

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

**BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

ITA No.3079/Del./2017
Assessment Year: 2010-11

M/s. ATS Infrastructure Ltd., 711/92, Deepali, Nehru Place, New Delhi	Vs.	ACIT, Central Circle, Noida
PAN :AADCA0609B		
(Appellant)		(Respondent)

Appellant by	Shri Ved Jain, Adv. Shri Ashish Goel, CA
Respondent by	Shri R.K. Gupta, Sr. DR

Date of hearing	11.08.2020
Date of pronouncement	18.08.2020

ORDER

PER O.P. KANT, AM:

This appeal by the assessee is directed against order dated 31/03/2017 passed by the Learned CIT(Appeals)-IV, Kanpur [in short 'the Ld. CIT(A)'] for assessment year 2010-11 raising following grounds:

- 1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax*

(Appeals) [CIT(A)] is bad, both in the eyes of law and on facts.

2 *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law, in passing the order without giving assessee a proper and adequate opportunity of being heard in clear violation of principal of natural justice.*

3 *(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law, in confirming the disallowance on an amount of Rs. 11,49,085/- made by AO on account of interest under section 36(l)(iii) of the Act.*

(ii) That the disallowance was made despite the fact that the loans were given out of business expediency.

(iii) That the disallowance is not called for in view of the fact that the assessee having sufficient owned funds and the advances having been not made out of borrowed funds, no disallowance of interest can be made.

4 *The appellant craves leave to add, amend or alter any of the grounds of appeal.*

2. Briefly stated facts of the case are that the assessee company was engaged in the business of the real estate and filed return of income for the year under consideration on 15/10/2010 declaring total income of ₹ 7,36,59,266/-. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. During assessment proceedings, the Assessing Officer observed that in the profit and loss account the assessee has debited interest of ₹ 11,49,085/-

but in the computation of the income filed, claimed interest of ₹ 2,40,49,065/- on borrowed capital under section 36(1)(iii) of the Act. The Assessing Officer denied this claim as it was not made by way of filing revised return of income. Further, regarding the interest of Rs.11,49,085/- which was debited in the profit and loss account, the Assessing Officer observed that the assessee had given interest-free advances to the sister concern and subsidiary companies, whereas the assessee has paid interest at the rate of 12-14% per annum on the money borrowed. The Assessing Officer has provided the list of the parties to whom interest free advances were given as under:

- i. Madhav Capital services Rs. 10,00,000/-
- ii. Rajandeep Singh Tawana Rs. 31,00,000/-
- iii. Sunshine Infratech Rs. 2,00,00,000/-
- iv. Lease Plan India Limited Rs. 7,27,579/-
- v. STG Softech Rs. 50,00,000/-

Total Rs. 2,98,27,579/-

2.1 The Assessing Officer questioned the allowability interest expenditure. In response, the assessee submitted that the advances were made for the business purpose to the subsidiary companies/sister concern, who was engaged in real estate business. The Assessing Officer rejected this contention as it was not supported by the documentary evidences. Accordingly, the Assessing Officer following the decision of the Hon'ble Allahabad High Court in the case of CIT-I, Lucknow Vs Sahu Enterprise

(supra), disallowed the interest expenditure of ₹ 11,49,085/- in terms of section 36(1)(iii) of the Act.

2.2 The assessee filed appeal before the Ld. CIT(A), however none appeared before him in response to the notices issued/opportunities allowed. The Ld. CIT(A) upheld the disallowance observing that the assessee could not bring anything on record to show firstly, that he had interest-free funds available with him, secondly, the interest-free funds were used to give advances to its sister concern for business purposes.

2.3 Aggrieved, the assessee is before the Tribunal raising grounds as reproduced above.

3. Before us, the Learned Counsel of the assessee filed a paper-book containing pages 1 to 89 and submitted that a similar issue came up for decision before the Tribunal in assessee's own case for A.Y. 2012-13 & AY 2013-14 in ITA No. 3080/Del/2017 & 5408/Del/2018 vide order dated 15.01.2020 (PB Page 71-89), wherein also, the Ld. AO made addition u/s 36(1)(iii) of the Act and the Tribunal has deleted the addition. He submitted that the case in hand is squarely covered by the above order as under:

- (i) In the case of A.Y. 2012-13 & AY 2013-14, the ITAT held that the assessee had sufficient own interest free funds from which the investments were made by the assessee in its sister concern and deleted the addition made by the Ld. AO.
- (ii) In the case in hand also, the assessee company had sufficient own funds of Rs.30,59,44,905/- which have been used to make these business advances of Rs. 2,98,27,579/- and the same is evident from the

balance sheet (PB Pg. 11) that assessee owned surplus funds as under:

Paid up Share Capital- Rs.1,50,42,000/-

Reserve & Surplus - Rs.29,09,02,905/-

Total - Rs. 30,59,44,905/-

4. The learned Counsel further submitted that it is a settled law that assessee is free to use its own funds the way it wants and the Revenue cannot compel the assessee to do or perform or use its funds in a particular manner. It is also settled law that when own funds are more than the funds utilized towards interest free advances, there cannot be any disallowance. In a scenario, where the interest free advances are given out of interest free funds, there is no need for assessee to prove the business expediency. This issue is squarely covered by the judgment of Hon'ble Apex Court in the case of CIT v. Reliance Industries Ltd. Civil Appeal No. 10 of 2019 dated 02.01.2019, citation 410 ITR 466 (SC).

5. The Ld. Departmental Representative, on the other hand, submitted that the argument of availability of the interest-free funds with the assessee has been taken for the first time before the Tribunal and no such arguments and the documentary evidence in support thereof have been submitted by the assessee before the lower authorities and, therefore, issue might be restored back either to the Ld. CIT(A) or to the Assessing Officer for deciding afresh in accordance with law.

6. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The issue of availability of interest-free funds has to be decided after verification of facts of the each year and cannot be allowed merely by following the decisions of the Tribunal (*supra*) in the case of the assessee in earlier years. We agree with the submission of the Learned Departmental Representative that this issue of availability of interest free funds has not been raised by the assessee before the Assessing Officer during assessment proceedings. In view of the decisions cited, if an assessee succeeds in establishing that interest free advances are given out of interest free funds available with him, then no disallowance is required to be made under section 36 (1)(iii) of the Act. If an assessee is unable to satisfy availability of interest free funds, then he may take the ground that loans have been utilized for the purpose of the business.

6.1 We find that before the Assessing Officer, the assessee argued only utilisation of loan funds by the subsidiary companies/sister concern for business purposes and for that too also no documentary evidences were submitted before the Assessing Officer. Before the Ld. CIT(A), the assessee did not appear and not filed any submissions. The argument of availability of interest free funds and giving of loans to subsidiary companies/sister concern out of such interest-free funds, has been raised for the first time before us, therefore in the interest of natural justice, we feel it appropriate to restore this issue back to the file of learned Assessing Officer for deciding afresh in accordance with law after providing adequate opportunity of being

heard to the assessee. The grounds raised by the assessee are accordingly allowed for statistical purposes.

7. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 18th August, 2020.

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER**

Dated: 18th August, 2020.

RK/-(D.T.D.S.)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi