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ASSISTANT COMMISSIONER OF INCOME TAX vs. DLF UTILITIES LTD.

IN THE ITAT DELHI BENCH 'B'

KUL BHARAT, JM & O. P. KANT, AM.

ITA No. 7800/Del/2018

Jul 30, 2021

(2021) 62 CCH 0373 DelTrib

Legislation Referred to

Section 143(3), 36(1)(iii), 14A

Case pertains to

Asst. Year 2013-14

Decision in favour of:

Assessee

Business expenditure—Interest on borrowings— Assessee company was engaged in business of generation of power through gas turbines and gas engines, running of multiplex theatres, providing facility management services and real estate development — Assessee filed return of income, which was revised declaring loss — Return was further revised for claim of TDS certificates — Return of income filed by assessee was selected for scrutiny assessment — Scrutiny assessment under section 143(3) was completed after making disallowance in terms of section 36(1)(iii) and disallowance under section 14A — CIT(A) deleted disallowances made by Assessing Officer — Held, CIT(A) in year under consideration followed finding of her predecessor for assessment year 2012-13 and deleted addition — Tribunal in ITA No.1998/Del/2016 for assessment year 2011-12 has deleted identical disallowance — High Court in ITA 39/2019 rejected appeal of Revenue against order of Tribunal — In assessment year 2012-13 also Tribunal in ITA No. 4156/Del/2017 has deleted disallowance — Most of investments/advances are continued from last year i.e. assessment year 2012-13, wherein Tribunal has deleted disallowance under section 36(1)(iii) on ground that advances/interest free loans have been given for business purposes in view of commercial expediency —F acts of year under consideration are also identical to facts

of case for assessment year 2011-12 — In view of above, respectfully following decision of Tribunal (supra) and decision of Delhi High Court there is no infirmity in order of CIT(A) on issue in dispute and accordingly, we uphold same — Revenue's ground dismissed.

Held

CIT(A) in the year under consideration followed the finding of her predecessor for assessment year 2012-13 and deleted the addition. Tribunal in ITA No.1998/Del/2016 for assessment year 2011-12 has deleted the identical disallowance. High Court in ITA 39/2019 rejected the appeal of the Revenue against the order of the Tribunal. In assessment year 2012-13 also the Tribunal in ITA No. 4156/Del/2017 has deleted the disallowance.

(para 4.3)

Most of the investments/advances are continued from last year i.e. assessment year 2012-13, wherein the Tribunal (supra) has deleted the disallowance under section 36(1)(iii) on the ground that advances/interest free loans have been given for business purposes in view of the commercial expediency. The facts of the year under consideration are also identical to facts of the case for assessment year 2011-12. In view of the above, respectfully following the decision of the Tribunal (supra) and decision of the Delhi High Court (supra), there is no infirmity in the order of the CIT(A) on the issue in dispute. The ground of the appeal of the Revenue is accordingly dismissed.

(para 4.4)

Conclusion

Disallowance under section 36(1)(iii) is liable to be deleted where the loans and advances have been given for business purpose on account of commercial expediency.

In favour of

Assessee

Income—Expenditure incurred in relation to income not includible in total income— Assessing Officer noticed that average of investment in equity shares during year was of Rs. 5,52,00,000/-, however, no disallowance was made by assessee for earning exempt income — After recording dissatisfaction over accounts of assessee, Assessing Officer invoked rule 8D and made disallowance — Though CIT(A), upheld that Assessing Officer has recorded sufficient reasons for computing disallowance under section 14A, however, she restricted disallowance — Held, Delhi High Court in case of Joint Investment Private Limited Vs. CIT, passed in ITA No. 117/2015 wherein disallowance has been restricted to quantum of exempted income earned by assessee in relevant year — Respectfully, following decision of Delhi High Court as cited by

Counsel of assessee, Assessing Officer is directed to restrict disallowance under section 14A to quantum of exempted income earned by assessee during year under consideration — Revenue's ground dismissed.

Held

Delhi High Court in the case of Joint Investment Private Limited Vs. CIT, passed in ITA No. 117/2015 wherein the disallowance has been restricted to the quantum of exempted income earned by the assessee in the relevant year. Respectfully, following the decision of the Delhi High Court as cited by the Counsel of the assessee, Assessing Officer is directed to restrict the disallowance under section 14A to the quantum of exempted income earned by the assessee during the year under consideration. Accordingly, the ground of the appeal of the Revenue dismissed.

(para 5.3)

Joint Investment Private Limited Vs. CIT, passed in ITA No. 117/2015 following.

In favour of

Assessee

Cases Referred to

CIT Vs Abhishek Industries reported in 286 ITR 1
CIT vs. Dalmia Cement (Pvt.) Ltd reported in 254 ITR 377

Counsel appeared:

Satyajeet Goel, CA for the Appellant.: Mahesh Thakur, Sr.DR for the Respondent

O. P. KANT, AM.

1. This appeal by the Revenue is directed against order dated 26/09/2018 passed by the Learned Commissioner of Income-tax (Appeals)-3, Delhi [in short 'the Ld. CIT(A)'] for assessment year 2013-14 raising following grounds:

1. Whether on the facts and in the circumstances of the case and in law, the Ld.. CIT(A) has erred in deleting the addition of Rs.3,15,81,435/- made by the A.O. on account of interest chargeable u/s 36(1)(iii) of the Act on interest free advances given to group companies."

2. "Whether on the facts and in the circumstances of the case and in law, the Ld. CT(A) has erred in restricting the addition of Rs.40,06,714/- made by the AO on account of disallowances u/s 14A of the Act to Rs.21,95,216/-.

2. Briefly stated facts of the case, as culled out from the order of the lower authorities, are that the assessee company was engaged in the business of generation of power through gas turbines and gas engines, running of multiplex theatres, providing facility management services and real estate development. For the year under consideration, the assessee filed return of income, which was revised

on 30/11/2014, declaring loss of Rs. 238,21,63,825/-. The return was further revised on 04/02/2015 for claim of TDS certificates. The return of income filed by the assessee was selected for the scrutiny assessment and statutory notices under Income-tax Act, 1961 (in short 'the Act') were issued and complied with. The scrutiny assessment under section 143(3) of the Act was completed on 22/12/2016 after making disallowance of Rs. 3,15,81,435/- in terms of section 36(1)(iii) and disallowance of Rs. 40,06,740/- under section 14A of the Act. On further appeal, the Ld. CIT(A) deleted the disallowances made by the Assessing Officer. Aggrieved, the Revenue is in appeal before the Income-Tax Appellate Tribunal (in short 'the Tribunal') raising the grounds as reproduced above.

3. Before us, the parties appeared through Video Conferencing facility. The learned Counsel of the assessee filed electronically copy of the decisions relied upon.

4. In support of ground No.1 of the appeal, the Learned DR relied on the order of the lower authorities and submitted that the assessee has diverted interest-bearing borrowed funds for interest free loans or loans at lower rate of interest to related party concerns, and therefore disallowance of interest on borrowed capital, which was used for advances to assessee subsidiary company is not eligible for deduction under section 36(1)(iii) of the Act.

4.1 On the other hand, the learned Counsel of the assessee submitted that identical disallowance on same borrowed capital was made by the Assessing Officer in assessment year 2011-12 and 2012-13, which has been deleted by the Tribunal. In assessment year 2011-12, the order of the Tribunal has been upheld by the Hon'ble Delhi High Court and, therefore, issue in dispute in the year under consideration is covered in favour of the assessee.

4.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The Assessing Officer observed that assessee had taken unsecured loan aggregating to Rs. 1635,24,22,344/- on which interest of Rs. 186,46,38,574/- was paid. He further observed that capital and reserve and surplus was of Rs. 274,41,45,816/- and, therefore, borrowed funds have been utilized for investment, interest free loans and advances and capital work in progress. According to the Assessing Officer, interest on borrowed capital was used for advances to assessee subsidiary company, which is not eligible for deduction under section 36(1)(iii) of the Act. The Learned Assessing Officer relied on various decisions cited in the assessment order including the decision of the Hon'ble Punjab and Haryana High Court in the case of CIT Vs Abhishek Industries reported in 286 ITR 1. The Learned Assessing Officer computed disallowance of Rs. 3,15,81,435/- as under:

<i>Sources of funds</i>			
<i>Particulars</i>	<i>Balance as on 31.03.2012</i>	<i>Balance as on 31.03.2013</i>	<i>Total of Fin. Years 2011-12 & 2012-13</i>
<i>Share Capital</i>	<i>1070746410</i>	<i>1070746410</i>	<i>2141492820</i>
<i>Reserve &. Surplus</i>	<i>2908878279</i>	<i>1673400406</i>	<i>4582278685</i>
<i>Secured loans</i>	<i>6429612918</i>	<i>6005281359</i>	<i>12434894277</i>

<i>Unsecured loans</i>	<i>10722793461</i>	<i>10347140985</i>	<i>21069934446</i>
<i>Total</i>	<i>21132031068</i>	<i>19096569160</i>	<i>40228600228</i>
<i>Average Additions- Source of Funds</i>			<i>20114300114</i>
<i>Utilization of Funds:</i>			
<i>Investment in immovable property</i>	<i>64914400</i>	<i>64914400</i>	<i>129828800</i>
<i>Investment in partnership firms</i>	<i>5189000</i>	<i>7384856</i>	<i>12573856</i>
<i>Advance recoverable</i>	<i>207024481</i>	<i>290860362</i>	<i>497884843</i>
<i>Advance paid to DLF Ltd.</i>	<i>11753416</i>	<i>11753416</i>	<i>23506832</i>
<i>Other advances</i>	<i>8162462</i>	<i>9407080</i>	<i>17569542</i>
<i>Total</i>	<i>297043759</i>	<i>384320114</i>	<i>681363873</i>
<i>Average additions- Utilization of funds:</i>			<i>340681937</i>
<i>Interest claimed as per book</i>			<i>1864608574</i>
<i>Amount of Disallowance u/s 36(1)(iii)</i>	<i>1864608574*340681937/20114300114 =</i> <i>31581435</i>		

4.3 Before the Ld. CIT(A), the assessee submitted that the issue in dispute was covered in favour of the assessee by the order of Ld. CIT(A) in earlier assessment years. It was also submitted that average of total interest-free fund (own funds) being share capital and reserve and surplus was of Rs. 336.19 crores as compared to average of loans and advances/investment of Rs. 34.07 crores. According to the assessee, the company had sufficient interest-free funds for making advances/investments. It was also submitted that advances/investment are part of the business activity and commercial expediency and same had been given/made wholly and exclusively for the purpose of the business only. It was submitted that investment in immovable property comprises of investment in golf land on which the assessee company has earned rental income. The investment in partnership firm M/S DLF South Point has been made to promote real estate in due course of business activities. The advance given to Mr. Pradeep Singh was for development of parking, which was wholly and exclusively for the purpose of the business. The advances given to DLF Ltd. were also in the nature of business advances. The Learned CIT(A) in the year under consideration followed the finding of her predecessor for assessment year 2012-13 and deleted the addition. Before us, the Learned DR has not disputed the contention of the learned Counsel of the assessee that identical disallowance has been deleted by the Tribunal in earlier years. We find that Tribunal in ITA No.1998/Del/2016 for assessment year 2011-12 has deleted the identical disallowance observing as under:

"5. We have heard the rival submissions and have also perused the material on record.. As far as the issue of disallowance of interest u/s 36(1)(iii) of the Act is concerned, we find that the Ld. CIT (A) has discussed the issue at length in paragraph 3.2 of the impugned order wherein he has given a categorical finding that the loans and advances include investment in immovable property which was part of the business activity of the assessee. It has been further recorded by the Ld. CIT (A) that the investment in the partnership firm was made exclusively for the purpose of the business. It has also been noted by the Ld. CIT (A) that the advances recoverable and forward- cover receivable included in the advances are business advances and have been given to suppliers with whom regular business transactions are under taken.. Similarly with respect to the advance given to DLF Ltd., the Ld. CIT (A) has noted that the same has also been given for the purpose of business. The Ld.. CIT (A) has also noted that apart from these advances, there were other advances also but on which interest has duly been charged by the assessee. The Ld. CIT (A) has also placed reliance on the judgment of the Hon'ble Apex Court in the case of S.A. Builders Ltd.. reported in 288 ITR 1 wherein the Hon'ble Apex Court had held that an expenditure may not have been incurred under any legal objection but yet it is allowable as a business expenditure if it was incurred on the grounds of commercial expediency. We note that the Hon'ble Apex Court has also observed that the expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The Ld. CIT (A) has also referred to the judgment of Hon'ble Delhi High Court in the case of CIT vs. Dalmia Cement (Pvt.) Ltd reported in 254 ITR 377 wherein it had been held by the Hon'ble High Court that once it was established that there was a nexus between the expenditure and the purpose of business, the revenue cannot justifiably claim to put itself in the armchair of the businessman and take up the role to decide as to how much is reasonable expenditure having regard to the circumstances of the case. Thereafter, the Ld. CIT (A) has given a categorical finding that in the instant case the loans and advances have been given on account of commercial expediency. The Ld. Sr. Departmental Representative could not point out any factual inaccuracy in the findings of the Ld. CIT (A) nor could she point out how the impugned order was not legally sustainable. Accordingly, we find no reason to interfere with the findings of the Ld. CIT (A) on this issue and we dismiss the grounds raised by the department."

4.3.1 The Hon'ble Delhi High Court in ITA 39/2019 rejected the appeal of the Revenue against the order of the Tribunal observing as under:

"5. The grounds of commercial expedience are now well established in tax jurisprudence. The

position of the CIT(A) and its affirmation by the ITAT are essentially based upon a fact appreciation that the assessee forewent interest. As to whether there was an element of sacrifice and if so, for what purpose, is not for the Court to consider, given that the loans obtained by the assessee were for its business purposes.

6. There is nothing on record to dispel/undermine the findings of the lower Appellate Authorities that commercial expediency dictated the nature of the transactions."

4.3.2 In assessment year 2012-13 also the Tribunal in ITA No. 4156/Del/2017 has deleted the disallowance observing as under:

"11. The assessee is in the business of real estate, entertainment & power generation and the loans & advances include investments in the property business of the assessee. Hence, it can be said that the advances recoverable included the advances which are business advances on which no interest is disallowable. It was also part of the record that another advances interest has been charged by the assessee as found out by the ld. CIT (A) on going through the Schedule 17 of the balance sheet. Since, the loans & advances have been given on account of commercial expediency and notional interest can be charged on such advances or interest can be disallowed u/s 36(1)(iii). In the case of Taparia Tools Vs JCIT CA No. 6366 of 2003, the Hon'ble Apex Court observed that while examining the allowability of deduction, the Assessing Officer is to consider the genuineness of the business borrowings and that the borrowings was further purpose of business and genuine. Once, the genuineness is proved and interest is paid on the borrowings, no interest can be disallowed on the grounds that the assessee has not correctly used the amounts borrowed. Further, the Hon'ble Apex Court in the case of SA Builders held that in case of interest bearing loans taken and interest free advances given, what is to be looked into is the measure of "commercial expediency" and "for the purpose of the business". Hence, keeping in view the facts of the case and legal prepositions laid down on this aspect of allowability of interest u/s 36(1)(iii), we hereby decline to interfere with the order of the ld. CIT (A). The appeal of the revenue on this ground is dismissed."

4.4 We find from the order of the Assessing Officer that most of the investments/advances are continued from last year i.e. assessment year 2012-13, wherein the Tribunal (supra) has deleted the disallowance under section 36(1)(iii) of the Act on the ground that advances/interest free loans have been given for business purposes in view of the commercial expediency. The facts of the year under consideration are also identical to facts of the case for assessment year 2011-12. In view of the above, respectfully following the decision of the Tribunal (supra) and decision of the Hon'ble Delhi High Court (supra), we do not find any infirmity in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground of the appeal of the Revenue is accordingly dismissed.

5. In ground No. 2, the Revenue has raised objection against restricting disallowance under section 14A of the Act to Rs. 21,95,216/- as against disallowance of Rs. 40,06,714/- made by the Assessing Officer.

5.1 Before us, the learned DR relied on the order of the Assessing Officer.

5.2 The learned Counsel of the assessee, on the other hand, submitted that in view of the decision of the Hon'ble Delhi High Court in the case of Joint Investment Private Limited Vs. CIT, passed in ITA No. 117/2015 (order dated: 25.02.20215), the disallowance has been restricted to the exempted income and, therefore, the order of the Ld. CIT(A) might be upheld.

5.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The Assessing Officer noticed that average of investment in equity shares during the year was of Rs. 5,52,00,000/-, however, no disallowance was made by the assessee for earning

exempt income. After recording dissatisfaction over the accounts of the assessee, the Assessing Officer invoked rule 8D of the Income-tax Rules, 1962 [in short 'the Rules'] and made disallowance of Rs. 40,06,740/-. Though the Ld. CIT(A), upheld that the Assessing Officer has recorded sufficient reasons for computing disallowance under section 14A of the Act, however, she restricted the disallowance to Rs. 21,95,216/-. Before us, the Learned Counsel of the assessee has relied on the decision of the Hon'ble Delhi High Court in the case of Joint Investment Private Ltd. (supra) wherein the disallowance has been restricted to the quantum of exempted income earned by the assessee in the relevant year. Before the Assessing Officer, the assessee mentioned that share of profit from partnership firm amounting to Rs. 21,95,216/- was claimed as exempt and Ld. CIT(A) has also restricted the disallowance to this amount. Respectfully, following the decision of the Hon'ble Delhi High Court as cited by the Learned Counsel of the assessee, we direct the Assessing Officer to restrict the disallowance under section 14A of the Act to the quantum of exempted income earned by the assessee during the year under consideration. Accordingly, the ground of the appeal of the Revenue is dismissed.

6. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 30th July, 2021.

Customized Notes

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