

No deduction of forex loss on loans granted to AE as assessee failed to prove that it was utilized for business of AE

Summary – The Mumbai ITAT in a recent case of Likproof India (P.) Ltd., (the Assessee) held that where it was not proved that loan given to foreign AE in foreign exchange was used for its business, foreign exchange fluctuation loss incurred by assessee would be capital loss and, thus could not be allowed under section 37(1)

Facts

- The assessee-company had incorporated an associated company (AE) in UAE for undertaking construction work and granted it loans denominated in foreign currency. It charged interest from the AE and offered same for taxation under head business income which was accepted by the revenue.
- The assessee-company incurred foreign exchange loss on such loans on account of restatement/revaluation as on the date of Balance sheet owing to adverse fluctuation in foreign exchange rates.
- The Assessing Officer disallowed the claim of foreign exchange loss. On the ground that as per proviso to section 43A any adjustment to the cost on account of foreign exchange was allowable only on settlement/payment of the liabilities and the loss was only a notional loss and was not on account of any trading liability but was related to loan liability.
- The Commissioner (Appeals) held that the loan granted to the foreign AE was a capital asset and any impairment with regard to money advanced was not allowable as deduction under section 37(1).
- On second appeal, the Tribunal:

Held

- The assessee-company is not able to bring on record cogent material/evidences in support of its claim that business/trade advances/loans were extended by the assessee-company to its foreign AE which has been in-fact actually utilized by its foreign AE for business purposes .The copies of Financial Statements of the said foreign AE or any other cogent material/evidences are not placed on records to prove and demonstrate that the assessee-company extended trade/business advances to its foreign AE in Emirates of Dubai in UAE and the same were in-fact actually utilized towards business purposes by its foreign AE while consistent finding of fact is recorded by authorities below that the assessee-company is not able to demonstrate and prove its contentions that the said interest bearing loans/advances denominated in foreign currency were granted by the assessee-company to its foreign AE in UAE for business purposes and its actual utilization by its foreign AE in UAE for business purposes. No such evidences has been placed before us by the assessee-company

to support its contention of having advances loans denominated in foreign currency to its foreign AE in UAE for business/trade purposes and its further actual utilization by its foreign AE in UAE for business purposes. The primary onus was on the assessee-company to have led cogent evidences to substantiate its plea of grant of said loans to its foreign AE for purposes of trade/business and its actual utilization by foreign AE for business purposes, which the assessee-company except for making bald statement could not led cogent evidences to substantiate its above stated contentions. The assessee-company on the other hand is charging interest on these loans granted to foreign AE and presumption would arise that the said loans were in-fact granted on capital field rather than being trading/business advances. In our considered view, this notional loss which arises owing to adverse fluctuation in foreign currency rates as on 31-3-2008 which led to restatement/revaluation of interest bearing loans denominated in foreign currency extended by the assessee-company to its foreign AE in UAE and which could not be proved by the assessee-company to have been extended for trade/business purposes, the presumption shall arise that loan is on capital field until the same is rebutted by the assessee-company and hence the said notional loss arising on restatement/revaluation of foreign currency loans due to adverse foreign exchange fluctuations cannot be allowed as deduction under section 37(1) while computing income of the assessee chargeable to tax under the Act.

- The Supreme Court in *Woodward Governor India (P.) Ltd.* held that losses on account of fluctuation of foreign exchange rates owing to reinstatement of liability arisen for stock-in-trade were held to be allowable under section 37(1), while for post amendment to section 43A with effect from 1-4-2003 by Finance Act, 2002, the adjustment to cost of capital asset acquired out of borrowings in foreign currency for acquisition of capital asset is to be adjusted on payment of foreign exchange liability and not to be adjusted on notional basis merely on fluctuation of foreign exchange rates on the date of Balance Sheet. Similarly, in *ETP International (P.) Ltd.*, the Tribunal recorded a finding of fact that the money was advanced by tax-payer for business purposes which has been used by foreign AE for the purposes of business and hence relying on the decision of Supreme Court in the case of *SA Builders v. CIT* [\[2007\] 288 ITR 1/158 Taxman 74](#) such losses were allowed by the Mumbai Tribunal based on the facts of the case, while in the instant case the assessee-company is not able to demonstrate that the loans/advances granted by the assessee-company to its foreign AE in Emirates of Dubai in UAE was in the nature of trade/business advances for the purposes of business of the assessee-company which has been in-fact actually utilized by its foreign AE for its business purposes. Appeal filed by the assessee-company is to be dismissed.