आयकर अपीलीय अधीकरण, न्यायपीठ –"B" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA

[Before Shri J. Sudhakar Reddy, AM and Shri A. T. Varkey, JM]

I.T.A. No. 1433/Kol/2018
Assessment Year: 2004-05

DCIT, Circle-8(1), Kolkata	Vs.	M/s EIH Associated Hotels Ltd. (Successor in interest to Indus Hotels Corp. Ltd.) (PAN: AAACI 6454 R)
Appellant		Respondent

Date of Hearing	09.03.2021
Date of Pronouncement	15.03.2021
For the Appellant	Smt. Ranu Biswas, Addl. CIT
For the Respondent	Shri A.K. Gupta, A.R

ORDER

Per Shri A. T. Varkey, JM:

This is an appeal preferred by the Revenue against the order of Ld. CIT(A)-8, Kolkata dated 29.04.2018 for Assessment year 2004-05.

2. Ground No. 1 is against the action of Ld. CIT(A) in deleting the addition made by the AO amounting to Rs. 90,58,372/- on account of proportionate interest in respect of investment in shares.

3. Brief facts of the case as noted by the AO is that the assessee has made investment in shares of Rs. 11.35 crores from which tax free dividend income was earned. Thereafter that the AO noted that the assessee's total investment in shares is 12% of the borrowed funds, therefore he disallowed proportionate interest @ 12% of the total interest paid and disallowed Rs. 90,58,372/-.

4. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who was pleased to delete the same.

5. Aggrieved the Revenue is before us.

6. We have heard both the parties and perused the records. At the outset, it was brought to our notice that similar issue cropped up before this Tribunal in earlier years and this issue is covered in favour of the assessee by order dated 25.01.2008 in ITA Nos. 724 &725/Kol/2007 for AY 2002-03 & 2003-04; and assessment order dated 22.12.2006 for AY 2001-02. The Ld. A.R. of the assessee Shri A.K. Gupta brought to our notice that the assessee has not earned any exempt income therefore no disallowance u/s 14A of the Income Tax Act, 1961 (hereinafter referred to as the Act) is legally permitted and for that proposition he relied on the decision of Hon'ble Delhi High Court in Chem Invest Ltd. vs. CIT reported in 378 ITR 33 (Del). The Ld. A.R drew our attention to page 28 of PB from which it is noted that the assessee has not earned any exempt income and relying on the decision of Hon'ble Delhi High Court in Chem Invest Ltd. (supra) as well as the decision of Hon'ble Delhi High Court in the case of CIT vs. GVK Project & Technical Services Ltd. [2019] 106 taxmann.com 180 (Del)] which decision in turn has been upheld by the Hon'ble Supreme Court reported in (2019) 106 taxmann.com 181 (SC), no disallowance was warranted. Further, it was also brought to our notice that the Ld. CIT(A) has taken note of the fact that the assessee has made investment in shares from AY 1998-99 and 1999-2000 and the said investment was made by the assessee from its own funds. The Ld. CIT(A) has noted after perusal of the balance sheet of the assessee for AY 2004-05 that the assessee had own funds of Rs. 101.25 crores whereas investment in shares is only to the tune of Rs. 11.35 crores which is only 11% of the own funds and therefore we note that no disallowance based on the reasoning of AO is correct. The Hon'ble Bombay High Court in the case of Reliance Utility and Powers Ltd. vs. CIT reported in 313 ITR 340 (Bom) held that when the assessee possesses mixed funds which include its own funds in sufficient quantity, a presumption that its own funds were utilized for the advances is to be drawn. Relying on the ratio of decision of Hon'ble Bombay High Court in Reliance Utility and Powers Ltd. (supra), we are of the opinion that in the facts of this case, no

proportionate disallowance based on the AO's reasoning cannot be accepted and therefore we confirm the order of Ld. CIT(A) and dismiss the ground No. 3 raised by the Revenue.

7. Ground no. 2 is against the action of Ld. CIT(A) in deleting Rs. 1,96,26,473/- on account of an advance to subsidiaries from borrowed funds.

8. Brief facts of the case as noted by the AO is that the assessee has given interest free advances amounting to Rs. 24,28,00,000/- to subsidiary company M/s Island Hotel Maharaja Ltd.. The AO asked the assessee to furnish the details of source of funds, and pursuant to the same, the assessee filed a chart indicating the sources of funds for advances made to the subsidiary company in different years and contended that in the earlier assessment year i.e. AY 2003-04 the advance was given out of own generated fund; and in this assessment year also the assessee reiterated the same contention. The AO did not accept the same by noting that in the immediate preceding assessment, the interest free advance were given out of borrowed funds and he observed that the assessee had utilized only 26% of the borrowed and cash credit facility funds of Rs. 93,34,32,584/- by way of giving interest free advances to its subsidiary company on which the assessee had paid interest of Rs. 7,54,86,434/- on the entire borrowed fund. Accordingly, proportionate interest on interest free advances was computed by AO at Rs. 1,96,26,473/- being 26% of the total interest paid on borrowed and cash credit account and this amount was disallowed.

9. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who was pleased to delete the same.

10. Aggrieved the revenue is before us.

11. We have heard both the parties and perused the records. At the outset, the Ld. A.R of the assessee submitted that this issue is also covered in favour of the assessee

by the Tribunal's order for AY 2002-03 and AY 2003-04 which is discernible from paper book pg nos. 10 to 15 and 17 respectively. We note that the Ld. CIT(A) has noted that the advance were out of its own funds and it was given to its own subsidiary company which is in the same line of hotel business. According to assessee, advances to its subsidiary was done as a measure of commercial expediency and which fact was accepted by the Ld CIT(A) and we note that the Ld. CIT(A) has given the decision in favour of the assessee by relying on the decision of Hon'ble Supreme Court in S.A. Builders vs. CIT (2006) 158 Taxman 74. The Ld. CIT(A)'s decision could not be controverted by the revenue and we note that the Tribunal in assessee's own case for AY 2002-03 and 2003-04 has decided the issue in favour of the assessee by holding as under:

> *"19. In this case, the assessee has given interest free advances against issue of share capital aggregating to Rs. 19,81,50,000/- in favour of its subsidiary company, Island Hotel Maharaj Ltd. In response to a query from the A.O. regarding the source of finance of the said advance, the assessee had submitted details relating to Rs. 1,47,50,000/-, which was introduced during the relevant previous year. The said fund was received out of the proceeds from redemption of IDBI Mutual Fund. The A.O. had .assumed that the balance amount of Rs. 18,34,00,000/- i.e. the opening balance was partly financed out of interest bearing loans. The A.O. had further assumed that 46% of the said opening balance was out of borrowed fund and he had applied interest @ 5.95% on such amount, which was considered as borrowed fund. In the process, the A.O. had disallowed Rs.50,19,658/- out of the total interest claim of the assessee. The Ld.CIT(A) had confirmed the disallowance made by the A.O.*
>
> *20. The AR during the course of the hearing had argued that the assessee company had made investments in its subsidiary company in the earlier years only out of its own fund. He had submitted that the conclusion of the A.O. is not based on any cogent findings but on assumptions. The learned AR had also relied on a recent decision of the jurisdictional Calcutta High Court in the case of CIT -vs-Britannia Industries Ltd. reported in 280 ITR 525 (Cal). At page 533, the Hon'ble High Court has noted "if there is surplus and the advance is made out of the mixed funds, in that event, it cannot be said that the amount borrowed as capital from the bank was advanced, in order to deny the benefit of section 36(1)(iii). In the present case, if it is established that the payment was made from the mixed accounts and the assessee had sufficient funds, then it is to be presumed that the payment was made out of assessee's own fund and that the borrowed capital was not siphoned out." In fact the Jurisdictional High Court has held that even if the overdraft account had a debit balance, the earlier conclusion should not have been different. In coming to this conclusion, the Hon'ble High Court had relied on a plethora of decisions held by the same Court earlier, such as, in 132 ITR 219, 135 ITR 698, 147 ITR 392 & 161 ITR 820. It was argued by the AR that the advances were made out of mixed bank accounts where the receipts out of current sales were credited. The AR had also submitted that apart from showing the years in which the advances were made, which were earlier to the previous year relevant to the assessment year under appeal it was submitted that such advances were made out of own funds. In fact the Revenue never raised this issue in the past while holding that the opening balance has been funded out of the*

borrowed funds and that too without any analysis and ignoring the principles laid down by the Hon'ble High Court." Hence, following the decision of the Hon'ble jurisdictional High Court, the AR argued that the advance against share capital made to the sister concern did not call for any disallowance out of the total interest claim of the assessee.

21. At the time of hearing, the AR of the assessee company had further contended that the amount advanced was to a subsidiary company of the assessee and such advance was made against the issue of share capital. He had also confirmed that the subsidiary company, to whom such advance was made, had actually issued the share capital in a subsequent year. The necessary details relating to such share issue in favour of the appellant i.e. extract from the Board Meeting of the subsidiary company allotting shares to the assessee company were also filed before the Hon'ble Bench. The AR had contended that it was not a case of a normal loan but an introduction of share capital to its subsidiary company. Consequently, the assessee did not charge any interest from the subsidiary company, since it had contributed towards its share capital.

22. The AR of the assessee company had also contended that the assessee company had introduced funds to its subsidiary company from time to time to protect its original investment. The subsidiary company was not doing well commercially during that, period and needed financial support from the parent company, which, is also evident from the Annual Accounts of the subsidiary company, which form part of the Paper Book filed by the assessee company. He further relied on the decision of the Hon'ble Supreme Court in the case of S.A.Builders Ltd. -vs- CIT reported in 288 ITR 1 (SC), wherein the Hon'ble Supreme Court had held that in case an amount is advanced to a sister concern as a measure of commercial expediency, the claim for deduction on account of interest cannot be denied merely because such advance was made out of borrowed fund. The Hon'ble Apex Court had further held that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm chair of the business man or in the position of Board of Directors and assume the role to decide however which is reasonable expenditure having regard to the circumstance of the case. No businessman can be compelled to maximize its profit. The Income tax Authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter before their own point of view but that of a prudent businessman. According to the Hon'ble Court, one should see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency from the point of view whether the amount was advanced for earning profits. According to the AR, the assessee company had advanced the money out of borrowed funds but from its own sources for which no interest was claimed as a deduction. Even assuming but not admitting that a part of the advance against the share capital was made out of borrowed funds, it is beyond doubt that such introduction of funds were made out of commercial expediency and following the decision of the Supreme Court, no disallowance out of the interest claim should be called for.

23. At this point, the Hon'ble Bench had directed the AR to prove that the advance was made as a measure of commercial expediency, since, in the said decision, the Hon'ble Supreme Court had also said that it is not the case that in each & every issue, interest on borrowed loan should be allowed, if advances are made to a sister concern. For instance, if directors of a sister concern utilized the amount advanced to it by the assessee for their personal benefit, obviously, it cannot be said that such money was advanced as a measure of commercial expediency. The AR of the assessee

had again relied on the said decision of the Supreme Court, wherein it is stated "however, where it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances the borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would in our opinion, ordinarily be entitled to deduction of interest on its borrowed monies." The AR further relied on the Annual Accounts of the sister concern i.e. Island Hotel Maharaj Ltd, which was placed on record and form part of the Paper Book. It was noted by Hon'ble Bench that the subsidiary company had an accumulated loss of Rs. 17,97,33,271/- till 31st March, 20021 i.e. the last day of the relevant previous year. On a scrutiny of the loans & advances, appearing in its annual accounts, it was also apparent that advances were mainly given for running the business, security deposits and income tax payments. It is noted from the Audit Report (page 26 of the Paper Book) that no loan or advance was given to any of the directors or to any company/firm, in which the directors were interested, which is prejudicial to the interest of the company. On a query from the Bench it was clarified that the assessee company was holding approximately 88% shares in the sister concern to which the advances were made.

24. Hence according to the AR, the advance against share capital was made to safeguard its original investment, since the subsidiary company was not doing well commercially and the funds introduced were utilized by the subsidiary company to carry on its day-to-day operations arid servicing of its interest liability.

25. On the other hand, the Ld. Representative for the Revenue had contended that the judgments relied upon by the AR of the assessee cannot be applied, since the facts of the assessee's case appears to be different.

26. Having carefully considering the arguments of both sides and going through the written submissions filed from time to time, it is noted that the assessee company had, in fact, introduced the funds to its subsidiary company from time to time according to its requirements. Moreover, the assesses company held approximately 88% shares of the said subsidiary company. The amount invested by the assesses company till 31st March, 2002 was Rs.11.35 crores. It is also noted that from the annual accounts of the subsidiary company that till 31st March, 2002 (page 39 of the Paper Book) the financial figures were as under :

Position of mobilization and deployment of funds (Amount in Rs.000)

Total liabilities	*687.062*
Total Assets	*687.062*
Sources of Funds	
Paid up Capital	*128,500*
Advance against issue of shares	*198,150*
Reserve & surplus	*15,273*
Secured loans	*314,944*
Applications of Funds	
Net Fixed Assets	*453.626*
Investments	*NIL*
Net Current Assets	*453.626*
Investments	*NIL*
Net Current Assets	*23,508*
Miscellaneous Expenditure	*NIL*
Accumulated Losses	*179,733*

27. On a perusal, it is apparent that the sister concern to which the funds were introduced had huge accumulated loss and was dependent on the holding company for its day to day operations and to pay interest on substantial amount of secured loans.

28. Considering the sizeable investments made, the assessee company had not other option but to make additional investment in order to protect its financial interest. There is no finding by the lower authorities that any fund was siphoned off by the sister concern. Moreover, from the annual accounts of the sister concern, it is evident that no loan was given to any of the directors or to any firm/company in which such director was interested. In fact, it was reported by the auditors of that the recipient company, i.e. Island Hotel Maharaj Ltd., that it did not advance any sum to any -of its director or any other firm /company in which such director if interested. Having said this and, relying on the decision of S.A. Builders Ltd (supra), we are agree with the AR that the advance in question was towards equity and given from time to time out of pure commercial expediency and to protect its own financial interest.

29. Even otherwise, we note that the advances given by the assessee company from time to time was against the issue of share capital. It has been placed on record that the assessee was actually allotted shares in a subsequent year out of the advances paid. Hence it is not the case that the funding was for a temporary adjustment and hence should not be equated with a normal loan. If that be so, there should not be any question of interest payable on a permanent fund introduced by the assessee company forming part of the capital of the sister concern. In the balance Sheet of the .sister concern also, the amount has been shown as forming part of the shareholders' fund.

30. Even regarding the source of funds, we disagree that the action of the A.O. who has made an ad-hoc allocation and came to a conclusion that part of the total advances was funded out of borrowed capital and ignoring the decision of jurisdictional Calcutta High Court in the case BIL (supra).

31. Having considered all these factors, we are of the view, that the disallowance made by the A.O had no reasonable basis and should be deleted in full."

12. Since the Revenue could not point out any change in facts or law on this issue from that of the AY 2002-03, we are inclined to follow the order of Tribunal in assessee's own case for AY 2002-03 and 2003-04, so we confirm the action of Ld. CIT(A) and dismiss the ground no.2 raised by the Revenue.

13. Ground no. 3 is against the action of Ld. CIT(A) in deleting the addition made by the AO amounting to Rs. 8,98,027/- on account of advertisement expenses.

14. Brief facts of the case as noted by the AO is that despite requesting the assessee to furnish details of expenditure of advertisement in a format prescribed in the notice u/s 142(1) of the Act, the assessee only furnished details in respect of the Agra and Udaipur unit, but no details have been furnished in respect of Jaipur Unit. According

to AO, the assessee has debited Rs. 89,80,273/- under this head. And since the assessee has not furnished complete details as called for, the AO was pleased to make disallowance of 10% of total expenditure credited and disallowed Rs. 8,98,027/-.

15. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who was pleased to delete the same.

16. Aggrieved the revenue is before us.

17. We have heard both the parties and perused the records. At the outset it has been brought to our notice that the Tribunal in assessee's own case for AY 2002-03 has restricted the disallowance at 2% of the estimate. We note that in assessee's own case for AY 2003-04 the Tribunal has decided the issue as under:

> *"38. In this ground the assessee had challenged the ad hoc disallowance of Rs. 7,78,744/- being 10% on advertising expenses. This ground is more or less similar to the ground no. 8 of the earlier year, i.e. ITA No. 724/Kol/2007. The AO had made the disallowance on the allegation that full details were not provided by the assessee while A.R had contended that details were filed though not in the same format as directed by the AO. We had already held in the order for the earlier year that non business expenses cannot be totally ruled out and had held the issue in favour of the Revenue and against the assessee. However, in that year the AO had made the ad hoc disallowance @ 2%, while this year without any additional reason had increased the disallowance to 10%. Following the order for AY 2002-03, we hold the issue in favour of the Revenue. However, the disallowance should be restricted to 2% of the advertising expenses."*

18. Respectfully following the Tribunal's decision in assessee's own case we restrict the disallowance at 2% of the advertising expenses thus, revenue's ground no. 3 is partly allowed.

19. Ground no. 4 is against the action of Ld. CIT(A) in deleting the addition made by the AO amounting to Rs. 6,20,487/- on account of staff welfare expenses.

20. Brief facts of the case as noted by the AO is that the assessee has debited Rs. 63,01,109/- under the head 'Staff Welfare Expenses'. The AO asked the assessee by raising question no. 9 in the notice dated 21st August, 2006. From the details

furnished in this respect, the AO noted that substantial part of the expenses were booked by different units of the assessee-company relates to 'Employees' meals on duty, medical expenses, medi-claim insurance, uniform expenses, recruitment expenses, employees' relation expenses. According to AO, recruitment expenses at Trident, Jaipur was claimed at Rs. 2,42,245/- and employees' relation expenses at Trident, Jaipur at Rs. 1,85,650/- and Rs. 1,92,592/- at Trident, Udaipur have been included under this head. The aforesaid expenses according to AO do not relate to Staff Welfare. According to AO, in the earlier assessment years, expenses on account of festival gift, Diwali sweets, etc. had been shown by the assessee as incurred on Staff Welfare which had been disallowed as not being related to Staff welfare of the assessee-company. For this assessment year also, the assessee had claimed such expenses which are again disallowable. Therefore, Rs. 6,20,487/- was disallowed out of the purported staff welfare expenses and added back to the total income of the year.

21. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who deleted the addition by holding as under:

> *"7.3.1. These amounts pertain to employee meals on duty, medical expenses, medical insurance, uniform expenses, recruitment expenses, employees relation- these are all expenses incidental to carrying on of the business. In the hotel industry, personnel/employees are crucial. These expenses are laid out and expended wholly and exclusively for the purpose of the business and thus are allowable u/s 37(1). DCIT, AO's other mention that some such expenses were disallowed in earlier AY assessment, is no reason to not allow here in appeal.*

22. Aggrieved the revenue is before us.

23. We have heard both the parties and perused the records. We note that the break-up of the amount disallowed is as under:

(i) Staff recruitment expenses at Trident, Jaipur	Rs. 2,42,245/-
(ii) Employees' relation expenses at Trident, Jaipur	Rs. 1,86,650/-
(iii) Employees relation expenses at Trident, Udaipur	Rs. 1,92,592/-
Total	**Rs. 6,20,487/-**

It is noted that the staff recruitment expenses were incurred only exclusive for the purpose of business and hence allowable expenditure. We note that the expenses on account of employees' relation expenses to the tune of Rs. 3,78,242/- was incurred for efficient functioning of the business which pertains to employees meals on duties, medical expenses, medical insurance, uniform expenses etc. and these expenses are incidental to carrying on the business which is crucial in the hotel industry. Therefore, it satisfies the condition that it was expended wholly and exclusively for the purpose of business and thus allowable u/s 37(1) of the Act. Therefore, we confirm the order of Ld. CIT(A) and this ground of appeal raised by the revenue is dismissed.

24. In the result, the appeal of the revenue is partly allowed.

Order is pronounced in the open court on 15th March, 2021.

Sd/-	Sd/-
(J.S. Reddy)	(A. T. Varkey)
Accountant Member	Judicial Member

Dated: 15.03.2021

SB, Sr. PS
Copy of the order forwarded to:

1. Appellant- DCIT, Circle-8(1), Kolkata
2. Respondent – M/s EIH Associated Hotels Ltd. (Successor in interest to Indus Hotels Corp. Ltd.) 4, Mangoe Lane, Kolkata-700001.
3. The CIT(A)- 8, Kolkata (sent through e-mail)
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata