS Ltd. The advance given was for the acquisition of a commercial complex to be constructed. The transaction ultimately did not take place and the assessee got back the advances. On these facts and circumstances, we are of the considered view that the advances were given for the purpose of business of the assessee.

7.1. S.36(1)(iii) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) reads as follows.

“ S.36(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in s.28:

(iii) the amount of the interest paid in respect of capital borrowed for the purposes of business or profession:

(Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset for extension of existing business or profession (whether capitalized in the books of accounts or not), for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction).

Explanation: Recurring subscriptions paid periodically by shareholders, or subscribers in mutual benefit societies which fulfil such conditions as may be prescribed, shall be deemed to be capital borrowed within the meaning of this clause.”

S.36(1)(iii) grants specific deduction for the amount of interest paid in respect of borrowed capital utilized for the purposes of the business. The proviso to S.36(1)(iii) as applicable to the impugned assessment year mandated disallowance of interest paid for acquisition of the asset only when the same is for the extension of the existing business of the assessee. The wording “for extension of existing business or profession” was omitted by the Finance Act, 2015 with effect from 2015-2016.

7.2. In our considered view, as advance was given for the purpose of business, no disallowance can be made under section 36(1)(iii) of the Act.

7.3. Further the A.O. has not demonstrated as to how he has come to a conclusion that the borrowed funds have been utilised for the purpose of making these advances. On the contrary he alleged that mixed funds were utilised for making these advances. The Hon’ble Bombay High Court in the case of CIT vs Reliance Utilities & Power Ltd. reported in 313 ITR 340 (Mum), has laid down a proposition that, when interest-bearing funds and interest-free funds are available with the assessee, the presumption would be that, interest-free funds were utilised for giving interest-free advances. The assessee is right in relying on the decision of Calcutta High Court in the case India Explosion Ltd. (supra).

7.4. Applying the propositions laid down by the Honble’Bombay High Court in the case of Reliance Utilities and Power Ltd. (supra) to the facts of this case we have to necessarily hold that the A.O. should presume that interest free funds have been utilized for giving interest free advances. The assessee has demonstrated that it has sufficient interest free funds. Hence no disallowance can be made on this ground also.

7.5. The learned counsel for the assessee submitted that the appeal for the earlier year on the very same issue before the Ld.CIT(A) was withdrawn, as the

assessee was having a loss and the amount of disallowance was small. Thus this withdrawal cannot act as precedent.

7.6. In view of the above discussion, we uphold the contentions of the assessee and set aside the order of the ld.CIT(A).

8. In the result assessee's appeal is allowed.

Order pronounced in the Open Court on 18th May, 2016.

Sd/-
(H.S. SIDHU)
JUDICIAL MEMBER

Sd/-
(J.SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Dated: the 18th May, 2016

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Copy of the Order forwarded to:

1. Appellant;
2. Respondent;
3. CIT;
4. CIT(A);
5. DR;
6. Guard File

By Order

Asst. Registrar