

आयकरअपीलीयअधिकरण“ए”न्यायपीठपुणेमें।
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH,
PUNE

BEFORE SHRI SATBEER SINGH GODARA, JM
AND DR. DIPAK P. RIPOTE, AM

आयकरअपीलसं. / ITA No.756/PUN/2017
निर्धारणवर्ष / Assessment Year : 2011-12

Bitwise Solutions Pvt. Ltd., Bitwise World, Off International Convention Centre, Shivaji nagar, Senapati Bapat Road, Pune – 411 016. PAN: AAACB 4239 K	Vs	The DCIT, Circle-1(1), Pune.
Appellant/ Revenue		Respondent/ Assessee

Assessee by	Shri Kishor B Phadke – AR
Revenue by	Shri S P Walimbe - DR
Date of hearing	27/04/2022
Date of pronouncement	29/04/2022

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This appeal filed by the Assessee is directed against the order of Id.Commissioner of Income Tax(Appeals)-1, Pune, dated 15.12.2016 for the Assessment Year 2011-12.The Assessee raised the following grounds of appeal:

- “1. *The learned CIT(A)-1, Pune erred in law and on facts in sustaining the addition u/s.36(1)(iii) of the ITA, 1961 of Rs.69,51,455/- made by learned DCIT, Circle-1(1), Pune(hereinafter referred to as the learned AO).*
2. *The learned CIT(A)-1, and the learned AO erred in law and on facts in not appreciating that, share purchase transaction for which loan was availed was a business transaction i.e. after buying shares, Bitwise Inc., USA, became 100% subsidiary of the appellant company.*
3. *The learned CIT(A)-1 and the learned AO further erred in law and on facts in not appreciating that appellant company benefitted from share purchase transaction in terms of direct control over Bitwise Inc., USA and assurance as to getting business in future years.*

4. *The learned CIT(A)-1 and the learned AO erred in law and on facts in holding that for qualification of interest expense u/s 36(1)(iii), appellant company ought to have engaged in the business of acquiring controlling interest in other companies and not otherwise.*
5. *The learned CIT(A)-1 and the learned AO further erred in law and on facts in sustaining the addition made on account of unrealized foreign exchange loss amounting to Rs.96,33,520/- on loan taken for purchase of shares in Bitwise Inc., USA on the analogy that the said loss was capital in nature since it is for purchase of shares.*

Additional Grounds of Appeal:

5. *Learned CIT(A)-1, Pune and learned AO erred in law and on facts in disallowing contribution made to gratuity scheme amounting to Rs.35,85,131/- u/s 36(v) of the ITA, 1961 and thereby making addition of the same amount in the total income of appellant.*
6. *Appellant contends that, appellant is eligible for claim of deduction of Education Cess expenditure of Rs.9,95,885 which ought to be granted as a deduction considering several decisions of the Honourable jurisdictional and other High Courts.*

2. Brief facts of the case are that assessee is engaged in the business of providing offshore software services such as data warehousing, application maintenance and support, application development, business intelligence and IT Infrastructure Management Service etc., to its associate company Bitwise Inc, USA. During the assessment proceedings, the Assessing Officer(AO) has noticed that assessee has made investment in the equity shares of Bitwise Inc. of Rs.8.99 crore during the year. The assessee had invested in the equity shares by taking term loan from Axis Bank Ltd., During the year, the assessee had paid interest of Rs.69,51,455/-. During the proceedings, the assessee's Authorised Representative explained to the Assessing Officer that investment in Bitwise Inc., was for getting control in interest and not for earning dividend. Bitwise Inc., is a sole work provider to assessee company. Assessee company since its beginning

had only one customer i.e. Bitwise Inc., USA. To carry out offshore jobs, it is always essential to have a setup at customers optioned location. Acquisition of shares of Bitwise Inc., USA made Bitwise Inc., USA 100% subsidiary of assessee company. Thus, assessee has ensured continuous flow of business. The assessee relied on various case laws during the assessment proceedings. The AO disallowed the interest. Relevant part of the assessment order is as under:

“In support of revenue’s case reliance is placed on the judgment of Jurisdictional High Court in the case of CIT v. Amritaben R. Shah [1998] 238 ITR 777¹ (Bom.) and of Gujarat High Court in the case of Sarabhai Sons (P.) Ltd. v. CIT [1993] 201 ITR 464 in which it has been held that interest on loan taken for purchasing shares for acquiring controlling interest in the company cannot be held to be expenditure incurred wholly and exclusively for earning income from dividend and deduction under section 57(iii) is not allowable. Though, the judgment has been rendered in context of section 57, the basic premise of case is same. In this case interest on loan taken for purchasing shares for acquiring controlling interest in the company cannot be held to be expenditure incurred wholly and exclusively for business. In the case of CIT vs Phil Corporation Ltd. (supra) it was never contended that investment in shares is not a business activity of the company. Hence, facts of both cases are not similar, as in this case it is clearly established that investment in shares is not a part of business activity of the assessee company. Hence interest of Rs.69,51,455/- is disallowed u/s.36(1)(iii) of the IT Act, 1961 and added back to the total income of the assessee company.”

3. Aggrieved by the order of the Assessing Officer, the assessee filed appeal before the ld.CIT(A). The ld.CIT(A) confirmed the disallowance.

4. Aggrieved by the order of the ld.CIT(A), the assessee filed appeal before this Tribunal. The ld.Authorised Representative(ld.AR) of the assessee submitted that additional Ground No.5 & 6 are not pressed.

5. Regarding disallowance of interest expenditure the ld.AR explained that the entire expenditure has been incurred for the business of the assessee. In support of his submission, the ld.AR submitted as under:

- “a) Customer relationship - In the pre-acquisition scenario, customers were extending the work to Bitwise Inc i.e. USA company, and in turn, the work used to flow to BSPL, i.e. the Appellant company. This was seen as a concern for business. Had this issue been taken up further, appellant and the USA company would have suffered is some customers orders.. Appellant has submitted copy of contract entered with M/s Discover Card (biggest customer of Bitwise Inc) at Page no. 150 of Paper Book-1 of AY 2011-12. Attention is invited to Clause no. (2.5) to (2.9), which reveals that there are restrictions to appoint subcontractor or a third party by the consultant i.e. Bitwise Inc. Prior to the said acquisition, appellant and Bitwise Inc were independent parties. But, parent- subsidiary is not perceived as violation of these clauses. Appellant's competitors viz. Infosys, Wipro, Cognizant etc. are all entities of a common group with parent-subsidiary relationship while dealing with their customers. Similar relationship has been achieved in the present case after the acquisition. It was commercially prudent to acquire the shares of Bitwise Inc and consolidate the whole business operations under single roof and thereby offer reliability to the customers and protect business relations.
- b) VISA and employee visits to USA - In the pre-acquisition era, appellant company had option of only **H1B visa** for sending the employee to USA for work purposes. The process of H1B visa is not conducive to types of contracts worked upon by Appellant. However, after acquisition of Bitwise Inc., option of **LI visa** was available for appellant company. **LI visa** is specifically for transfer/travelling of employees belonging to the same group i.e. holding-subsidiary companies. Detailed comparison of H1B and LI visa is placed on record vide Page no. 184 to 189 of Paper book no. 2 of AY 2.011-12
- c) Commercial Value / Conso reporting benefits - New arrangement offers more strength to commence activity at other locations. Appellant company has large asset base in India. To expand the same, appellant company requires support of bank loan. New arrangement helps in getting bank finance for Indian Activity, as earnings of subsidiary gets considered in granting loans.
- d) Employee retention - In software activity, retention of key employees is a crucial aspect. To create confidence and peace in the minds of senior employees, holding - subsidiary relationship grants far more comfort in the minds of employees. Lien on employment could be easily retained in case, employees of respective companies are to be transferred to other jurisdictions. Bitwise group is able to retain more than 800 employee head count as on date. Employees

increased comfort of a consolidated entity was another factor of commercial expediency.

- e) *Employee morale - ESOP's and values - The key employees can be offered shares of the Indian company from the perspective of granting some partial ownership. For the record, appellant company has offered equity shares of Bitwise India to some of the key employees. Plans of ESOP allotment are under discussion and the ESOPs of the Indian company are planned to be offered even to the subsidiary company employees in USA. Such possible seamless offering of ESOPs to the employees adds to commercial expediency purpose. Further, at the time of retirement of such key employees, value per share on CONSO basis is paid by the appellant company. This increases employee's morale to work relentlessly for the company and achieve higher growth.*
- f) *Futuristic opportunities - It is submitted that, all the promoters of the appellant are Indian and hence they have affiliation for India. As such, appellant has major asset base in India. In keeping with the pace of increased competition, it is necessary that market publicity should be increased gradually. All the big competitors of the appellant viz. Infosys, Wipro etc. are listed entities. These giants acquired popularity through strong and competent employee base and market reputation which is due to going listed on the stock exchanges in India. Appellant is also planning to go listed in India in near future and subsequently in USA stock exchange also. Acquisition of a company as a wholly owned subsidiary is a step to increase the numerical value of the group and thereby to earn popularity. As such, acquisition of shares has business expediency. The audited group figures demonstrate the same thing which is being thought of in the background.*
- g) *Valuation method benefits - With a CONSO accounts of the India and USA companies, Appellant can certainly command a much better price in future for any partnering, public offering, venture capitalist funding, etc. etc."*

6. On the other hand, the Id.Departmental Representative(Id.DR) for the Revenue relied on the orders of Lower Authorities. The Id.DR vehemently argued that the amount borrowed was not for the purpose of business as investment is not business of the assessee. The assessee has borrowed money for investment in shares. Therefore, interest paid on loan is not an allowable expenditure.

7. We have heard both the parties, perused the material available on record and have gone through the orders of the Lower Authorities carefully. It is observed that the Hon'ble Bombay High Court in the decision of PCIT vs. Concentrix Services (I)(P.) Ltd. [2019] 111 taxmann.com 269 (Bombay) held as under:

(f) *We note that it is undisputed that the business of the Respondent-assessee is of running of BPO and Call Centres. Nor is it disputed that M/s.Minacs Canada is also in the business of Information Technology enabled Services i.e. BPO and Call Centre. It was the business decision of the Respondent to enhance/expand its activities and presence in the world market for that purpose had acquired controlling interest in the business of M/s.Minacs Canada which was in the same line of business as the Appellant. To make the above investment for the purpose of its business the loan was taken. Therefore the interest expenditure incurred on loans taken for investment in acquiring controlled interest in a Company which was in the same line of business as that of the Respondent would be allowable expenditure under section 36(1)(iii) of the Act. In Srishti Securities (P.) Ltd, (supra) the interest expenditure under section 36(1)(iii) of the Act had been disallowed by the Assessing Officer on the ground that the primary object of acquiring shares was only to acquire controlling interest in the Company. Thus not for purposes of business. This the Tribunal negated. Further in Appeal this Court has held that where an assessee claims deduction of interest paid on capital borrowed, all that an assessee has to show is that the borrowed funds were used for business purpose and if so then interest will have to be allowed as a deduction. The submission on behalf of the Revenue that the Petitioner is in the business of BPO and Call Centre activities and not in the business of investment means the prime business of the assessee is of running BPO and Call Centres and as recorded by the Tribunal the entire funds were borrowed so as to expand the business activities of BPO and Call Centres in Canada by acquiring a Canadian Company. Thus the loan was taken for the purpose of business. This is a finding of fact which has not been shown to be perverse. The expansion of ones activities in Canada would require acquisition of a Company by purchasing shares therein so as to expand the assessee's business. The object of the expenditure clearly is for the purpose of the business and therefore the interest incurred on the funds borrowed for investment in M/s.Minacs Canada has to be allowed as a deduction under section 36 (1)(iii) of the Act. So far as the finance expenditure is concerned, it would follow the allowing of interest expenditure. This expenditure is incurred in respect of the above loan taken for purpose of business and allowable u/s 36(1)(iii) of the Act. In fact, it was so allowed by the Revenue in Assessment Year 2007-08."*

8. The ld.DR for the Revenue could not distinguish the said decision of the Hon'ble Bombay High Court in PCIT vs. Concentrix Services (I)(P.) Ltd.(supra). It has been demonstrated by the ld.AR that

assessee's business is mainly from the Bitwise Inc., USA. Therefore, to control and develop the business it was important for assessee to own the company Bitwise Inc., USA. Therefore, it is a strategic investment by assessee. The purchase of the shares of the company i.e. Bitwise Inc., USA, was a business decision based on business necessity. Therefore, respectfully following the proposition of law laid down by jurisdictional High Court, the interest expenditure of Rs.69,51,455/- is allowed as revenue expenditure. Accordingly, the Ground No.1, 2, 3 and 4 raised by the assessee are allowed.

9. In the result, appeal of the assessee is Partly Allowed.

Order pronounced in the open Court on 29th April, 2022.

Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 29th April, 2022/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकरअपीलीयअधिकरण, पुणे/ITAT,Pune.