आयकर अपीलीय अधिकरण "ई" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

श्री महावीर सिंह,न्यायिक सदस्य **एवं**
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।

BEFORE SHRI MAHAVIR SINGH, JM AND SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./I.T.A. No. 2792/Mum/2011
(**निर्धारण वर्ष** / Assessment Year: 2006-07)

Standard Chartered Investments & Loans (India) Limited **(CIN U65990MH2003PLC142829)** Oriental Building 364, Dr. D.N. Road, Fort Mumbai – 400 001	**बनाम**/ Vs.	**Additional Commissioner of Income Tax 1(3)** Aaykar Bhavan M.K. Road Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. **AAHCS-3462-N**		
(पीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकर पील सं./I.T.A. No. 2908/Mum/2011
(**निर्धारण वर्ष** / Assessment Year: 2006-07)

Joint Commissioner of Income Tax 1(3) OSD Aaykar Bhavan M.K. Road Mumbai-400 020	**बनाम**/ Vs.	**Standard Chartered Investments & Loans (India) Limited** Oriental Building 364, Dr. D.N. Road, Fort Mumbai – 400 001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. **AAHCS-3462-N**		
(पीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Sanjiv M. Shah, Ld. AR
Revenue by	:	Naveen Gupta, Ld. DR

सुनवाई की तारीख / **Date of Hearing**	:	04/05/2017
घोषणा की तारीख / **Date of Pronouncement**	:	02 /06/2017

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. These are two appeals-one each by assessee and revenue for Assessment Year [AY] 2006-07 which assails the order of Ld. Commissioner of Income Tax (Appeals)-2, Mumbai dated 21/01/2011 on different grounds of appeal. Since, both appeals springs out of the same order, we dispose-off both the appeals by way of this common order for the sake of convenience and brevity. First, we take up Revenue's appeal ITA No. 2908/Mum/2011 where the sole ground raised by revenue contest deletion of disallowance of *leasehold / refurbishment* expenses of Rs.135,53,555/-.

2. Briefly stated, the assessee being *resident corporate assessee* engaged as *NBFC,* was assessed for impugned AY u/s 143(3) vide Assessing Officer [AO] order dated 30/12/2009 at Rs.27.17 crores after certain adjustments / disallowances as against returned income of Rs.15.47 crores *e-filed by assessee* on 08/11/2006. During assessment proceedings, it was noticed that the assessee claimed an amount of

Rs.1.35 crores as *refurbishment* expenses on leasehold property as revenue expenditure which were capitalized in the books of accounts and against which depreciation was provided. However, the assessee, in the computation of income, disallowed the depreciation and claimed full expenses of Rs.1.35 crores as revenue expenditure. The AO noted that the same were incurred in connection with starting of new *consumer business* by the assessee which was altogether a new line of business and hence the same were capital in nature. The depreciation on these expenses was disallowed by the Ld. AO on the premises that the assessee failed to substantiate that leasehold assets were put to use during the impugned AY.

3. Aggrieved, the assessee assailed the same successfully before Ld. CIT(A) vide impugned order dated 21/01/2011 where the Ld. CIT(A) noted that the assessee, being a *NBFC,* was already engaged in *corporate financing* and incurred the expenditure in the course of venturing into *retail financing business* and therefore, both business being related business only and since expenditure was incurred to *refurbish* the leasehold premises which were not owned by the assessee, the same being revenue expenditure, was allowable to the assessee. Aggrieved, revenue is in appeal before us.

4. The Ld. Departmental representative [DR] contended that the assessee incurred the said expenditure in the course of entering into new line of business and incurred heavy expenditure towards the establishment thereof and since the benefit thereof was expected to be received over a longer period of time, the same were capital in nature

against which the depreciation was available to the assessee provided the assets were put to use. However, the assessee could not substantiate start of new line of business during the impugned AY and therefore, rightly not eligible to claim even the depreciation.

5. Per *contra,* the Ld. Counsel for assessee [AR] placed reliance on the findings of Ld. CIT(A) and contended that the assessee was not entering into any new line of business as wrongly noted by Ld. AO. Further, the assessee incurred revenue expenditure against leasehold properties and therefore, was quite eligible to claim the same and the contention of the revenue was misplaced that the assessee received benefit of enduring nature in view of the fact that the assessee did not owned the said premises and did not acquire any new capital asset. Reliance was placed on the judgment of Apex court in *CIT Vs. Madras Auto Services P. Ltd. [233 ITR 468].*

6. We have heard the rival contentions and perused relevant material on record. It is undisputed fact that the assessee, being *NBFC,* was already engaged in *corporate financing*. It proposed to enter into *retail finance segment* and during the course, incurred the impugned expenditure. Therefore, as rightly noted by Ld. CIT(A), there was no new line of business. From the material available on record, it is evident that impugned expenditure was incurred against several properties located over different places and were incurred mainly on account of *interior work, electrical works, cabling & wiring, carpets, signage expenses, architect's fees, brokerage expenses, consultants' fees* etc. which *prima facie,* are expenses of revenue in nature. It is well settled principle that

entries in the books of accounts are not conclusive / determinative of taxability of income and therefore, issue of taxability has to be adjudged within the statutory framework only. At this juncture, it would be prudent to reproduce the relevant observations of apex Court in *CIT Vs. Madras Auto Services (P) Ltd. [supra]:-*

> *"11. All these cases have looked upon expenditure which did bring about some kind of an enduring benefit to the company as revenue expenditure when the expenditure did not bring into existence any capital asset for the company. The asset which was created belonged to somebody else and the company derived an enduring business advantage by expending the amount. In all these cases, the expenses have been looked upon as having been made for the purpose of conducting the business of the assessee more profitably or more successfully. In the present case also, since the asset created by spending the said amounts did not belong to the assessee but the assessee got the business advantage of using modern premises at a low rent, thus saving considerable revenue expenditure for the next 39 years, both the Tribunal as well as the High Court have rightly come to the conclusion that the expenditure should be looked upon as revenue expenditure."*

Therefore, we find that the assessee may have received benefit of enduring nature but the same was not sole and decisive factor of determining the nature of impugned expenditure. The impugned expenses were only to conduct the business more profitably and therefore, allowable to the assessee as revenue expenditure. Therefore, after considering all the factors as discussed above and noting that the impugned expenditure did not bring into existence any capital asset, we see no reason to interfere with the findings of the Ld. CIT(A) and hence, the expenditure being revenue in nature and incurred towards refurbishment of leasehold properties were allowable to the assessee as revenue expenditure. The revenue's appeal stands dismissed with a direction to Ld. AO to verify the fact that the assessee has disallowed

depreciation against the same in succeeding years and the assessee, in turn, is also directed to demonstrate the same before Ld. AO.

7. Now, we take up assessee's appeal ITA No. 2792/M/2011 where the assessee is aggrieved by addition of certain income accrued on *preference share capital* and disallowance of *Debt issue expenses* and *employees contribution to provident fund.*

8. During assessment proceedings, it was noted that the assessee had purchased certain preference shares which were classified as *held to Maturity / Long Term Capital Assets* and certain income of Rs.8.56 crores in respect thereof was credited to profit & loss account but the same was reduced while computing the total income. The assessee contended that the preference shares, being long term in nature, were capital assets of the assessee and chargeable under the head *capital gains* at the time of sale of these shares. Since there was an assured return at the time of redemption of preference shares, the assessee recognized the accrued return over the life of preference shares which were only an accounting methodology to accrue the income over the tenure of the investments. However, not convinced, Ld. AO treated the same as interest income and added the same to the income of the assessee. Another addition was related with *debt issue expenses* of Rs.1.78 crores which was made by the AO following the decision in assessee's own case for AY 2004-05 & 2005-06. The third addition of Rs.40,505/- was related with *employees contribution to provident fund* which was deposited after the due date and hence disallowed by AO u/s 43B.

9. Aggrieved, the assessee contested all the additions before Ld. CIT(A) without any success vide impugned order dated 21/01/2011 and raised similar contentions. The Ld. CIT(A) noted that the preference shares carried fixed rate of return and had no linkage with proportionate holding of the assessee and therefore, not dividend in nature but interest income and therefore, rightly been added to the income of the assessee. The disallowance of debt issue expenses was confirmed upon noting that the identical matter in assessee's own case for AY 2004-05 was remitted back to the file of Ld. AO by the Tribunal and the same was pending. The third addition u/s 43B for Rs.40,505/- was also confirmed on the premises that the same was deposited late. Aggrieved, the assessee is in appeal before us.

10. The Ld. Counsel for assessee, first of all drew our attention to the fact that identical issue of debt issue expenses arose in assessee's own case for AY 2004-05 & 2005-06 and the Tribunal, in both the years, restored the matter back to the file of Ld. AO for some verification and re-adjudication and hence following the same, the matter may be remitted back on similar lines. The Ld. DR fairly conceded the same.

11. Upon perusal of records, we note that the issue of debt issue expenses arose in assessee's own case for AY 2004-05 & 2005-06 and the Tribunal in ITA No. 6978/Mum/2007 order dated 22/09/2009 for AY 2004-05 and ITA No. 1474/Mum/2009 order dated 25/03/2011 for AY 2005-06 restored the matter back to the file of AO with the following directions:-

"6.We have heard the learned representatives of the parties and perused the record. The allowability of the expenses only to be seen in the light of section 37 of the Act and not in accordance with the books of accounts of the assessee. Therefore, we do not agree with the revenue that in the books of account the expenses were treated as deferred revenue expenses and the same cannot be claimed u/s 37 of the Act. The expenses incurred in respect of stamp duty registration fees and legal fees for obtaining loan are of revenue expenditure and the same are allowable u/s 37 of the Act as held by the Apex Court in the case of India Cements Ltd. cited supra. The judgment of the Apex Court in the case of Madras Industrial Corporation Ltd. (supra) is distinguishable on facts as in that case the issue was in respect of discount given on issue of debentures was an inbuilt condition of the transaction as debentures were issued at a discount of 2% redeemable after 12 years. The liability was for 12 years and matching principle demands that it should be allowable over twelve years. Under the circumstances, the Apex court allowed to discount written off proportionately written off each year over a period of redemption. In principle, both the judgments of the Apex Court in the case of India Cements Ltd. and Madras Industrial Corporation cited supra have laid down the law considering the facts of the respective case. In the case under consideration, the assessee filed CRISIL and the ratings are said to be a certificate issue by CRISIL , dated 12.07.2005, which is the date falling after the end of the relevant year i.e. 31st March, 2004. The learned AR clarified that this certificate has wrongly endorsed whereas the correct certificate has been placed at Page 13 of the assessee's paper book which is dated 5th March, 2004. The nature of expenditure of both the amounts of Rs.8,64,000/- towards rating charges paid to CRISIL and Rs.36,000/- for stamping charges for CPS are not available on record as no relevant receipts were produced. Whether such certificates amount to loan paper. The nature of the document has not been examined by the revenue authorities after considering relevant rules & procedures and utilization of the certificate. The relevant facts are required to be put on record after necessary verification. Further, it is not clear from the record that the amount paid to CRISIL Ltd. is in respect of certificate dated 5th March, 2004 or 12.07.2005. The relevant details of particulars of total commercial papers pertaining to the year under consideration are also not on record, which are necessary for deciding the issue under consideration. Under these circumstances, since the above facts are required to be brought on record after verification, we remit the matter back to the file of the AO to decide the issue in accordance with law after considering the discussion made as above and after providing the opportunity of hearing to the assessee."

Since Ld. AR has contended that the matter is identical and similar in all respect, following the decision of this Tribunal in assessee's own case, we remit the issue back to Ld. AO with similar directions of verification and adjudication as per law after providing due opportunity of being

heard to the assessee. This ground of assessee's appeal stands allowed for statistical purposes.

12. Regarding disallowance of Rs.40,505/- u/s 43B, being late deposit of *employees' contribution to provident fund*, reliance has been placed on the judgment of Hon'ble Bombay High Court in *CIT Vs. Ghatge Patil Transports Ltd. [2015 53 taxmann.com 141].* The Ld. DR contended that the same was required to be deposited before due date as per the relevant provident fund act and therefore, rightly been disallowed.

13. After hearing both sides, we find that issue stand squarely covered by the cited judgment of Hon'ble Bombay High Court, where the jurisdictional court has made the following observations:-

> *"**14.** From a reading of above, it is clear that the employer-assessee would be entitled to deduction only if the contribution to the employee's welfare fund stood credited on or before the due date and not otherwise. It transpires that Industry once again made representations to the Ministry of Finance to remove this anomaly. The result was that an amendment was inserted which came into force with effect from 1st April, 2004 and two changes were made in section 43B firstly by deleting the second proviso and further amendment in the first proviso which reads as under:—*
>
> *"**Provided** that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return."*
>
> ***15.** In this manner, the amendment provided by Finance Act, 2003 put on par the benefit of deductions of tax, duty, cess and fee on the one hand with contributions to various Employees' Welfare Funds on the other. All this came up for consideration before the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra). The Tribunal in the case at hand relied upon the said judgment. There is no reason to fault the order passed by the Tribunal. We are of the view that the decision of the Supreme Court in Alom Extrusions Ltd. (supra) applies to employees' contribution as well as employers' contribution. Question Nos.2, 3 & 4 are accordingly answered in favour of the assessee and against the revenue."*

Respectfully following the same, we find that since the contribution has been deposited by the assessee before due date of filing of return of income, no disallowance is called for in terms of Section 43B. The impugned addition stands deleted. This ground of assessee's appeal succeeds.

14. Regarding addition on account of accrued interest on preference shares, the Ld. AR, drawing our attention to the documents placed in the paper book, contended that the assessee held preference shares of several companies as *long term investments* as *capital assets* on *held-to-Maturity* basis and reflected as such in the Balance Sheet. The assessee could earn fixed pre-determined return in the form of dividend on these shares and the assessee, following consistent accounting policy, recognized the accrued dividend income on these shares over the tenure of the shares. But nevertheless, the shares constituted capital assets in the hands of the assessee, being taxable under the head capital gains u/s 45 upon their maturity / sale. Even otherwise, the final redemption / maturity amount was nothing but sum of principal and pre-determined fixed dividend thereupon which has been recognized as income in the books of the assessee over the tenure of the shares and taxing the same as interest would amount to double taxation in view of the fact that these shares matured in succeeding years and offered to tax as capital gains in AY 2007-08 & 2008-09 which has been accepted in 143(3) assessments.

15. It was further contended that the revenue could not re-write the terms of the agreement of issuance of preference shares, according to

which, the assessee could earn only dividend on those shares as against interest income treated by revenue, which was never possible. These shares could never fetch interest income but only dividend income and there was clear distinction between the terms *'debt'* and *'capital'* as per observation of Hon'ble Bombay High Court in *CIT Vs. Enam Securities Private Ltd. [345 ITR 64].* The dividend was never declared by the issuer and therefore, from this angle also, no right to receive dividend accrued in favor of assessee at any time during impugned AY and the assessee was bound to pay taxes on its real income only. More so, entries / treatment in books of accounts were not conclusive to determine the taxable event.

16. Per *contra*, Ld. DR placed reliance on the findings of lower authorities and contended that the assessee did not provide any calculations to demonstrate that the accrued income on the shares has been inbuilt into the redemption / maturity amount. No detail of capital gains was ever provided by him to substantiate the various contentions. Moreover, these shares did not carry any voting right which is a distinct feature of preference shares. The assessee was entitled for pre-determined fixed rate of return on these instruments and therefore, the same was nothing but interest income earned by the assessee which he was obliged to offer to tax during impugned AY following mercantile system of accounting.

17. We have heard the rival contentions and perused relevant material on record. First of all, a perusal of assessee's Balance Sheet as on 31/03/2006 placed at Page-26 of the *paper-book*, reveals that the

preference shares has been shown under the head *Long Term investments*, the detailed break-up of which has been provided on Page-32 of the *paper-book* according to which the assessee is holding preference shares of four companies namely (i)*Idea Cellular Ltd. (ii)A.V.Digital Networks Pvt. Ltd. (iii) Deccan Digital Networks Pvt. Ltd. & (iv) Metro Digital Networks Pvt. Ltd.*

18. A perusal of terms of preference shares of *Idea Cellular Ltd.* as contained in amendment agreement dated 31/10/2005 reveals that the assessee could earn two streams of income on these shares viz. right to receive fixed cumulative preferential dividend and secondly, certain pre-determined redemption premium as per the attached annexure.

19. Further, a perusal of copies of financial statements of issuer companies and relevant shares certificates placed in the *paper-book* reveals that these instruments have been classified as preference shares in the books of issuer as part of share capital.

20. As per Note No. 3 forming part of Computation and Return of income for impugned AY, it is stated that the assessee, following applicable accounting guidelines, hold preference shares on *Held to maturity basis / Long Term Capital Assets* and accordingly, income credited to Profit & Loss account on these shares has been deducted from computation of income and would be offered to tax in accordance with Section 45. The amount so accrued and deducted in AY 2006-07, 2007-08 & 2008-09 is Rs. 8.56 crores, Rs.18.76 crores & Rs.5.54 crores respectively. The assessee has reflected *'Short term capital gains'* on sale of Idea Cellular Preference shares in AY 2007-08 for Rs.8.44 crores

& Rs.8.47 crores as *'Long Term Capital Gains'* on sale of preference shares in AY 08-09 which has been accepted by the revenue in 143(3) assessments. The same reveals consistency in the arguments of the Ld. AR vis-à-vis financial statements / documents placed before us.

21. Therefore, on the facts and circumstances of the case, we find strength in various arguments of Ld. AR that the preference shares being held as *Long Term Investments* as *capital assets* were assessable to tax under the head *'capital gains'* u/s 45. The revenue could not bring any material to establish the fact that any dividend was actually declared by these companies during the impugned AY. Further, the capital gains offered by assessee upon sale of preference shares has been accepted by the revenue in succeeding years in Section 143(3) proceedings and therefore, we find no reason to interfere with those assessments.

22. Certain additional evidences in the form of paper-book dated 24/10/2013 has been produced before us in support of calculations of accrual of income on preference shares/ maturity value etc., which require, appreciation at the level of Ld. AO since the Ld. AR has asserted that whatever dividend / income has been accrued / received on these instruments, the same has been inbuilt into the maturity value and there is no revenue leakage. Therefore, in principal, while upholding the claim of the assessee that the income on these shares was assessable under the head *'capital gains'* upon their maturity, we remit the matter back to the file of AO for the purpose of verifying the fact whether all income accrued / received on these shares was inbuilt into the maturity / redemption / sale value and there was no revenue

leakage. The assessee, in turn, is directed to substantiate the same forthwith, failing which the Ld. AO shall be at liberty to dispose-off the issue on the basis of material available on record. The assessee's ground of appeal stands allowed for statistical purposes.

23. The Ld. AO is directed to recomputed book Profit u/s 115JB and brought forward/set-off of losses, if required.

24. In nutshell the revenue's appeal stands dismissed whereas the assessee's appeal stands partly allowed.

Order pronounced in the open court on 02nd June, 2017.

Sd/-	Sd/-
(Mahavir Singh)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated :02.06.2017
Sr.PS:- Thirumalesh

<u>आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**