IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "C", MUMBAI

BEFORE SHRI RAJENDRA SINGH, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER

ITA No.74/Mum/2011
Assessment Year:2007-08

M/s. Creation 4, Parekh Vora Chambers, 66, Nagindas Master Road, Fort, Mumbai- 400 001 **PAN: AAAFC 0639 D**	Vs.	ITO, 12(3)(4), Mumbai.
(Appellant)		(Respondent)

ITA No.408/Mum/2011
Assessment Year: 2007-08

ITO, 12(3)(4), Mumbai.	Vs.	M/s. Creation 4, Parekh Vora Chambers, 66, Nagindas Master Road, Fort, Mumbai- 400 001 **PAN: AAAFC 0639 D**
(Appellant)		(Respondent)

Assessee by : Shri Vijay Mehta
Revenue by : Shri R.A. Pant, D.R.

Date of Hearing : 01.08.2013
Date of Pronouncement : 11.10.2013

O R D E R

Per Sanjay Garg, Judicial Member:

With this common order we will dispose off above noted cross appeals, one by the assessee and the other by the revenue against the order of the CIT(A) -23 dated 10.11.2010 relevant to assessment year 2007-08.

ITA No. 74/M/11

In this appeal preferred by the assessee, two effective grounds have been raised.

Ground No. 1 :

Disallowance on interest on loan:-

2. Vide ground no. 1 the assessee has contested the confirmation of the disallowance of Rs.1,47,707/- made by the A.O. being ad hoc 25% of the total interest claimed. The assessee has claimed that the amounts receivable were outstanding on account of sales conducted by the appellant and that there was a direct nexus between expenditure and the business purpose.

3. The assessee is in business of exhibiting cinema slides & short films in theatres and the sole concessionaire and also in allied business related to outdoor advertising. During the assessment proceedings, the Assessing Officer noticed that the assessee had claimed interest expenditure of Rs.5,90,828/-, which was found to be a major expenditure. The entire receivables were from its group concerns including M/s. Creations Publicity P. Ltd. It was observed from the P & L account and balance sheet of earlier years that the major activities were with its group concerns and a major amount of its receivables from the said parties was shown as outstanding. Further there were unsecured loans of Rs.52 lakhs on which the assessee had paid interest @ 12% which was claimed as an expenses. The A.O. observed that the average non-interest bearing funds available to the assessee were only Rs.51.70 lakhs out of total average funds available of Rs.1.04 crores. He further observed that a major portion of the said funds had been utilized for processing balances recoverable from debtors which was Rs.65.24 lakhs at the beginning of the year and Rs.70.28 lakhs at the end of the year i.e. an average of Rs.67.76 lakhs. The A.O. thus noticed hat a portion of the interest bearing funds had been utilized for processing the debtors. In view of the facts that the entire receivables were

from group concerns and the debit balances were outstanding since long and there was no business constraint to provide for such substantial credits especially considering that the total turnover was only Rs.1.76 crores, the assessee was required to justify its claim of interest as its business exigency. The assessee stated that the turnover of the assessee was entirely related to the Creation Publicity P. Ltd. and the transaction was done purely on commercial basis and having regard to prevalent market rates. Further that the said company had a total turnover of Rs.26.24 crores out of which there were debtors outstanding of Rs.20.59 crores which was nearly 78.46%. Since the assessee's entire revenue related to the said party there was no alternative but to allow credit to the company. The assessee further pointed out that the outstanding of the said company had decreased from the preceding year.

The Assessing Officer however observed that the hoarding sites were owned by many small concerns of the group which in turn provided the services to the bigger companies including Creation Publicity P. Ltd. That the major creditors to Creation Publicity P. Ltd. were group concerns. The statement of affairs clearly indicated that there were no exigencies for the assessee to grant credits to its group concerns and claim substantial interest expenses. The parties from whom loans were said to be taken were entities of small means whose income invariably was below the taxable limit or attracting nominal tax. The assessee had shown to have taken loans from 49 parties of amounts ranging from Rs.20,000/- to Rs.3,85,000/-. Incidentally out of total interest payment of Rs.5.91 lakhs, the assessee had deducted tax at source on only an amount of Rs.12,870/-. In this regard, verifications were also made on test check basis wherein it was found that there was intra movement of funds between most of the parties who had granted loans to the assessee and such parties had also granted loans to other group concern of the assessee. The said loans were stated to have been advanced more than 10 years earlier and the interest received was balanced against the interest paid showing nominal net income which did not attract any tax or nominal tax. The A.O. thus concluded that there was a plan involved in arranging the affairs of the group in the manner so as to avoid due tax. There was no business exigency of the assessee for such long term credits offered to its group concern especially when it was operating on substantial borrowed funds. In view of the same, it was held that the entire interest cannot be attributed to the business requirement of the assessee. The A.O. thus disallowed 25% of the interest expense claimed i.e. Rs.1,47,707/- as not incurred for the business of the assessee.

4. In first appeal the ld. CIT(A) observed that the appellant had not been able to prove any nexus between the expenditure and the purpose of the business. So he confirmed the additions so made by the AO.

5. Before us the A.R. has submitted that there was no colourable device adopted by the assessee to avoid tax as has been alleged by the authorities below. The money was not promptly received from sister concerns whereas, the assessee was in need of money for its business purpose. Hence, as per the trade practice it borrowed money at prevalent market rate of interest. Even the sister concerns of the assessee company were amenable to same rate of tax slab to which the assessee had been. So even if the assessee would have charged interest from the sister concerns, then the sister concerns would have claimed the same as expenditure and ultimately there would have been no tax affect to the revenue. Even in earlier years no disallowance had been made on this account. Even in case of sister concerns, GP ratio was much more as compared to other parties. On the other hand ld. D.R. has relied upon the authorities below.

6. We have considered the submissions made by the ld. representatives of both the parties. Though there seems to be some force in the contention of the

ld. A.R. that some business exigency was involved for the interest expenditure claimed. However, as observed by the A.O. certain manipulation by the assessee to reduce its taxable income cannot be ruled out. In view of the overall facts and circumstances of the case, we find that the disallowance at the rate of 25% made by the A.O. was excessive. Hence, keeping in view of the overall facts and circumstances of the case, the disallowance made under this head is reduced and confirmed to 10% of the total interest expenditure claimed.

Ground No.2 :

Disallowance of 75% of Electricity Expenses amounting to Rs. 1,42,675/-.

Ground No.2 is relating to the disallowance of 75% of Electricity Expenses amounting to Rs. 1,42,675/-.

7. The A.O. noticed that the assessee had claimed Office Electricity expenses of Rs.1,90,234/- in respect of Office No.4, 7 and 14 used by the assessee for the business. He further noticed that the premises No.4 belonged to the assessee whereas office No.7 and 14 belonged to partners of the firm. The AO thus disallowed 75% of the electricity expenses as not incurred wholly and exclusively for the business of the firm. The CIT(A) also confirmed the additions so made by the AO.

8. The ld. AR has brought our attention to the fact that similar additions were made in the case of the assessee for A.Y. 2005-06 which were further confirmed by the CIT(A). However, in appeal, the ITAT, Mumbai in its order dated 13.07.2010, passed in ITA No.574/M/2010 for A.Y. 2005-06 held that the burden is on the assessee to establish that the expenses claimed were wholly and exclusively for the purpose of business. Since the facts, in the opinion of the ITAT, were subject to verification, the ITAT remitted the matter back to the file of the Assessing Officer with a direction to consider the facts and decide the

issue afresh. Another co-ordinate bench of the tribunal vide order dated 15.2.2011 passed in ITA No.3206/M/2010 for Assessment year 2006-07, has again restored the matter on the identical issue raised in the case of assessee to the A.O. for deciding the same following the directions given by the tribunal for AY 2005-06. Since the issue involved in this ground is identical to that involved for A.Y. 2005-06, hence following the similar line, the matter in this issue is remitted back to the file of the AO for deciding a fresh in terms and directions given vide the order of the ITAT dt. 13.07.2010 for AY 2005-06.

ITA NO.408/M/2011

Disallowance of Professional and Legal fees paid amounting to Rs.53,07,819/-

9. The sole issue raised by the revenue in it's appeal is regarding deletion of disallowance of Professional and Legal fees paid amounting to Rs.53,07,819/-. The issue involved is whether for the assessee, who is in the business of outdoor advertising, the expenditure incurred in litigation for protection of right to display hoardings at particulars sites is capital in nature or revenue expenditure.

10. As observed above the assessee is in business of outdoor advertising also. The assessee claimed that the above said professional and legal expenses were incurred for Litigation matter for protecting the ownership of the hoarding sites and also that the expenses were wholly and exclusively for the purpose of the business of the assessee. The same were revenue expenses u/s. 37of the Income tax Act.

11. However the Assessing Officer after perusing the details filed observed that the expenses incurred were to protect the ownership of the hoardings sites which were the capital asset of the assessee. Assessing Officer relied upon the decision of the Allahabad High Court in the case of M/s. Plastic Products Ltd. v. CIT [62 ITR 209] wherein it has been held that the litigation expenses incurred

in the acquisition of capital asset is of a capital nature. He further relied upon the decision of the Supreme Court in the case of CIT v. Dalmia Jain & Co. Ltd. 81 ITR 754 wherein it has been held that the issue to be considered is whether the Litigation expenses incurred by the assessee were for the purpose of creating, curing or completing the assessee's title to capital or whether it was for the purpose of protecting its business. It was further held that if it for protecting capital asset the same is a capital expenditure and if it is for business, it is revenue expense. The Assessing Officer also relied upon the decision of the Hon'ble Kerala High Court in the case of CIT Vs. Malyalam Plantation India Ltd. reported 169 ITR 237 wherein it has been held that the expense for preserving the assessee's right in or over a capital asset is in the nature of capital expenditure. The A.O. thus held that the expenses were not for challenging any right to obtain any business but for the protection of its right to the capital asset in the nature of hoarding sites. The expenses of Rs.53.07 lakhs incurred were considered as a capital expenditure and the claim of the same as a revenue expense was disallowed.

12. Before The ld. CIT(A), the appellant submitted that the details of the cases/litigation, name of parties to the litigation as well the nature of the litigation. The CIT(A) observed that none of the litigation expenses were incurred by the appellant for the purpose of creating, curing or completing the assessee's title to the capital. All the litigation expenses were wholly and exclusively for the purpose of the business of the assessee, which was being done mainly from the hoarding sites in the Heera-Panna property at the Haji Ali Junction. The assessee had not claimed any ownership rights in the said hoarding sites. After going through the pleadings and prayers of different plaints/ petitions relating to the litigation of the assessee, the CIT(A) observed that the litigation in question was for possession of the hoarding sites or structures or to receive enjoy or appropriate the proceeds, profits, income from

the use of any part thereof and further for restraining the defendants from interfering, obstructing or preventing Plaintiffs(assessee) from using or enjoying directly or indirectly and from contracting for or receiving or retaining any profits or income from the use of the suit hoardings sites and structures and to handover the amounts if any collected by them, to the Plaintiffs. The CIT(A) thus concluded the litigation by the assessee was for the purpose of protecting its business, to protect the source of its income. The appellant had been seeking to protect its possession of, access to and use of the hoarding sites, through the litigation. The litigation expenses were therefore allowable. He therefore directed the Assessing Officer to allow the same after verification of the payments. The revenue is thus in appeal before us.

13. We have heard the ld. Representatives of the parties and have also gone through the record. The case of the assessee is that it had been contesting the litigation for protecting its right to display the hoardings on certain prominent sites for the purpose of its business of outdoor advertising. On the other hand the case of the Revenue is that the said expenditure was incurred for acquisition and protection of capital asset, hence capital in nature. In our view, in case of business of outdoor advertising, the expenses incurred in litigation for protection of right to display the hoardings at particular sites can not be said strictly to be of capital in nature. These types of expenditure are so closely related to the outdoor advertising business of the assessee that it would fall in the definition of revenue expenditure. The displaying of hoardings being the business of the assessee, the expenditure incurred for right to display is thus business right of the assessee. Thus the expenditure incurred for protection of business rights, in our view, is revenue in nature. However, the expenditure incurred for acquisition of right to display will fall in the definition of capital expenditure. The Hon’ble Supreme Court in the case of “Dalmia Jain & Co.” (supra) has held that in deciding whether a particular expenditure is capital or

revenue in nature, what the courts have to see is whether the expenditure in question was incurred to create any new asset or was incurred for maintaining the business of the company. If it is the former it is the capital expenditure; if it is the latter, it is the revenue expenditure. It has also been so held by the Hon'ble Allahabad High Court in the case of "Plastic Products Ltd." (supra). In CIT v/s O.P.N. Arunachala Nadar : (1983) 141 ITR 620, the Hon'ble Madras High Court has held that legal expenses incurred by the assessee to protect the source of his income or the title to his business or to preserve or maintain his business assets to be regarded as expenditure incurred wholly and exclusively for the purpose of his business and therefore, allowable as deduction for the purpose of computing the profits for income tax purposes. However, as held by the Hon'ble Supreme Court in the case of "Dalmia Jain & Co." (supra) distinction is to be made as to whether the expenditure is for creating, curing or completing the assessee's title to capital or for protecting the business.

14. In view of the legal position as discussed above regarding the matter in dispute, we restore the issue to the file of A.O. to make a distinction as to which of the expenditure was incurred by the assessee for protection of its right to display over a prominent or particular site and which of the expenses were incurred for acquisition of right to display on such sites. The expenditure incurred for protection of the rights on the sites whether leasehold or ownership or otherwise which were already under control or possession of the assessee will be treated as revenue in nature. However, the expenditure incurred for getting or acquisition of right to the sites, which were not under possession or control of the assessee before the start of litigation, will be treated as capital expenditure. The distinction is to be made between protection of business rights and creation of business rights. The former will be considered as revenue expenditure and the latter as capital expenditure. Needless to say that the A.O. will give proper

opportunity to the assessee to present its case and submit the necessary documents then to decide the issue by way of a speaking order.

15. In the result, appeal of the Revenue is **partly allowed** for statistical purposes.

Order pronounced in the open court on this 11th day of October, 2013.

Sd/-	**Sd/-**
(Rajendra Singh)	**(Sanjay Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 11.10.2013.

* Kishore

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR "C" Bench

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By Order

Dy/Asstt. Registrar, ITAT, Mumbai.