IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH MUMBAI

BEFORE MS KAVITHA RAJAGOPAL, JUDICIAL MEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No. 775/MUM/2024
Assessment Year: 2015-16

Deepak N Sippy, Bunglow No.01, Priyanka Apartment, S.T. Road, Opp. Atur Park, Chembur, H.O., Mumbai – 400 071 (PAN : BIOPS8598E)	Vs.	Assistant Commissioner of Income Tax – 27(1), Mumbai
(Appellant)		**(Respondent)**

Present for:

Assessee : Dr. Gopalakrishna, CA
Revenue : Smt. Mahita Nair, Sr. DR

Date of Hearing : 20.06.2024
Date of Pronouncement : 30.08.2024

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A), 58, Mumbai, vide order no. ITBA/APL/S/250/2023-24/1059659559(1), dated 12.01.2024 passed against the assessment order by Assistant Commissioner of Income Tax-27(1), Mumbai, u/s. 143(3) of the Income-tax Act (hereinafter referred to as the "Act"), dated 18.12.2017 for Assessment Year 2015-16.

2. In the grounds of appeal assessee has contested the disallowance of Rs.33,45,313/- as a proportion of the total brokerage paid of Rs.50,00,000/- for the realisation of investment principal of Rs.1,73,12,500 and the interest realised thereon of Rs.85,63,262/- which was claimed as a deduction u/s. 57 (iii), being expense incurred wholly and exclusively to earn the said income.

3. Brief facts of the case are that assessee filed his return of income on 11.07.2015, reporting total income at Rs.45,77,520/- which included interest income of ₹ 85,63,262/- where from a deduction of ₹ 51,66,936/- was claimed u/s. 57 of the Act. This deduction comprised of an amount of Rs. 50,00,000/- paid as brokerage in order to recover investment made by the assessee in a project of M/s. Concrete Builders. The builder had failed to commence the project and had also refused to return the money due to which the assessee had to take the services of group of brokers.

3.1. In the course of assessment proceedings, ld. Assessing Officer enquired from the builder about the said transaction which was confirmed in the statement recorded by him. According to the builder, the project in which the assessee had invested was cancelled due to non-receipt of necessary permissions from the government which therefore required it to refund the money paid by the assessee for booking the property in the said project. Ld. Assessing Officer had summoned the brokers also who appeared before him and confirmed about the transaction for which copies of memorandum of understanding entered into, between the brokers and the assessee was placed on record. Copies of bank statements were also furnished,

evidencing payment of brokerage by the assessee as per the memorandum of understanding to the brokers who were engaged and responsible for obtaining the refund of amount due from the builder. Statements recorded by the ld. Assessing Officer in the course of assessment proceedings were made available to the assessee for cross-examination.

3.2. After considering the submissions of the parties and their statements, ld. Assessing Officer noted that assessee had paid a brokerage of Rs.50,00,000/- for securing refund of the entire money invested by him in the project of M/s. Concrete Builders. The refund of money included two components, namely, principal amount of Rs. 1,73,12,500/- and the interest component of Rs.85,63,262/- thereon. According to the ld. AO, the brokerage of ₹ 5 0,00,000/- paid by the assessee relates to both the amounts, i.e., for the principal component and for the interest component which were secured for obtaining the refund from the builder through the brokers. Thus, a show cause notice was issued to the assessee to justify why the proportional brokerage paid towards the principal amount should not be disallowed. Ld. AO completed the assessment by disallowing the portion of brokerage paid by the assessee out of Rs.50,00,000/-, i.e., Rs.33,45,313/-, by holding that the payment was made towards both the principal and interest recovery. Therefore, assessee is eligible to claim deduction u/s.57(iii) only in respect of the interest income offered to tax. Aggrieved by this disallowance on a proportional basis assessee went in appeal before the ld. CIT(A).

4. Before the ld. CIT(A), assessee reiterated his submissions along with detailed explanations and corroborative documentary evidences. Details of refund received by the assessee from the builder is tabulated below:

Date	*Net amount Received (Rs)*	*Particulars*
12.05.2014	*1,00,00,000*	*The total amount includes full interest of Rs 85,63,262/- after deducting TDS of Rs 8,56,326/- net interest is Rs. 77,06,936/-*
26.02.2015	*50,00,000*	
27.02.2015	*50,00,000*	
05.03.2015	*50,19,436*	

5. Assessee explained that after the receipt of full amount of principal and interest from the builder as tabulated above, he paid brokerages to Shri Sushil V Raheja and his associates as per the terms and conditions agreed under the memorandum of understanding, totalling to 50 lakhs. Assessee submitted that genuineness and bonafide of the amount of brokerage paid by the assessee is not in dispute as the same has been accepted by the ld. Assessing Officer in para 9 of the impugned assessment order, after considering the submissions of all the concerned parties and their statements recorded by him in the course of assessment. It was also submitted that payment of brokerage by the assessee is not in the nature of payment specifically disallowable u/s. 58 of the Act. Assessee also submitted that section 57 provides for such expenditure which is wholly and exclusively laid out or expended for earning such income. The said section does not provide for such expenditure to be partly allowed by adopting certain proportionality based on assumption which is incorrect and not in accordance with the

provisions contained in the said section but as per personal surmises and conjectures.

5.1. Assessee placed reliance on several decisions to buttress his contentions. He also placed reliance on the decision in the case of Virmati Ramkrishna vs. CIT (1981) 131 ITR 659 (Guj) which laid down the principles in respect of claim of deduction of expenditure u/s. 57 of the Act. Ld. CIT(A) also reproduced the principles laid down by the Hon'ble Gujarat High Court in the case of Virmati Ramakrishna (supra). He considered the submissions made by the assessee and reproduced the contents of the memorandum of understanding entered into by the assessee with the broker. He also extracted the relevant portion of the statement recorded by the ld. AO of the broker wherein it was acknowledged about the said transaction. Ld. CIT(A) sustained the disallowance made by ld. AO by adopting a proportional amount of brokerage towards getting back refund of the principal amount. We note that while holding so, there is no discussion on the applicability of the decision of Hon'ble Gujarat High Court and other judicial precedents. Aggrieved, assessee is in appeal before the Tribunal.

6. Before us, ld. Counsel for the assessee reiterated the above narrated facts and circumstances of the case and referred to the documentary evidences which are placed on record in the paper book. At the outset, we note that the genuineness and bonafide of the transaction of payment of brokerage by the assessee is not in dispute. The dispute is on the disallowance made by the ld.AO by splitting this amount of ₹ 50 lakhs paid by the assessee as a lumpsum payment into two parts by allocating a portion towards receipt of refund of principal amount and a portion towards receipt of interest thereon

from the builder. Assessee has received principal amount of Rs.1,73,12,500/- and gross interest of Rs.85,63,262/- as a recovery from the builder. Interest has been offered under the head 'income from other sources' from which deduction of Rs.50 lakhs paid towards brokerage has been claimed u/s. 57(iii). According to the ld. AO, only a portion of this, i.e., Rs.16,54,657/- is allowable against the said interest income.

7. Assessee has claimed that he has paid the brokerage under clear and specific understanding that he shall receive the full amount due from the builder which will include both the principal amount as well as the interest there on. The amount of brokerage agreed between the two parties is a lumpsum amount of ₹ 50 lakhs which is wholly and exclusively paid for recovering the total amount due from the builder. We have perused the terms of memorandum of understanding as reproduced by ld. CIT(A) in para 6.1.2.and note that the services agreed to be received by the assessee from the brokers is for getting the refund of amount from M/s. Concrete Builders which is due to the assessee. Against this service, assessee agreed to pay a sum of Rs. 50 lakhs as brokerage and for getting the deal settled between the assessee and the Builder. The consideration agreed upon is not in terms of percentage of the amount recovered by the brokers from the builder. We note that it is a lumpsum amount agreed to at Rs. 50 lakhs, for the recovery of entire amount from the builder due to the assessee. The said agreed consideration is not bifurcated in the memorandum of understanding towards recovery of principal and interest, separately.

8. We delve into the provisions of section 57 to note that it allows deduction from the income chargeable under the head 'income from other sources' towards expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income. Amounts not deductible are provided u/s. 58 which do not apply in the present case before us. We have also perused the principles enunciated by the Hon'ble Gujarat High Court in the case of Virmati Ramakrishna (supra) which are reproduced in the order of ld. CIT(A) in para 6.1.3. The same are extracted below for ease of reference.

(i) in order to decide whether an expenditure is a permissible deduction under s. 57(ii), the nature of the expenditure must be examined;

(ii) the expenditure must not be in the nature of capital expenditure or personal expenses of the assessee,

(iii) the expenditure must have been laid out or expended wholly and exclusively for the purpose of making or earning "income from other sources"

(iv) the purpose of making or earning such income must be the sole purpose for which the expenditure must haves been incurred, that is to say, expenditure would not have been incurred for such purpose as also for another purpose, or for a mixed purpose,

(v) the distinction between purpose and motive must always be borne in mind in this connection, for, what is relevant is the manifest and immediate purpose and not the motive or personal considerations weighing in the mind of the assessee in incurring the expenditure;

(vi) if the assessee has no option except to incur the expenditure in order to make the earning of the income possible, such as when he has to incur legal expense for preserving and maintaining the source of income, then, undoubtedly, such expenditure would be an allowable deduction; however, where the assessee has an option and the option which he exercises has no connection with the making or earning of the income and the option depends upon personal considerations or motives of the assessee, the expenditure incurred in consequence of the exercise of such option cannot be treated as an allowable deduction;

(vii) it is not necessary, however, that the expenditure incurred must have been obligatory, it is enough to show that the money was expended not of necessity and with a view to an immediate benefit to the assessee but voluntarily and on the ground of commercial expediency and in order indirectly to facilitate the making or earning of the income,

(viii) if, therefore, it is found on application of the principles of ordinary commercial trading that there is some connection, direct or indirect, but not remote, between the expenditure incurred and the income earned, the expenditure must be treated as an allowable deduction;

(ix) it would not, however, suffice to establish merely that the expenditure was incurred in order indirectly to facilitate the carrying on of the activity which is the source of the income, the nexus must necessarily be between the expenditure incurred and the income earned,

(x) it is not necessary to show that the expenditure was a profitable one or that in fact income was earned,

(xi) the test is not whether the assessee benefited thereby or whether it was a prudent expenditure which resulted in ultimate gain to the assessee but whether it was incurred legitimately and bona fide for making or earning the income,

(xii) the question whether the expenditure was laid out or expended for making or earning the income must be decided on the facts of each case, the final conclusion being one of law"

9. From the above, we note that the manifest and immediate purpose of making the payment of Rs.50 lakhs by the assessee was to receive back the full amount due to the assessee from the Builder, which was under very specific and clear understanding. From the principles enunciated by the Hon'ble Gujarat High Court in the case of Virmati Ramakrishna (supra), we find that the expenditure incurred by the assessee is for the sole purpose of recovering the amount due by him from the Builder. Assessee had no option except to incur the expenditure in order to make possible the recovery of the amount including earning of income in the form of interest on the principal amount. The expenditure incurred has been laid out and expended wholly and exclusively for the purpose of recovering the amount including the income in the form of interest duly reported under the head 'income from other sources'. Expense incurred is neither in the nature of capital expenditure nor in the nature of personal expenses of the assessee. It is also important to note that the payment of Rs.50 lakhs is a lumpsum payment made by the assessee in terms of

memorandum of understanding where there is no bifurcation or split of this expenditure relating to recovery of principal and recovery of interest, both of which were due to be received from the Builder by the assessee, nor it is linked on a percentage basis depending upon the quantum of recovery out of the total due.

10. We note that genuineness and bonafide amount of brokerage paid by the assessee is not in dispute but the disallowance out of this made at Rs.33,45,313/- in the proportion of ratio of principal and interest received by the assessee from the Builder is contested by the assessee before us, which is not in consonance with the provisions contained in section 57(iii) of the Act. There is nothing enabling contained in the said section allowing the ld. AO to estimate the incurring of expenditure towards the income reported by the assessee under the head 'income from other sources' from which the said deduction is claimed. Once it is established that the expenditure has been incurred wholly and exclusively for the purpose of earning such income and it is not in the nature of capital or personal expenses or not covered by section 58 of the Act, the same is allowable. It is merely incidental that part of the money recovered is subjected to tax and part of it is not.

10.1. Section 57 provides for allowing such expenditure which is wholly and exclusively laid out or expended for the purpose of earning such income. It does not provide for such expenditure to be partly allowed on an estimation basis if in the opinion of the Assessing Officer, the expenditure is partly laid out or expended for earning such income. The ld. AO cannot have presumption that exemption of expenditure is partly laid out or expended for earning the income.

10.2. We need to look at the entire transaction as a whole and not to adopt a dissecting approach. On this aspect, Hon'ble High Court of Gujarat in the case of Atir Textile Industries (P.) Ltd. vs DCIT [2015] 55 taxmann.com 380 (Guj) held in para 12 and 13 as under:

> *"12. .....In nutshell, while considering the case to extend benefit under Section 157(iii) of the Act, the competent authority is within its right to find out the legal nature of transaction and for that purpose, it may lift the veil but while doing so, the competent authority has to consider the transaction as a whole and for that reason, the competent authority cannot split the transaction in more than one part and select any particular part so as to say that such part is illegal or illegitimate or impermissible and deny to extend benefits under Section 57(iii) of the Act.*
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> *13. .....So, it appears that the Revenue splitted the transactions in such a manner that it upheld the genuineness of borrowing, payment and receipt of interest but when question of considering payment of additional interest of 6.5% came into consideration, it termed the said part of transaction as colourable device/tax planning. So, the question is whether the Revenue can split the transaction in the manner it did so. It is true that the Court cannot re-examine/re-appreciate the findings of fact recorded by the Tribunal but as a matter of fact, after splitting transaction, as done in the case on hand, the Tribunal was required to term/treat the entire transaction as a whole colourable device. Had it been so, the matter would stand on different footing. In our opinion, the Tribunal cannot split the transaction into two parts or more. For that purpose, we made searching inquiry from learned advocate Mr.Bhatt to show any provision of law under the Act or precedent which empowers the Revenue to split transaction into two or more parts and then to hold any one particular part of said transaction as legal/permissible/admissible and other part of the same transaction being colourable device. Learned advocate Mr.Bhatt could not lay his finger on any provision/precedent which empowers the Revenue to do so. So, once the primary transaction of lending, borrowing and passing of payment of interest is found to be genuine, merely because it resulted into equal amount of income, it would not become a colourable device and consequently earning any disqualification."*
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> [emphasis supplied by us by underline]

11. We also note that ld. AO ignored that assessee had other legal recourse to recover the principal amount from the Builder. However, in order to recover not only the principal amount but also the interest thereon from the Builder, assessee took up the matter by availing the services of the brokers and their associates by agreeing to pay them a lump sum amount of ₹ 50 lakhs which ultimately resulted into the recovery of the entire amount including the principal and interest thereon. Assessee has duly offered the interest component as income in his return under the head 'income from other sources' and has thus claimed a deduction of 50 lakhs plus other expenses, from the said interest income which was received by him only after the services of the brokers. Accordingly, the balance of convenience is in favour of the assessee and thus the deduction of claim of Rs.50 lakhs from the interest income of Rs.85,63,262/- offered in the return by the assessee is justified.

11.1. We note that implication of section 57(iii) is narrower by the use of the expression "for the purpose of" in conjunction with the words "making or earning of income" from "other sources" when compared with the words “for the purpose of business or profession” used in section 37(1). In order to decide whether a deduction is permissible, connection between the expenditure and earning of income must exist, either direct or indirect. Also, the expenditure must be incurred for the purpose for earning the income though it is not necessary that incurring of expenditure is profitable one or in fact income was earned. Hon’ble Supreme Court in the case of Vijaya Laxmi Sugar Mills Ltd. vs CIT [1991] 191 ITR 641 (SC) held that “*The requirement under section 57*(iii) *that the expenditure should have been incurred 'for the purpose of making or earning such income' shows that the object of*

spending or the end or aim or the intention of such spending was for earning the interest income.

12. Considering the facts and circumstances of the case and detailed factual elaboration made in the above paragraphs, judicial precedents discussed herein, we find it proper to delete the addition made by the ld. AO by disallowing a portion of the total expense of Rs.50 lakhs incurred by the assessee towards recovery of brokerage from total amount due from the builder. Accordingly, grounds taken by the assessee are allowed.

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

Order is pronounced in the open court on 30 August, 2024

Sd/-	Sd/-
(Kavitha Rajagopal) Judicial Member	(Girish Agrawal) Accountant Member

Dated: 30 August, 2024

MP, Sr.P.S.

Copy to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai