

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH ‘A’

BEFORE SHRI RAJPAL YADAV, VICE-PRESIDENT
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No.2024/Ahd/2018

Asstt.Year : 2015-16

Addlife Investments P.Ltd. 1 st Floor, Viral House Nr.JBR Corporate House Sidhu Bhuvan Road Bodakdev, Ahmedabad 380 054. PAN : AAMCA 1664 K	Vs	ITO, Ward-1(1)(1) Ahmedabad.
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri A.C. Shah, AR
Revenue by :	Shri S.S. Shukla, Sr.DR

सुनवाई की तारीख/Date of Hearing : 09/09/2021

घोषणा की तारीख /Date of Pronouncement : 30/09/2021

ORDER

PER RAJPAL YADAV, VICE-PRESIDENT: Assessee is in appeal before the Tribunal against order of the Id.CIT(A)-1, Ahmedabad dated 20.8.2018 passed for the Asstt.Year 2015-16.

2. The assessee has raised the following two grounds:

- i) *The learned CIT(A) has erred in confirming the preliminary expenses of Rs. 25,59,701 under Section 35D instead of claim of expenditure of Rs. 26,42,282 being 1/5th total preliminary expenses of Rs. 1,32,11,408 eligible for deduction under Section 35D(1) in as much as the learned AO has misappreciated the facts and that the assessee is eligible to claim deduction of Rs. 26,42,282 being 1/5th total preliminary expenses of Rs. 1,32,11,408.*
- ii) *The learned CIT(A) has erred in not treating the interest of Rs. 14,09,68,423 as capital expenditure in as much as the interest paid is for*

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the acquisition for the shares and therefore the interest paid on such acquisition of shares is a capital expenditure and that the learned AO has misappreciated the facts."

3. Facts in brief are that assessee is an investment company. It has filed its return of income on 22.9.2015 declaring total income of Rs.3,33,740/-. The return was processed under section 143(1) of the Act, and thereafter the same was taken up for scrutiny assessment under section 143(3) for limited purpose by issuance of notice under section 143(2) of the Act on 19.9.2016, which was served upon the assessee. During the course of assessment proceedings, it was observed by the AO that the assessee has claimed deduction of Rs.26,42,282/- under section 35D of the Income Tax Act, 1961 being 1/5th of amortization of preliminary expenses. By show cause notice, the Id.AO sought details of claim of preliminary expenses which had been amortized during the year under consideration and as to why deduction of Rs.26,42,285 incurred towards increase of authorized capital should not be disallowed, as the same was capital in nature. The assessee filed a detailed reply dated 15.12.2017, in which it has given a detailed break-up of preliminary expenses of Rs.1,32,11,408/-, which the Id.AO noted in page no.2 and 3 of the assessment order. It was explained by the assessee that the main object of the assessee-company was to carry on the business as Core Investment Company and to invest in group companies. The assessee company was registered on 28.11.2013 with authorized share capital of Rs.3.00 crores and incurred expenses of Rs.4,12,908/- at the time of registration of the company. Thereafter, on 18.12.2013 authorised capital was increased to Rs.211 crores by incurring expenses of Rs.1,27,98,500/-. In effect the assessee has incurred a total

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expenditure of Rs.1,32,11,408/-. Thus, as per the assessee subsequent increase in the authorized capital was the part of initial registering activity, and therefore, the preliminary expenses such as stamp duty and form filing fees with ROC are eligible for deduction under section 35D of the Act, and for that purpose, the assessee was eligible to amortize 1/5th of preliminary expenses for the purpose of commencement of business or investing in core investment company. The Id.AO however, did not accept the submissions of the assessee. He held that expenses for increasing authorized share capital and stamp duty for allotment of shares were incurred after the date of incorporation, which as per provision of section 35D of the Act do not allow, because there was no mention of such expenditure in any provisions of the section 35D. He, accordingly, and after following the order of the CIT(A) for the preceding assessment 2014-15 on similar issue, rejected claim of the assessee for amortization of Rs.1,27,98,500/-, but allowed only an amount of Rs.4,12,908/- being the expenses incurred at the time of registration of the assessee-company to be amortized; thus the Id.AO allowed Rs.82,581/- being 1/5th of Rs.4,12,908/-. In other words, the Id.AO has rejected the remaining amount of Rs.25,59,701/- (Rs.26,42,282/- minus Rs.82,581/-). Dissatisfied with order of the I.AO, the assessee went in appeal before the Id.CIT(A). Before the Id.CIT(A) it was submitted by the assessee that though the AO has accepted in principle that the assessee was eligible for deduction of preliminary expenses incurred at the time of registration of the Company, but the claim of the assessee was rejected on the ground that the preliminary expenses incurred for increase of authorized capital after the incorporation of the company. It was submitted that business of the

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company has commenced from the date of passing of the resolution dated 17.12.2013 i.e. within 20 days from the date of incorporation on 28.11.2013 to invest in the shares to the tune of Rs.305 cores. The company was incorporated on 28.11.2013 for the purpose of investment in Core Investment Company, and this object was achieved by investing as CIC in Sterling Addlife India P.Ltd. Therefore, even the subsequent increase in the authorized share capital was the part of initial registering activity and therefore the preliminary expenses such as stamp duty and form filing fees with ROC are eligible for deduction under section 35D of the Act. He submitted that as per the provisions of section 35D the expenses for registering the company does not mean that the expenses incurred at the time of incorporation, but also the expenditure incurred for registering the company for compliance of other formalities for the purpose of commencement of business. In the instant case, the assessee has commenced the business for the first time by investing Rs.305 cores in shares of Sterling Addlife India Ltd., and therefore, the expenditure incurred for ROC and stamp duty was only for the purpose of commencement of business, and that the only difference was that the expenditure was incurred not only in one stage but in two stages i.e. on 28-11-2013 and on 18-12-2013 when the authorized share capital was increased for the purpose of investment Rs.305 cores in the shares of Sterling Addlife, and the said provision has not envisaged that only expenditure incurred for incorporation/registration, but also to the expenditure incurred for increase of authorized capital at the time of commencement of business. However, the Id.CIT(A) did not satisfy with the explanation of the assessee. He observed that fees for registering the company has been covered in section 35D(2)(c) only

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allows the fees which were paid for register the company but not for fees paid for subsequent increase of authorized share capital after the incorporation of the company. Therefore, the expenditure incurred by the assessee was capital in nature, which does not come under general provisions of section 37 or under the specific provisions of section 35D of the Act. The Id.CIT(A) accordingly confirmed order of the AO. Aggrieved by the action of the Revenue authorities, the assessee is now before the Tribunal.

4. Before us, the Id.counsel for the assessee reiterated the submissions as were made before the Id.Revenue authorities. He further submitted that similar issue has arisen in assessment year 2014-15 and both Revenue authorities rejected the claim of the assessee. When the issue went upto the Tribunal, the Tribunal in ITA No.2053/Ahd/2017 and others by holding that incorporation/registration of a company does not mean that the assessee has commenced business activities, and the business activities of a company seems to be commenced only after doing the transaction for which it was established. In the instant case, expenses incurred for increasing the share capital was before the commencement of the assessee-company, and therefore, they are covered under the provisions of section 35D of the Act. Accordingly, the ITAT allowed the claim of the assessee. Since facts are exactly same with that of preceding assessment year, such of the assessee in this year as well should be allowed. The Id.counsel for the assessee placed on record copy of the order of the Tribunal dated 1.6.2020. On the other hand, the Id.DR supported the orders of the Revenue authorities.

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5. We have gone through the record and material available on record. We also gone through order of the Tribunal in the assessee's own case in ITA No.2053/Ahd/2017 order dated 1.6.2020. We find that the issue whether claim in respect of deduction under section 35D of the Act incurred towards increase of authorized share capital is allowable or not, has been agitated before the Tribunal by the assessee in preceding assessment year i.e. 2014-15. The Tribunal vide order dated (supra) allowed claim of the assessee. The ground raised by the assessee in that appeal exactly the same as that of the year under consideration. Therefore, in order to decide the issue on hand, we reproduce the ground raised in that and finding of the Tribunal on the issue as under:

Ground No.2

“2. The learned CIT(A) has erred in holding that Section 35D is not applicable on the facts of the case and thereby as erred in disallowing the amortization of 1/5th preliminary expenses under Section 35D by placing reliance on certain decisions in as much as the assessee is eligible to claim deduction under Section 35D as per the ratio laid down in the decisions relied by the assessee reproduced in the submission to CIT(A) and that the decision relied by the CIT(A) are not applicable on the facts of the case.”

Finding:

“19. We have heard the rival contentions of both the parties and perused the materials available on record before us. Admittedly, the assessee company was incorporated on 28th November 2013 with the object of making the investment in another company. The 1st investment was made by the assessee by acquiring the shares of Sterling Addlife Pvt. Ltd. for a value of Rs. 305 crores. Thus the business of the assessee commenced only upon the acquisition of the shares of such company. As such the registration of the company and the commencement of the business of the assessee are 2 different things. The incorporation/registration of a company does not mean that the assessee has commenced business activities. In fact the business activities of the assessee company commences only after doing the transaction for which it was established. Thus in such a situation, we are of the view that the activity of the assessee commenced upon the acquisition of the shares of the company as discussed above. Thus the expenses incurred by the assessee as specified under the provisions of section 35D of the Act, before the commencement of the business are eligible for deduction. The relevant provisions of section 35D of the Act reads as under:

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35D. (1) Where an assessee, being an Indian company or a person (other than a company) who is resident in India, incurs, after the 31st day of March, 1970, any expenditure specified in sub-section (2),—

- (i) before the commencement of his business, or
- (ii) after the commencement of his business, in connection with the extension of his 92 [***] undertaking or in connection with his setting up a new 92 [***] unit,

the assessee shall, in accordance with and subject to the provisions of this section, be allowed a deduction of an amount equal to one-tenth of such expenditure for each of the ten successive previous years beginning with the previous year in which the business commences or, as the case may be, the previous year in which the extension of the 92 [***] undertaking is completed or the new 92 [***] unit commences production or operation :

93 [Provided ***** (2) The expenditure referred to in sub-section (1) shall be the expenditure specified in any one or more of the following clauses, namely :—

(a) expenditure in connection with—

- (i) preparation of feasibility report;
- (ii) preparation of project report;
- iii) conducting market survey or any other survey necessary for the business of the assessee;
- (iv) engineering services relating to the business of the assessee

Provided that the work in connection with the preparation of the feasibility report or the project report or the conducting of market survey or of any other survey or the engineering services referred to in this clause is carried out by the assessee himself or by a concern which is for the time being approved 94 in this behalf by the Board;

(b) legal charges for drafting any agreement between the assessee and any other person for any purpose relating to the setting up or conduct of the business of the assessee;

(c) where the assessee is a company, also expenditure—

- (i) by way of legal charges for drafting the Memorandum and Articles of Association of the company;
- (ii) on printing of the Memorandum and Articles of Association;
- (iii) by way of fees for registering the company under the provisions of the Companies Act, 1956 (1 of 1956) 94a ;
- (iv) in connection with the issue, for public subscription, of shares in or debentures of the company, being underwriting commission,

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brokerage and charges for drafting, typing, printing and advertisement of the prospectus;
(d) *such other items of expenditure (not being expenditure eligible for any allowance or deduction under any other provision of this Act) as may be prescribed.*

It is a fact on records that the expenditure in connection with the increase in authorized share capital was incurred before the commencement of the business. Therefore we hold that the assessee is eligible for deduction of the impugned expenditure under the provisions of section 35D of the Act. In view of the above, we set aside the finding of the learned CIT (A) and direct the AO to allow the claim of the assessee. Hence the ground of appeal of the assessee is allowed.”

6. A perusal of the ground and finding of the Tribunal reproduced above, where one of us (AM) is author of that order, no inconsistency was pointed out by the Id.DR in that decision so that we can take a contrary view in the case on hand. Therefore, following the judicial precedent, we allow the claim of the assessee in this year as well, and ground no.1 of the assessee's appeal is allowed.

7. Coming to ground no.2, wherein the assessee has aggrieved by the action of the Id.CIT(A) in not treating the interest expenditure as capital expenditure.

8. A brief facts of the case in this regard are that, during the assessment proceedings, the Id.AO noticed that the assessee has deducted interest expenditure of Rs.14,10,28,423/- in the profit & loss account, which assessee has *suo moto* disallowed under section 37 in the computation of income from business or profession. As per the assessee, investments were made from borrowing from banks and own funds, and these were in nature of capital assets and not business assets. Assessee has accordingly capitalized interest expenditure to the cost of

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investment. The Id.AO has sought explanation from the assessee as to why interest expenditure has been capitalized with the cost of investments. It was explained by the assessee that has invested Rs.305 crores in shares of Sterlig Addlife Inida Ltd. out of loan taken from Kotak Mahindra Bank Ltd. and an amount of Rs.14,09,68,423/- was paid to the said bank towards interest expenditure on the said loan. It further explained that the assessee has acquired the shares as capital assets and not as business assets, and therefore, the same was not covered under section 36(1)(iii) but under section 48 and therefore, cost of acquisition included the interest paid on borrowing used for the purpose of acquisition of capital assets. Assessee accordingly capitalized the interest on borrowing utilized for the purpose of investment in shares, and disallowed such interest in the computation of income. After going through the submissions of the assessee, the Id.AO has taken a different view in the matter. The Id.AO observed that inclusion of interest expenditure incurred in post acquisition in the cost of acquisition of shares would give rise to analogous situation, whereby there would be artificial increase of cost of acquisition of the investments, and would result in incorrect and invalid indexation at the sale of capital assets, and the correct treatment would be capitalize the interest cost and other related finance only upto the date of acquisition of investments in the value of the investment. In the instant case, since the financial cost was incurred post-acquisition, the same should be accounted year to year basis as revenue expenditure. He accordingly disallowed the claim of the assessee for capitalization of interest of Rs.14,09,68,423/- of the Act. Aggrieved assessee went in appeal before the first appellate authority. However, the Id.CIT(A) after a detailed discussion neither allowed the

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claim of the assessee as capital expenditure on the ground that the same was post-acquisition expenditure, nor allowed to treat the same as revenue expenditure, because, shares are not purchased/acquired for the business purpose. Dissatisfied with order of the Revenue authorities, the assessee is now before the Tribunal.

9. Before us, the ld.counsel for the assessee reiterated submissions made before the Revenue authorities. He further submitted in the assessment year 2014-15, similar claim was made, but both the Revenue authorities rejected the claim of the assessee. Thereafter, the assessee went in appeal before the Tribunal in ITA No.2053/Ahd/2017 and others, the Tribunal vide order dated 1.6.2020 has allowed the claim of the assessee. Therefore, since the facts and circumstances being same, impugned claim of the assessee in this year should also be granted. The ld.counsel has placed on record copy of the Tribunal cited above. On the other hand, the ld.DR supported orders of the Revenue authorities.

10. We have considered rival submissions and gone through the material available on record, as also, order of the Tribunal passed in the assessee's own case for Asstt.Year 2014-15. We find that similar claim made by the assessee in the preceding year was allowed by the Tribunal vide order dated 1.6.2020 (supra), which was not disputed by the ld.DR. The ground raised by the assessee in the A.Y.2014-15 and relevant part of the Tribunal's order read as under:

Ground:

"1. The learned CIT(A) has erred in holding that the interest of Rs. 1,61,81,506 incurred for the acquisition of shares is not the part of cost of capital asset by placing the reliance on certain decisions in as much as the interest on borrowing utilized for the purpose of acquisition of shares is part of cost of the shares as held by the

decisions relied by the assessee in the submission which is reproduced in the appellate order and that the learned CIT(A) failed to appreciate the ratio laid down in the decisions relied upon by the assessee) and that the decision relied by the CIT(A) are not applicable on the facts of the case.”

Findings of the Tribunal:

10. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, the assessee in the present case is an Investment Company and it can earn two types of income out of such investment i.e. on transfer of such investments which is chargeable to tax under the head capital gain and the dividend income under the head income from other sources but the same has been exempted under section 10(34) of the Act. It is a fact on record that interest cost has been incurred by the assessee on the money borrowed which was utilised for the purpose of the investments. The AO in his order held that the impugned interest expenses can be allowed as revenue in nature whereas the learned CIT (A) reversed the finding of the AO by holding that such expenditure cannot be treated as revenue in nature. The relevant finding of the learned CIT (A) reads as under:

“It is observed that as per provisions of section 36(1)(iii) of the Act, interest payable in respect of capital borrowed for the purpose of business is allowable expenditure but in present case, as appellant has not acquired shares for the purpose of its business, hence such interest cannot be allowed as revenue expenditure. Thus, appellant was correct in making disallowance of such expenditure while filing return of income and to that extent, AO's observation that income of current assessment year is required to be reduced cannot be accepted and AO is directed to disallow above interest expenditure while computing taxable income of current year.

The above finding of the learned CIT (A) has not been challenged by the revenue. Thus it is transpired that the finding of the learned CIT (A) has reached to its finality. Now the question arises for the treatment of such interest expenditure in the books of accounts of the assessee. There is no dispute to the fact about the incurrance of such expenditure by the assessee directly attributable to the investments. From the preceding discussion we note that the learned CIT (A) on one hand has not allowed to be treated such expenditure as revenue in nature and on the other hand he has not allowed the same to be capitalized. In our considered view, such finding of the learned CIT (A) is contrary to the provisions of Act. Accordingly we disagree with the finding of the learned CIT (A).

11. In our considered view, once the assessee has been held as Investment Company, then the interest expenses directly attributable to such investments required to be capitalized. In this regard we find support and guidance from the judgement of Hon'ble Madras High Court in the case of CIT versus Trishul Investments Ltd reported in 305 ITR 434 wherein it was held as under:

As per the memorandum of association of the assessee company, it could be seen that the assessee company was incorporated on 24-1-1995 under the Companies Act, 1956 to engage in the business of investment. The finding

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given by the Tribunal was that the assessee had no intention to trade in shares. Hence, the purchase of shares could not be business asset in the hands of the assessee. The assessee had rightly offered the same under the head 'Capital gain'. The Tribunal also correctly arrived at a conclusion that it was only an investment activity and held that the profit derived from the sale of shares was subject to capital gain. The reasons given by the Tribunal were based on valid materials and evidence and there was no infirmity in the order of the Tribunal. Moreover, the interest paid for acquisition of shares would partake character of cost of share and, therefore, the same was rightly capitalized along with the cost of acquisition of shares."

The principles laid down by the Hon'ble Madras High Court in the case cited above are directly applicable to the present facts of the case. Therefore, we are of the view that the impugned interest expenses needs to be capitalized.

Before parting, it is also pertinent to note that the authorities below and the assessee has referred to many cases which are recorded in the respective orders but we do not find any reason to deal with all of them individually for the sake of brevity and convenience but suffice to hold that the principles laid down in the case of Trishul Investment Limited (supra) are directly applicable in the present facts of the case. Hence the ground of appeal of the assessee is allowed."

11. The facts and circumstances as mentioned in the above order remain the same in the present year as well, therefore following the decision of the Tribunal, we allow claim of the assessee for capitalization of interest expenditure on the money borrowed from the bank for investment in post-acquisition of shares.

12. In the result, appeal of the assessee is allowed.

Pronounced in the Open Court on 30th September, 2021

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

**Sd/-
(RAJPAL YADAV)
VICE-PRESIDENT**

Ahmedabad; Dated, 30/09/2021