IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'C', BENGALURU

BEFORE SHRI. JASON P. BOAZ, ACCOUNTANT MEMBER

AND

SHRI. LALIET KUMAR, JUDICIAL MEMBER

I.T.A No.780/Bang/2016
(Assessment Year : 2011-12)

Shri. Chetan Dass,
No.189, Sankey Road, Sadashivanagar,
Bengaluru .. Appellant
PAN : ACCPD7140E

v.

Joint Commissioner of Income tax,
Range-6, Bengaluru .. Respondent

Assessee by : Shri. H. N. Khincha, CA
Revenue by : Shri. M. K. Biju, JCIT

Heard on : 04.09.2017
Pronounced on : 19.10.2017

O R D E R

PER LALIET KUMAR, JUDICIAL MEMBER :

The present appeal is arising out of the order passed by the CIT (A) – LTU, Bengaluru, dt.22.03.2016, for the assessment year 2011-12, on the following grounds :

1. The learned Assessing Officer had erred in the disallowing the claim of deduction of interest is Rs.29,90,918/- and the learned Commissioner of Income tax (Appeals) has erred in confirming the same.

2. The lower authorities have arrived at an erroneous conclusion on an improper appreciation of facts. On correct appreciation of facts it will be clear that deduction of Rs.29,90,718/- was correctly claimed by the appellant and the same is to be allowed to the appellant.

3. The learned Assessing Officer has also erred in levying interest u/s.234B, 234C of the I. T. Act, 1961. The appellant denies liability to pay Interest. The interest having been levied erroneously is to be deleted.

02. Brief facts are, the assessee an individual, filed the return of income for the AY 2011-12 declaring an income of Rs.30,66,010/-. The case was selected for scrutiny and notice was issued on 06.08.2013 in response to which the assessee's representative appeared and the case was discussed. Thereafter a show-cause notice was issued as the assessee failed to furnish the requisite details.

03. The AO made an addition of Rs.29,90,718/-, being deduction of claim for interest by the assessee. It was the case of the assessee that the assessee entered into an agreement of lease with Beeradevara Devasthanagala Sangha (hereinafter referred to as 'BDS' for short), Sampige Tank Bund Road, Woodlands Hotel, Bengaluru, in respect of property at Residency Road also known as Sampige Tank Bund Road vide agreement dt.06.08.1980. The assessee claims that the agreement could not be fully converted into contract of lease due to dispute between the assessee and the BDS, which resulted into filing of a

litigation and the case was pending before the Hon'ble Karnataka High Court by way of RFA No.90/2012. The assessee had entered into 'agreement to sublease' to lease the above said property with M/s. Tapovan Builders P. Ltd on 23.02.1987 and further another sub-lease agreement was entered with M/s. Bangalore Hospital Ltd on 23.09.1990. The assessee received sums of Rs.9,50,000/- and Rs.40 lakhs from the above two sub-lessees respectively as advance and the assessee has claimed Rs.29.90 lakhs only as interest expense on the above said advance. It was submitted by the assessee that the interest payable on the advances has been claimed as deduction u/s.57 of the Act, from the interest received on deposits. However, the AO was not convinced and has made the addition on the following grounds :

i) that the claim is vague

ii) the parties entered into lease agreements despite knowing that the property was in litigation

iii) the matter has not reached finality and the liability is not crystalised

iv) interest is not actually paid and the liability is a contingent one.

Feeling aggrieved by the order passed by the AO, the assessee filed an appeal before the CIT (A).

05. The CIT (A) confirmed the additions made by the AO. Being further aggrieved, the assessee is in appeal before us.

06. Before us the Ld. AR relied upon the provisions mentioned in the sub-lease agreement to the following effect :

IV. CONSIDERATION FOR GRANTING ON SUB-LEASE

a) The consideration for granting on sub-lease of the schedule properties is the rent at the rate of Rs.30,000/- (Rupees thirty thousand) only per month agreed to be paid by the sub-tenant in favour of the chief-tenants every month in the manner mentioned hereinafter and a further sum by way of advance goodwill of Rs.85,00,000/- (Rupees eighty five lakhs) only out of which the sub-tenant has today paid in favour of the chief-tenants a sum of Rs.40,00,000/- (Rupees forty lakhs) only as advance as follows:-

i) A sum of Rs.40,00,000/- (Rupees forty lakhs) only by Pay Order bearing No.704661 dated 22/9/90 drawn on Canara Bank, RMV Extension, Bangalore in favour of chief-tenants.

and the sub-tenant agrees to pay the balance advance goodwill of Rs.45,00,000/- (Rupees forty five lakhs) only in favour of the chief-tenants on the date of actual execution and registration of the deed of sub-lease by the chief-tenants in favour of the sub tenant. The said goodwill/advance amount is non-refundable sum which the chief-tenants need not repay to the sub-tenant on the expiry of the period of lease. However, subject to the condition that for any reason the sub-lease of the entire schedule properties or any part thereof does not materialise, proportionate sum received by the chief-tenants from the sub-tenant under this agreement as advance shall become repayable immediately together with the interest at the rate of 18% (eighteen percent) per month to be calculated from the date of dispossession of the sub-tenant from the schedule properties till the actual date of payment.

It was submitted that the assessee is bound to compensate the sub-lessees for any expenses / losses that would be incurred as a result of defect in the title of the assessee. Further our attention was also drawn to para 17 of the agreement which is reproduced below :

> *"17. The Chief-tenant hereby agrees and undertake to effectually and fully indemnify the Sub – tenant against all actions, proceedings or demands and if the Sub-tenant suffer any loss or damage or expenditure by way and because of any claim, entitlement or demand by any person whomsoever or as a result of defect in the title of the Chief – tenant in respect of the Schedule Property to the extent of such loss, damage or expenditure that the Sub-tenant may suffer as afore-mentioned."*

07. In view of the above, it was submitted by the Ld AR that the liability is not a contingent liability and it is the liability of the assessee to pay the interest in terms of the agreement and therefore the finding of the AO and CIT (A) were in correct. Further, it was submitted that the assessee is following the mercantile system of accounting and the assessee is liable to show the interest income in its books of account. It was lastly submitted that invocation of section 57(3) by the authorities below were not correct.

08. On the other hand, the Ld. DR supported the orders of the lower authorities and has submitted that the agreement entered into between the assessee (chief-tenant) with the sub-lessees is not enforceable in the eyes of law and therefore there is no question of contingent liability.

09. We have heard the rival submissions and perused the material on record and also the written submissions filed. From the record, the following facts arise :

i) The assessee was granted a lease dt.19.05.1978 registered as No.604 in Book-I, Volume 1949 Page 97 in the O/o the Sub-Registrar, Bangalore, for a period of ten years ;

ii) Further the assessee sought extension of lease of two portions vide agreement dt.19.05.1987 by paying an amount of Rs.9.5 lakhs for a period of 48 years with an option to renew for a period of 23 years, for an amount of Rs.9.5 lakhs paid by M/s. Tapovan Builders, further M/s. Tapovan Builders had undertaken to pay another Rs.10 lakhs to the assessee at the time of registration of the sub-lease agreement in favour of the sub-lessee. Sub-lease was to be executed within six months from the date of principal tenant entering into the lease of the said property with the landlord.

iii) In the agreement dt.19.05.1987, it was clearly mentioned that a litigation was going on between the principal tenant and BDS, which was a subject matter of O.S. No.10329/1983.

iv) Similarly, the assessee entered into another lease with M/s. Bangalore Hospitals Ltd, by a sub-lease agreement dt.23.09.1990 for grant of sub-lease for a period of 48 years and subject to extension for a further period of 23 years. In the sub-lease agreement it is mentioned that sub-lessee has given a Pay Order for a sum of Rs.40 lakhs as advance towards the grant of sub-lease.

v) It was further stipulated that the assessee will be getting Rs. 30,000/- pm as agreed from the sub-tenant. It was also

mentioned in the said agreement that the sub-lessee namely, Bangalore Hospitals Ltd had not also paid another sum of Rs.45 lakhs at the time of actual registration and execution of sub-lease by the chief tenant in favour of the sub-lessee. In the agreement dt.23.09.1990, the assessee had also mentioned about the pendency of the dispute between the chief tenant and BDS.

10. From the above, it is clear that the initial lease for a period of ten years expired on 19.05.1988 and there was no extension of lease agreement in favour of the assessee. On account of the above, we are of the opinion that once the assessee did not have any right to remain in possession of lease, there was no occasion for the assessee to enter into a sub-lease agreement initially with Tapovan Builders in the year 1987 and thereafter with Bangalore Hospitals Ltd. Moreover the existence of both the sub-lease agreements was dependent upon the clear and marketable title of the assessee, on the basis of which the assessee can execute the sub-lease agreement in favour of these two sub-lessees. Once the title of the assessee is under cloud, there is no occasion for the assessee to execute the sub-lease agreement in favour of these two entities.

Further both the sub-lease agreements were only a prelude to the agreement as neither the title of the assessee was clear nor the assessee could put these two entities into possession, nor these two entities have paid the remaining amount of Rs.10 lakhs and Rs.45 lakhs respectively.

11. In view of the above, the claim of the assessee that the interest was payable on advances of Rs.9,50,000/- and Rs.40,00,000/- are not payable on accrual basis. Once the assessee was unable to discharge its obligation under the agreement, it is for the assessee to take a call and return the amount received by him immediately when he was unable to pay the amount. Further the credit of interest accrued in favour of these two entitles was relatable to the business of the assessee, as it was not wholly and exclusively connected with the business of the assessee. Our view is further supported by the fact that these two entities have not shown any interest amount towards these advances as receivables in their books of account.

12. In view of the above, we are of the opinion that the liability is only sought to be credited by way of crediting the interest amount was merely a contingent liability / or rather no liability in the eyes of law. Therefore the assessee was not entitled to credit the same amount by deducting it under the provisions of the Act. In view of the above, the reasoning given by the CIT (A) in para 3.17 and 3.18 are correct and no interference is called for.

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

Sd/-	Sd/-
(JASON P. BOAZ)	(LALIT KUMAR)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated : 19.10.2017.
MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order

SENIOR PRIVATE SECRETARY