आयकर अपीलीय अधीकरण, न्यायपीठ –“A” कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL “A “ BENCH: KOLKATA

[Before Hon’ble Shri J. Sudhakar Reddy, AM and Hon’ble Shri A. T. Varkey, JM

ITA No.2475/Kol/2019
Assessment Year: 2012-13

D.C.I.T, Circle-5(2). Kolkata	Vs.	M/s. Sisecam Flat Glass India Ltd. (Formerly known as M/s. HNG Flat Glass Ltd) PAN: AABCH7942Q
Appellant		Respondent

AND
C.O No. 05/Kol/2020
[arising out of ITA No. 2475/Kol/2019 A.Y 2012-13]

M/s. Sisecam Flat Glass India Ltd. (Formerly known as M/s. HNG Flat Glass Ltd) PAN: AABCH7942Q	Vs.	D.C.I.T, Circle-5(2). Kolkata
Cross Objector-Assessee		Respondent-Department

Date of Hearing	02-03-2021
Date of Pronouncement	15.03.2021
For the Appellant/Department	Shri Dhrubajyoti Ray, JCIT, Ld.DR
For the Respondent/Assessee	Shri Akkal Dudhwewala, FCA & Ms, Anchal Gupta, FCA, Ld.ARs

ORDER

Shri J.Sudhakar Reddy, AM

The appeal filed by the revenue and corresponding cross objection filed by the assessee both are directed against the order of the Learned Commissioner of Income-tax (Appeals), 7, Kolkata dated 20-05-2019 for the assessment year 2012-13 passed u/s. 250 of the Income-tax Act, 1961 (hereinafter, referred to as the ‘Áct’)

2. There was a delay of 103 days in filing this Revenue's appeal. After perusing the petition for condonation of delay, we are convinced that the Revenue was prevented by sufficient cause from filing this appeal in time before this Tribunal. Thus, we condone the delay and admit this appeal.

3. The assessee is a company engaged in the business of manufacturing & processing of float glass, mirror glass etc. It filed return of income on 28-09-2012 declaring total loss of Rs. 75,16,43,560/- and book loss of Rs. 56,41,39,850/- u/s. 115JB of the Act. The Assessing Officer passed an order u/s. 143(3) of the Act. On 27-03-2015, determining the total income of the assessee at a loss of Rs. 72,87,81,724/- under normal provisions, inter alia making disallowances of i) loss on interest rate (hedging contract) of Rs. 2,26,10,487/- and ii) disallowed monitoring fees for non-deduction of TDS u/s. 40(a)(ia) of the Act. On appeal the Ld. CIT(A) granted relief.

4. Aggrieved, the Revenue is in appeal before us on the following grounds:-

> *1. Whether on the facts and in the circumstances of the case, the Ld CIT(A) has erred in considering the monitoring fees within the preview of interest as per DTDA article between India and Germany as per clause 4 of this article.*
>
> *2. Whether on the facts and in the circumstances of the case, the Ld CIT(A) has erred in allowing deduction on account of loss on interest rate hedging contract as this loss cannot be considered as expenditure.*
>
> *3. Whether on the facts and in the circumstances of the case, the Ld CIT(A) has erred in allowing deduction on account of loss on interest rate hedging contract as this loss is Mark to Market losses whose treatment should be governed by the Accounting Standard 3D.The assessee fails to do so.*
>
> *4. That the appellant craves leave to add to and/or alter, amend, modify or rescind the grounds hereinabove before or at the hearing of this appeal.*

5. We have heard the rival contentions. On a careful consideration of the facts and circumstances of the case and perusal of the papers on record and the orders of the authorities below, we hold as follows:

6. On the first issue of disallowance made u/s. 40(a)(ia) of the Act, we find that the Ld. CIT(A) has discussed this issue from para 4.2 to para 4.7 at pages 5 to 7 of his order. The

Ld. CIT(A) referred the 'definition of interest' u/s. 2(28A) of the Act as well as the definition of interest under Article 11 of the Double Taxation Avoidance Agreement (DTAA) between India & Germany and thereafter, he held as follows:-

"4.2. I have considered the submission of the AR of the appellant in the backdrop of the assessment order as well the relevant material on record. It is noted that the appellant had obtained a loan facility from the DEG Bank, Germany. In terms of the loan agreement, the appellant along with interest was also required to pay monitoring fees to the Bank towards servicing of loan, maintaining record of payments, collecting and making escrow payments, passing principal and interest payments details etc. According to the appellant the monitoring fees paid to the Bank was in the character of 'interest' as defined in the Income-tax Act, 1961 as well as the DTAA between India and Germany and therefore in terms of the specific Article 11 (3)(b) it was the appellant's case that both the interest as well as monitoring fees paid to the DEG Bank was exempt from tax in India. The AO however was not fully agreeable with the claim of the appellant. Although the AO agreed that 'interest' paid to DEG Bank was exempt from tax in India but according to him the monitoring fees paid pursuant to the loan agreement was not akin to 'interest' and was therefore subject to withholding tax u/s 195 of the Act. The AO therefore held that the appellant was an 'assessee-in-default' for not deducting tax on the monitoring fees and therefore disallowed the payment of Rs. 2,51 ,3501- by invoking Section 40(a)(i) of the Act. In this factual background the limited issue for my consideration is whether at all the monitoring fees is in the nature of 'interest' so as to qualify for exemption from income-tax in India under Article 11(3) (b) or for that matter at all chargeable to tax in India terms of the DTAA between India and Germany.

4.3 In this context it would first be relevant to the expression 'interest' as defined in section 2(28A) of the Act which reads as follows:

> *"2(28A) interest means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes an service fee or other charge in respect of the monies borrowed or debt incurred or in respect of an credit facility which has not been utilized.;."*

It is noted the above definition is an inclusive one which was inserted vide the Finance Act, 1976. The said inclusive side of the definition is relevant. In other words, the expressions 'any service fee or other charge' in respect of the monies borrowed are relevant. It is a fact that the aforesaid expression 'any service fee or other charge' is not defined in the Act but they are qualified by certain expressions and they are (i) 'in respect of the monies

borrowed', (2) 'in respect of the debt incurred', (3) 'in respect of any credit facility' or (4) in respect of any credit, which has not been utilized'. These expressions indicate that the scope of the expression 'interest' is very wide. The expression 'any' borrowing/debt/ credit facility utilized or not' also come under the said scope. The expression 'any service fee or other charges', which are undefined, in my considered opinion, covers fee or charges of any or every kind which are payable by the assessee in respect of such borrowing/debt! credit facility utilized or not.

4.4. In view of the above I am therefore of the considered view that the expressions 'service fee and other such charges' which are levied by the lender in the course of such loan inter alia includes processing, monitoring, managing, re- structuring charges or fees etc. and therefore the impugned expenditure falls within the scope of the said clause. I therefore held that monitoring fees paid to Bank pursuant to the loan agreement is in the nature of the service charges and such other charges as defined in section 2(28A) of the Act and therefore qualify as 'interest' under Section 2(28A) of the Act. This view finds support from the decisions of the Hon'ble ITAT, Pune in the cases of Shimla Automobiles (P) Ltd. Vs. ITO (1641TD 9) & Chintamani Hatcheries (P) Ltd. Vs. DCIT (751TD 116).

4.5 Now I proceed to examine the definition of interest as defined under Article under Article 11 of the Double Taxation Avoidance Agreement between India & Germany which reads as follows:-

> *The term "Interest" as used in this Article means <u>income from debt-claims of every kind</u>, whether or not secured by mortgage and whether or not is carrying a right to participate in the debtor's profits, and in particular, income from Government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article"*

4.6. It is noted that the term 'interest' is defined so as to mean income from debt- claim of any kind. Meaning thereby any stream of income derived in any form by the lender, i.e. DEG Bank, which emanate from a debt-claim which in the present case is the loan advanced by DEG to the appellant is in the nature of interest. In my considered view therefore the term 'interest' as defined in the DTAA between India & Germany is far wide and comprehensive than the definition under Section 2(28A) of the Act. The definition of interest is not restricted to only service charges or any other charges in relation to the loan/debt/borrowing but it includes any and all forms of income derived in relation to the loan/debt/borrowing. In the given facts of the present case the income by way of monitoring fees has arisen to

DEG Bank from the loan agreement entered into with the appellant and therefore it is without any doubt that it is in the nature of 'interest' as defined under Article 11 of the DTAA between India & Germany.

4.7. For the reasons set out above therefore I hold that the monitoring fees paid by the appellant to DEG Bank, Germany qualified as 'interest' both under Income-tax Act, 1961 as well as the Double Taxation Avoidance Agreement between India & Germany and in that view of the matter the said payment was not liable to tax in India in terms of the specific exemption granted under Article 11 (3)(b) of the Indo- German DTAA. In the circumstances the appellant could not be treated as an 'assessee-in-default' under Section 40(a)(ia) and hence the impugned disallowance of Rs. 2,51 ,350/- made by the AO is held to be untenable on facts & in law and is therefore directed to be deleted. These grounds are allowed. "

6. Monitoring fees paid by the assssee to DEG Bank, Germany qualified as 'interest' both under Income-tax Act, 1961 as well as the Double Taxation Avoidance Agreement between India & Germany and the payment made in question was not liable to Income-tax under the Act in terms of the specific exemption granted under Article 11(3)(b) of the indo-German DTAA. Hence, no deduction of tax at source was required to be made u/s. 195 of the Act. As there was no violation of Sec. 195 of the Act, the disallowance made u/s. 40(a)(ia) of the Act was deleted by the Ld. CIT(A). We find no infirmity in this finding of the ld. CIT(A). Hence, we uphold the same and dismiss ground no. 1 of revenue's appeal.

7. Ground nos. 2 & 3 are against deletion of disallowance made by the Ld. CIT(A) of loss on "Interest Rate Hedging Contract". The Ld. CIT(A) discussed this issue vide paras 5.2 to 5.8 at pages 11 to 13 of his order, which as follows:-

"*5.2 I have considered the submission of the AR of the appellant in the backdrop of the assessment order as well the relevant material on record. From the Profit & Loss Account the AO noted that the appellant had claimed loss of Rs.5, 11,03,987/- from interest rate hedging contract. The AO held that such loss was not allowable under Section 43A or Section 37(1) and therefore disallowed the same. The AO disallowed net sum of Rs.2,26,10,487/- after netting off the loss of Rs..5,11,03,987/- against the reversal of earlier year's loss of Rs.2,84,93,000/- which was similarly disallowed in AY 2011-12. From the impugned order I find that the AO's order is cryptic. The AO did not discuss the background facts leading to*

MTM loss which the appellant accounted in its books but simply disallowed it by holding that 'loss' cannot be equated with 'expenditure'.

5.3. From the facts on record it is noted that the appellant had entered into an interest swap derivative with State Bank of India with a view to reduce effective interest cost on the borrowings. The assessee had originally borrowed a foreign currency loan which carried floating rate of 6-month LIBOR Rate SSA. Since the appellant expected that the global USOR rates would increase in view of the slow market conditions, the appellant entered into a derivative contract with State Bank of India wherein it swapped the loan amount notionally in the same USD currency but converted it into a fixed rate loan carrying 2.77% interest rate with a view to cap its losses and the effective cost of borrowings in case the global LIBOR rates increased. Meaning thereby if the floating rate payable on the original USD Loan would be lower than 2.77%, then the appellant would pay the difference under the swap arraignment to SBI but if the floating rate paid on the original USD Loan was higher than 2.77%, then SBI shall pay the difference to the appellant. In the relevant year, since the LIBOR rate was lower the appellant was required to bear higher interest cost i.e. fixed rate of 2.77% thereby resulting in a loss of Rs. 5,11,03, 987/- as on 31st March 2012 under the interest rate swap arrangement.

5.4. It is thus noted that due to adverse fluctuation in UBOR rates that upon re-alignment of the interest rate derivative, the assessee had incurred MTM losses at the close of the financial year. In terms of the mandatory Accounting Standards prescribed by ICAI for accounting for such derivative contracts and following the doctrine of prudence, the assessee was mandatorily required to provide for such losses in respect of all outstanding derivative contracts at the balance sheet date by marking them to market. Accordingly with reference to the interest rate swap outstanding as on 31.3.2012, the assessee determined the loss of Rs. 5, 11 ,03,987/- at the year end .

5.5. In view of the above, it is apparent that the purpose of entering into interest swap arrangement was to reduce effective cost of borrowing the dominant purpose for which the interest swap arrangement was entered into was not to obtain additional loan but to reduce effective cost of existing borrowing. In view of these facts therefore I find merit in the AR's contention that any loss or gain which arose from the interest rate swap arrangement was in the revenue field since the underlying transaction for such an arrangement was the interest payable on the loan which was a revenue item. This Proposition finds support from the decision of the Hon'ble ITAT, Kolkata in the case of DCIT Vs. Mcleod Russell India Ltd. (ITA Nos. 114 & 115/Ko1/2016) dated 03.05.2019 wherein it was held that the MTM loss incurred on currency interest rate arrangements with Bank

was non-speculative in nature and deductible from the profits of the business.
5.6. As far as the AO's contention that 'loss' cannot be equated with 'expenditure' u/s 37(1) is concerned, I find merit in the AR's contention that the appellant never claimed the sum of Rs. 5, 11,03,987/- by way of expenditure u/s 37(1) of the Act and therefore the reasoning given by the AO to make the impugned disallowance has no legs to stand on. From the audited accounts I find that the sum of Rs. 5, 11,03,987/- was debited by way of loss on the interest rate derivative and such loss being incidental to the business of the appellant was allowable as deduction in terms of Section 28 of the Act.
5.7 Even with regard to Section 43A, it is noted that the AO was unable to make out a case as to how Section 43A was applicable in the present case. I find that it is not a case that the loss arose on repayment of the principal amount of loan or due to any exchange fluctuation in the foreign currency component of the principal loan. Instead the facts on record are clear that the loss had arisen on account of interest rate hedging contract. Hence I am of the considered view that Section 43A had no application whatsoever in the given facts of the present case.

5.8. For the reasons set out above the MTM loss of Rs. 5, 11 ,03,987/- incurred by the appellant under the interest rate swap arrangement is held to be fully allowable as deduction from. the profits of the business u/s 28 of the Act. The AO is therefore directed to delete the net disallowance of Rs. 2,26, I 0,487/-. These grounds are allowed."

8. We find that this issue is covered in favour of the assessee by the decision of the co-ordinate bench of this Kolkata Tribunal, 'B' Bench in the case of M/s. Mcleod Russel India Ltd. Vs. DCIT in ITA Nos. 114-115/Kol/2016 for the AYs. 2008-09 & 2009-10 order dated 03-05-2019. As the ld. CIT(A) has applied the proposition of law laid down by this Tribunal on this issue , we find no infirmity in the order of the Ld. CIT(A). We uphold the same. Ground nos. 2 & 3 raised by the revenue are dismissed. Ground no. 4 raised by the revenue is general in nature. Therefore, the same is dismissed.
10. The appeal of the revenue (ITA No. 2475/Kol/19 for the AY 2012-13) is dismissed.

C.O No. 05 Kol/2020 (arising out of ITA No. 2475/Kol/2019 for the A.Y 2012-13)

9. In the cross objection (No. 05/Kol/20) the assessee has raised the following grounds:-

1. For that on the facts and in the circumstances of the case, the CIT(A) was grossly unjustified in not allowing the depreciation claimed u/s. 32 in respect of software.

2. For that on the facts and in the circumstances of the case, since the software expenditure of Rs. 10,16,976/- incurred in AY 2011-12 was disallowed by the Revenue holding it to be capital in nature, then the lower authorities ought to have allowed depreciation thereon in terms of Section 32 of the Act in the relevant AY 2012-13.

10. The assessee had claimed expenditure incurred on software in the earlier AY 2011-12, which was claimed by the assessee as revenue expenditure. The Ld. AO, however, treated the same as capital expenditure. He treated the software as fixed asset “” Plant & Machinery” and granted statutory depreciation @ 25%. The assessee claimed depreciation on opening WDV. The Ld. CIT(A) rejected the same by holding as under:-

“6.2 I have carefully considered the submissions of the AR of the appellant against the relevant material on record. It is noted that the appellant had incurred expenditure on software in the earlier AY 2011-12 which was claimed as revenue item of expenditure deductible from business profits. The AO who framed the assessment order u/s. 143(3) for AY 2011-12 disallowed the said expenditure and treated it to be capital in nature. The appellant contested on the issue before the appropriate appellate authority which I find is still pending for disposal. In the meantime, however, the appellant has raised a fresh claim before the AO as well as before me that since the software expenditure has been treated as capital expenditure in AY 2011-12, then corresponding depreciation thereon @ 25% on the closing WDV for AY 2011-12 should be allowed for this AY 2012-13. I am however, constrained not to entertain the alternative claim of the appellant for the simple reason that it has not accepted the Department’s stand in the matter for the earlier year and conversely claiming depreciation which only goes to show the paradoxical stand in the matter. Therefore, the claim of depreciation on such disputed expenditure cannot stand in good stead for the appellant in any manner. In these circumstances, the appellant cannot in the same breath claim depreciation on such disputed item of expenditure in the subsequent year i.e. the relevant AY 2012-13. In view of the foregoing deliberations on the issue at hand, I do not find any merit in the contention of the appellant’s AR. This ground stands dismissed accordingly.”

11. After hearing the rival contentions, we restore this matter to the file of the Ld.AO for fresh adjudication as per law. The AO, however, in the earlier assessment year treated the

expenditure in question as having been incurred as capital in nature and granted depreciation. The assessee has to be granted depreciation on W.D.V of this asset. The revenue authorities are wrong in not granting the depreciation in question. Nevertheless, it is brought to our notice by the Ld. Counsel of the assessee that the assessee has challenged the decision of the Ld. AO for A.Y 2011-12 that the appeal is pending. If so, in case the assessee's claim on this issue will become infructuous. With this observation, we remand the matter to the file of the Ld. AO to decide the same afresh. Ground nos. 1 & 2 of assessee's cross objection are allowed for statistical purpose.

12. In the result, the appeal of revenue is dismissed and cross objection of assessee is allowed for statistical purpose.

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

Sd/-	Sd/-
(Aby. T. Varkey)	(J. Sudhakar Reddy)
Judicial Member	Accountant Member

Dated : 15 March, 2021

**PP(Sr.P.S.)
Copy of the order forwarded to:

1. Appellant/Revenue: The DCIT, Cir-5(2), Aaykar Bhawan, P-7 Chowinghee Square, Kolkata-69.
2 Respondent /Assessee–M/s. Sisecam Flat Glass India Ltd (Formerly known as M/s. HNG Flat Glass Ltd) 2 Red Cross Place, BBD Bag, Kolkata-1.
3. CIT(A)-, Kolkata (sent through e-mail)
4. CIT- , Kolkata.
5. DR, ITAT, Kolkata. (sent through e-mail)

By order,

/True Copy, Assistant Registrar