

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C" KOLKATA**

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.2457/Kol/2013
Assessment Year :2008-09

French Motor Car Co. Ltd.,234/3A, A.J.C.Bose Road, Kolkata-700 020 [PAN No.AAACF 4735 G]	V/s.	ACIT, Range-12, P-7, Chowringhee Square, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri A.K. Tibrewal, FCA
प्रत्यर्थी की ओर से/By Respondent	Shri Rajat Kumar Kureel, SR-DR
सुनवाई की तारीख/Date of Hearing	17-04-2017
घोषणा की तारीख/Date of Pronouncement	02-06-2017

आदेश /ORDER

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-XIX, Kolkata dated 22.08.2013. Assessment was framed by ACIT, Range-12, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 29.12.2010 for assessment year 2008-09.

Shri A.K.Tibrewal, Ld. Authorized Representative appeared on behalf of assessee and Shri Rajat Kr. Kureel, Ld. Departmental Representative represented on behalf of Revenue.

2. Ground No. 1 to 4 are inter-related and therefore being taken up together to pass a consolidated order for the sake of brevity.

The issue raised by assessee in this appeal is that Ld. CIT(A) erred in upholding the order of Assessing Officer by sustaining the disallowance of

₹52,01,397/- on account of interest on the borrowed fund utilized for the purpose of investment in property.

3. Briefly stated facts are that assessee is a limited company and engaged in the vehicle business. The assessee for the year under consideration has claimed interest expense of ₹3,39,24,382/- in its profit and loss account. The assessee has also shown a sum of ₹7,43,05,666/- under the head "advance" towards the purchase of the property. During the course of assessment proceedings, AO observed from the tax audit report that assessee is not engaged in property business, therefore, he treated the advance given for the purchased of impugned property as 'investment'. Accordingly, he opined that the proportionate interest should be disallowed. Thus, AO held the estimated rate of interest @ 7% for the purpose of disallowance after considering the advance shown by assessee. The interest on the advance was worked out at ₹52,01,397/- (7% of 7,43,05,666) which was disallowed and added to the total income of assessee.

4. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) claim to have been engaged in property business since the financial year 1992-93 and prayed for deletion of the interest as made by AO. The assessee also submitted that there was sufficient own fund available with it for making the investment in the impugned property but AO without bringing anything on record that the borrowed fund was utilized in the impugned property has disallowed the proportionate interest. The disallowance made by the AO was based on surmise and conjecture. However, Ld. CIT(A) disregarded the contention of the assessee and confirmed the order of AO by observing as under:-

"The appellant has pleaded that he is carrying on the business of dealing in immovable properties since last several years and also produced some details of small transactions which were entered pertaining to financial year 1992-93 to 1995-96. Therefore, I am of the firm opinion that appellant is not doing business of immovable properties in true spirit. It is a common feature that every company is having property transactions in addition to their business. In order to avail deduction u/s. 36(1)(iii) the following condition must be satisfied;

i. The assessee must have borrowed money.

- ii. The money so borrowed must have been used for the purpose of business.
- iii. Interest is paid or payable on such borrowings.

It is needless to say that the appellant has fulfilled the above conditions except condition ii. The investment was made not for the purpose of business within the meaning of section 36(1)(iii). Not only that this investment in properties was not in the regular course of business but also lacking commercial expediency as the appellant is debiting huge interest without making any substantial profit while dealing in properties. As per the appellant's version, the amount was invested out of its own fund and not from the borrowed capital fund and arguing that there was sufficient fund available and the investment made from the mixed account. Such type of vague explanation does not hold much water. The AO has taken the rate of interest @ 7% to give a touch of reasonableness towards his disallowance. Rate of interest naturally depends upon various factors such as the credit of the debtor in the market and availability of capital in the market at a particular time. On account of business exigencies when a businessman may be forced to pay a higher rate of interest, it may be reasonable to hold that no prudent businessman would agree to borrow capital at an excessive or unreasonable rate of interest. It seems that the AO has taken care of this aspect and taken the interest rate @ 7% on fair estimate basis. Therefore, addition made on this count amounting to ₹52,01,397/- is justified and confirmed."

Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us on the following grounds:-

- "1) That on the facts and in the circumstances of the case the Ld. Commissioner of Income Tax (Appeals) erred in confirming the disallowance of Rs.52,01,397 made by the Ld. Assessing Officer out of interest paid on borrowings on the alleged ground that part of the borrowed funds were used for investment in property.*
- 2) That although the explanation of the Appellant Company, that the investment in properties were made out of own funds and not out of borrowed funds, was supported by evidences on record, the Ld. Commissioner of Income Tax (Appeals) erred in rejecting the said explanation by wrongly and arbitrarily alleging that the explanation is vague and does not hold much water.*
- 3) That there being no finding by Revenue in any year whatsoever, that the borrowed funds were ever used by the Appellant Company for any purpose other than business, the Ld. Commissioner of Income Tax (Appeals) was not justified in disallowing the interest of Rs.52,01,397 on any arbitrary and unfounded allegation that the borrowed funds were not wholly used by the Appellant for the purposes of its business.*
- 4) That the adverse findings and allegations in para 5.2 of the impugned order passed by Learned Commissioner of Income Tax (Appeals), for confirming the disallowance of Rs.52,01,397 made by the Assessing Officer, are contrary to facts on record and perverse."*

5. Ld. AR for the assessee before us filed paper book which is running pages from 1 to 172 and submitted that assessee is engaged in business of property and therefore the interest expense should be allowed as deduction u/s. 36(1)(iii) of the Act. Besides the above, he also submitted that there was sufficient own fund available with the assessee for making such investment in the impugned property. Ld. AR in support of assessee's claim drew our attention on page 138 of the paper book where the balance-sheet of assessee was placed. He also submitted that no disallowance on account of interest was made in the immediate preceding assessment year 2007-08 though the assessment was framed u/s. 143(3) of the Act. Ld. AR also drew our attention on pages 116 to 118 of the paper book where the assessment order was placed. Ld. AR also submitted that most of the investment in the advance of the impugned property is coming from the earlier years and in the year under consideration advance for ₹1,36,95,000/- only was made. Ld. AR for the assessee in support of assessee's claim drew our attention on the amount of opening balance and the advance given in the current year which is placed on page 97 of the paper book.

On the other hand, Ld. DR before us submitted that nexus between borrowed fund/ own fund vis-à-vis to the investment in impugned property should be established by the assessee and onus lies upon the assessee to demonstrate that no borrowed fund has been utilized in the investment of impugned property. He vehemently relied on the order of Authorities Below.

6. We have heard rival contentions of the parties and perused the materials available on record and perused the order of Authorities Below. The issue in the instant case relates to the disallowance made by the Authorities Below on account of utilization of borrowed fund in the investment of impugned property. As per Ld. AR, the assessee is engaged in the business of property. However, on perusal of records, we find that Ld. AR failed to substantiate its claim on the basis of documentary evidence that assessee is engaged in the business of property. Therefore, we are not inclined to hold

that assessee is engaged in property business and thus the advance in impugned property is representing investment.

Now, however, coming to other arguments of Ld. AR placed before us that assessee has invested in the impugned property out of its own fund, in this regard, we find that earlier year, the Revenue has not disallowed any interest on account of utilization of borrowed fund in the impugned property and there was an investment in the impugned property to the tune of ₹6,06,10,665/- which was enhanced in the year under consideration by ₹1,36,95,000/-. At the same time, we find that investment in the property was enhanced whereas the loan liability of the assessee was reduced from 38.89 crores to 27.98 crores as evident from the audited balance-sheet of the assessee which is placed on page 138 of the paper book. Therefore, the possibility of making such investment in the impugned property in the current year out of borrowed fund is ruled out. Admittedly, no disallowance was made by the Revenue on account of interest in the immediate preceding year. Thus, the question before us remains to be adjudicated whether the investment in the property in the current year was out of the borrowed fund. In this connection, we observe that loan liability of the assessee has reduced in the year under consideration. Therefore, we hold that no borrowed fund has been utilized in the impugned property. For the aforesaid reasons, we reverse the order of Ld. CIT(A) in this regard and direct the AO to delete the addition. This ground of assessee's appeal is allowed.

7. In the result, assessee's appeal stands allowed.

Order pronounced in the open court 02/06/2017

Sd/-
(न्यायिक सदस्य)
(N.V.Vasudevan)
(Judicial Member)
Kolkata,

Sd/-
(लेखा सदस्य)
(Waseem Ahmed)
(Accountant Member)

*Dkp, Sr.P.S

दिनांक:- 02/06/2017 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-French Motor Car Co. Ltd., 234/3A,A.J.C. Bose Road, Kolkata-20
2. प्रत्यर्थी/Respondent-Addl. Commissioner of Income-tax, Range-12, P-7, Chowringhee Square, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of
Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता ।