

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F', NEW DELHI**

Before Sh. N. K. Saini, AM And Smt. Beena Pillai, JM

ITA Nos. 1978 & 1979/Del/2011 : Asstt. Years : 2007-08 & 2008-09

M/s Paliwal Infrastructure (P) Ltd. B-14, Greater Kailash-1, New Delhi	Vs	Deputy Commissioner of Income Tax, Circle-12(2), Bangalore
(APPELLANT)		(RESPONDENT)
PAN No. AABCR7764E		

**Assessee by : Sh. Satish Kumar Goel, Adv.
Revenue by : Smt. Rasmita Jha, Sr. DR**

Date of Hearing : 16.12.2015	Date of Pronouncement : 08.02.2016
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ORDER

Per N. K. Saini, AM:

These two appeals by the assessee are directed against the order dated 30.03.2011 and 31.03.2011 of Id. CIT(A)-XVII, New Delhi for the assessment years 2007-08 and 2008-09 respectively.

2. Since the issue involved is common and the appeals were heard together so these are being disposed off by this common order for the sake of convenience and brevity.

3. First we will deal with the appeal for the assessment year 2007-08 in ITA No. 1978/Del/2011. The only effective ground raised in this appeal reads as under:

“That in the facts and circumstances of the case of the appellant, the order of the learned Commissioner of Income Tax (Appeals) in confirming disallowance of Interest of Rs.3,63,74,505/- in respect of investment made by the appellant in M/s Abhitex International, Panipat, which was made for business consideration only, hence is altogether arbitrary, against the provisions laid under law, illegal and uncalled for.”

4. Facts of the case in brief are that the assessee was engaged in the business of operation and maintenance of Industrial Park which had been built by M/s RMZ Corp Holdings Pvt. Ltd. and was acquired by the assessee in the year 2005. The assessee had been deriving income from the units located in the Industrial Park. During the year under consideration the assessee had received gross receipt of Rs.28,59,81,773/- after including other incomes, the assessee arrived at gross total income of Rs.6,81,02,483/- on which deduction u/s 80IA(4)(iii) of the Act amounting to Rs.4,49,07,385/- was claimed and taxable income of Rs.2,31,95,098/- was arrived. The assessee had filed return of income on 10.06.2008 by declaring taxable income of

Rs.2,31,95,100/- which was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter referred to as the Act) on 19.03.2009. Later on, the case was selected for scrutiny. The AO asked the assessee to furnish various details to substantiate its claim of deduction. The assessee furnished copies of approval taken from Ministry of Commerce & Industry, CBDT Notification and lease agreements with tenants etc. The AO observed that the assessee had invested Rs.40,87,02,301/- as on 31.03.2007 in one of its partnership firm, namely, M/s Abhitex International and the details revealed that those funds were directly advanced from ABN Amro loan account as under:

<i>Sl. No.</i>	<i>Particulars</i>	<i>Debit</i>	<i>Credit</i>
1.	<i>ABN Amro Bank Account Twds transfer of funds – Loan drawn down from ABN Amro Bank tfrd to Loan account – 24.06.2005</i>	<i>18,43,77,955</i>	
2.	<i>ABN Amro Bank Account Twds tfr of funds – Ch. No.911276 dated 01.07.2005</i>		<i>16,00,000</i>
3.	<i>ABN Amro Bank Account Twds tfr of funds – Ch. No.917628 dated 02.08.2005</i>		<i>85,00,000</i>
4.	<i>ABN Amro Bank Account Twds tfr of funds – Ch. No.135601 dated 06.09.2005</i>	<i>13,05,00,000</i>	
5.	<i>ABN Amro Bank Account Twds tfr of funds – Ch. No.135605 dated 15.09.2005</i>	<i>1,75,00,000</i>	
6.	<i>ABN Amro Bank Account Twds tfr of funds – Ch. No.785311 dated 22.10.2005</i>		<i>18,00,000</i>
7.	<i>ABN Amro Bank Account</i>		<i>15,00,000</i>

	<i>Twds tfr of funds – Ch. No.787710 dated 03.11.2005</i>		
8.	<i>ABN Amro Bank Account Twds tfr of funds – Ch. No.135610 dated 25.11.2005</i>	<i>1,00,00,000</i>	
9.	<i>ABN Amro Bank Account Twds tfr of funds – Ch. No.298434 dated 31.12.2005</i>		<i>5,00,000</i>
10.	<i>ABN Amro Bank Account Twds tfr of funds – Ch. No.135613 dated 31.12.2005</i>	<i>35,00,000</i>	
11.	<i>ABN Amro Bank Account Twds tfr of funds – Ch. No.301647 dated 27.02.2006</i>		<i>35,00,000</i>
12.	<i>ABN Amro Bank Account Twds tfr of funds – Ch. No.135621 dated 16.03.2006</i>	<i>35,00,000</i>	
13.	<i>ABN Amro Bank Account Twds tfr of funds – Ch. No.135622 dated 16.03.2006</i>	<i>1,25,00,000</i>	
14.	<i>ABN Amro Bank Account Twds tfr of funds – Ch. No.797817 dated 30.06.2006</i>		<i>3,00,000</i>

<i>Opening Balance:</i>	<i>36,18,77,955</i>
<i>Current Total:</i>	<i>1,77,00,000</i>
<i>Closing Balance:</i>	<i>34,41,77,955</i>

5. From the above details, the AO noted that the assessee had invested Rs.34,41,77,955/- as on 01.04.2006 in M/s Abhitex International and there was additional transfer of funds during the current year to the tune of Rs. 6,45,24,346/-. Thus, total outstanding balance as on 31.03.2007 came to Rs.40,87,02,301/-. According to the AO there was clear nexus for diversion of funds to the associate concern of the assessee. He further observed that the partnership deed of M/s Abhitex International revealed that

no interest was payable to the assessee for the capital contributed by it. Whereas the assessee had fully borne the interest and finance charges on its own account which was clearly detrimental to the interest of the revenue. The AO disallowed proportionate interest on the funds transferred to the sister concern, treating the same for non-business purposes. The AO found that the assessee had paid interest @ 8.9% (on an average) to the ABN Amro Bank. Accordingly, disallowance of Rs.3,63,74,505/- was made and added to the income of the assessee.

6. Being aggrieved the assessee carried the matter to the Id. CIT(A) and submitted that the action of the AO was not justified as the same was not based on proper appreciation of facts and was in violation of legal position on the issue. It was further submitted that the borrowings from the bank got reduced from Rs.136 crores as on 31.03.2006 to Rs.124 crores as on 31.03.2007 and the assessee had non-interest bearing funds of Rs.34,67,15,55/- during the financial years 2005-06 and Rs.31,68,35,357/- during the financial year 2006-07. It was stated that the assessee had also cash flow funds available with respect of depreciation on fixed assets amounting to Rs.12.30 crores and Rs.11.60 crores during the periods relevant to the assessment years 2006-07 and

2007-08 respectively. The relevant portion of the submissions of the assessee has been reproduced by the Id. CIT(A) in para 7 at page nos. 17 to 20 of the impugned order which read as under:

“7. Before me, the Ld. AR for the appellant has submitted that the action of the AO was not justified as the same was not based on proper appreciation of facts and was in violation of legal position on the issue. It was submitted that the borrowing from the bank got reduced from Rs.136 crores as on 31.03.2006 to 124 crores as on 31.03.2007. It was further submitted that the appellant had non interest bearing funds of Rs.34,67,15,557/- during the F. Y. 2005-06 and non interest bearing funds of Rs.31,68,35,3577/- during F. Y. 2006-07 as under:

<i>S.N.</i>	<i>Particulars</i>	<i>F.Y. 2005-06</i>	<i>F.Y. 2006-07</i>
<i>1.</i>	<i>Share Capital</i>	<i>45,00,000</i>	<i>45,00,000</i>
<i>2.</i>	<i>Reserve & Surplus</i>	<i>6,33,13,861</i>	<i>6,47,722</i>
<i>3.</i>	<i>Current Liabilities</i>	<i>27,89,01,966</i>	<i>31,16,87,635</i>
	<i>TOTAL</i>	<i>34,67,15,557</i>	<i>31,68,35,357</i>

It was submitted that besides the above non interest bearing funds, the appellant had also during F.Y 05-06 and 06-07 the cash flow funds availability w.r.t. Depreciation of Fixed assets Rs.12.30 Cr in A.Y. 2006-07 and Rs.11.60 Cr in A.Y. 2007-08 asstt. Year. For the sake of convenience, the relevant portion of the Ld. AR's submission is reproduced as under:

"That the AO's observations on the disallowance of Bank Interest amounting to Rs.3,63,73,505 stand reproduced at Pages 9-10 of the Paper Book. The

learned AO has proceeded to disallow the said amount while calculating the same at an average interest rate of 8.9% on the closing outstanding of Rs.40,87,02,301 without considering the dates and period of the amounts going as debit and the credits during the year. The learned AO while making this addition/disallowance has neither considered nor made a mention of one word w.r.t appellant's submissions made in course of assessment proceedings and also made in written reply before him. Your honour, as has been mentioned/, stated in opening para above with regard to submissions made earlier vide Pages 10-12 of the Paper Book, in addition the commercial expediency is further explained/substantiated which squarely covers the issue in assessee/appellant's favour to prove that no disallowance out of interest was called for:

A) Brief Facts

That M/s RMZ Corp. Holdings Private Ltd. The Millenia, Tower B, Level 12-14, No. 1&2, Murphy Road, Ulsoor, were the owners of-

(i) Land, building and other facilities at Plot Nos.14 and 15, Road No #2 HITEC City Layout, Survey No.64 (Part), Madhapur Village, Serilingampali Mandal, Ranga Reddy District Hyderabad(AP) 500081

(ii) The above property was approved by Andhra Pradesh Industrial Infrastructure Corporation Ltd. for commercial purposes(IT PARK). For the purpose/objective of acquiring the ownership/share holding of said Company, Paliwal Group in Panipat made the investment while acquiring the Shares in

the names of-(a) Paliwal Overseas Pvt. Ltd. (b) Paliwal Industries (P) Ltd. (c) Sh.Avinash Chander Sharma (d) Smt. Rani Paliwal W/o. Sh.Avinash Chander Sharma (e) Sh. Abhishek Paliwal S/o. Sh. Avinash Chander Sharma. All the above mentioned assesseees made the respective investments from their accounts/resources which included in the case of c,d,& e, the withdrawals mainly from M/s. Abhitex International, Panipat, a partnership firm in which all three were partners.

(iii) That the total investment in acquiring the shares was to the tune of Rs. 86,99,85,000/-. Details w.r.t. the said investment and respective withdrawals are contained in the copies of accounts produced. The Paidup capital of M/s. RMZ Futura(now present name as M/s. Paliwal Infrastructure) was Rs.45 lakhs only as against which the above mentioned five persons of Paliwal Group including two companies invested the amount as stated above i.e. Rs.86,99.85,000/- which finds place in the respective balance sheets of all the five assesseees. Your honour, the paid up share value remained the same as per the balance sheet of the appellant company.

(iv) That the amount was made available by M/s Paliwal Infrastructure, the appellant company to M/s. Abhitex international, Panipat was in lieu of commercial expediency only i.e. the management of the company & firm belong to same group of family members only and the investment was withdrawn at one stage from said firm only as mentioned in Para(i) above by three partners.

(B) Commercial Expediency

Your honour, having stated the relevant facts in brief as above and from the statement of relevant accounts it would be amply clear that at one stage amount was withdrawn for acquiring shares by three Individuals i.e. Partners of M/s. Abhitex International, Panipat which was a commercial expediency to expand and later on the amount came back from M/s. Paliwal Infrastructure Pvt. Ltd. (earlier name M/s. RMZ Futura). Both the events i.e. withdrawal & Receipts are two sides of same coin i.e. Commercial Expediency. Hope your honour will surely appreciate the same alongwith the submissions already made vide Pages 9-12 of Paper Book.

Your honour, in the submissions already made and made above it may be worth mentioning & relying upon- an important case law-a recent judgement from a larger Bench of Hon'ble Pb. & Hr. High Court in ITR No.169 & 170 of 1996 order dt.1.2.2011 (copy attached). The most relevant para for reference to the context and consideration is Para 11 of this judgement which is reproduced hereunder:-

"11. Learned counsel further submitted that the opinion of different persona with regard to the fact as to whether a particular transaction is to be entered into or not would be subjective and differs from each other. The Assessing Officer may look at the facts from a conservative point of view whereas the assesses may have to look for a broader aspect keeping in view long term planning. Many a times, to keep the flag flying, the group companies have to be supported with funds from financially healthy companies. The manner in which the transaction has been entered into by the assessee can at the

best be termed as tax planning, but in no way it can be opined as tax evasion. Tax planning is permissible. Reliance for the purpose was placed upon M/s. McDowell and Company Limited v. Commercial Tax Officer, (1985) 154 ITR 148 and Union of India v. Azadi Bachao Andolan(2003) 263 ITR 706."

Besides the above relevant para in the judgement there are two Paras extracted from Apex Court decision in- SA Builders Limited V. Commissioner of Income Tax(Appeals) and another (2007) 288 ITR 1, wherein the Hon'ble S.C. had agreed per decision of jurisdictional Delhi H.Court(CIT V. Dalmia Cement(Bharat) Limited 254 ITR 377. Sir, Para 31 & Para 32 SA Builders judgement(supra) stand extracted at Page 14 of Pb. & Hr. High Court case the copy of which as stated above is enclosed. These two paras read as-

"31. We agree with the view taken by the Delhi High Court in CIT Vs. Dalmia Cement(Bharat) Ltd. (2002) 174 CTR (Del) 188: (2002) 254 ITR 377(Del) that once it is established that there was nexus between the expenditure and the purpose of the business(which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The IT authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The

authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits.

32. We wish to make it clear that it is not our opinion that in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case."

In view of above it is prayed that disallowance of interest out of Bank Intt. deserves to be deleted in the facts and circumstances stated and explained."

7. It was further submitted before the Id. CIT(A) that the investment was made in M/s Abhitex International, Panipat, for the commercial expediency and that the assessee had received share profits of Rs.39,24,346/- as on 31.03.2007. The relevant submissions of the assessee were as under:

"7.1 The ld. AR further submitted that the investment was made in Abhitex International because of commercial expediency and the appellant has received share profits of Rs.39,24,346/- from M/s Abhitex International as on 31.03.2007. For the sake of convenience, the relevant portion of the Ld. AR's submission filed vide letter dated 29.03.2011 are reproduced as under:

“(3) That entire share holding of RMZ Corp. Holdings (P) Ltd. i.e. 45000 shares of Rs.100/- was acquired by Paliwal Group in five names as under:

	<i>No. of share</i>	<i>Amount</i>
<i>M/s Paliwal Industries (P) Ltd.</i>	<i>18000</i>	<i>34,79,94,000/-</i>
<i>M/s Paliwal Overseas (P) Ltd.</i>	<i>9000</i>	<i>17,39,97,000/-</i>
<i>Avinash Chander Sharma</i>	<i>6750</i>	<i>13,04,97,750/-</i>
<i>Rani Paliwal W/o</i>	<i>6750</i>	<i>13,04,97,750/-</i>
<i>Shri Avinash Chander Sharma</i>		
<i>Abhishek Paliwal</i>		
<i>S/o Shri Avinash Chander Sharma</i>	<i>4500</i>	<i>8,69,98,500/-</i>
	<i>45000</i>	<i>86,99,85,000</i>

That the above investment in shares was done as per details & copies produced before your honour on 28.03.2011. Your honour, having acquired the entire shareholding of RMZ Corp. Holdings (P) Ltd. by the above persons, the same company was thus a sister concern of the group and vice versa. That copy of ROC return is also produced.

(4) That the appellant/assessee M/s Paliwal Infrastructure had entered into as a partner in M/s Abhitex International, Panipat w.e.f. 01.04.2006. Copy of partnership deed as desired is produced herewith. That the copies of account for period ending 31.03.2007 also bears out of the share profit entry of Rs.39,24,346/- as on 30.03.2007.

It is hoped that above information/clarification sought will meet the desired compliance by the appellant.”

8. The Id. CIT(A) after considering the submissions of the assessee confirmed the disallowance made by the AO by observing in para 8 of the impugned order as under:

“8. I have carefully considered the submissions of the appellant and perused the assessment order. My observations on this issue are as under:

(i) I find that the appellant company became partner in Abhitex International during the year to the extent of 12% share in profit. It contributed Rs.45,81,77,955/- as share capital in the said firm, out of which Rs.5,34,00,000/- were withdrawn during the year. The said contribution was made out of borrowed funds from the ABN Amro Bank. The AO disallowed the proportionate interest of Rs.3,63,73,505/-payable to the said bank against the aforesaid borrowed funds. The AO further observed that it was a diversion of funds to the group concern without having any business purpose.

(ii) The Ld. AR emphasized that it was not a case of diversion of borrowed funds but it was investment as capital in the firm M/s Abhitex International in which the appellant company was partner of share profit to the extent of 12%. He further emphasized that the said investment was made for business purpose and in the light of commercial expediency. It was also submitted that contrary to the AO's observations, the borrowing from the bank got reduced from Rs.136 crores as on 31.03.2006 to 124 crores as on 31.03.2007. Hence, the disallowance of the interest of

Rs.3,63,73,505/- was not justified and the same is required to be deleted.

(iii) On consideration of the fact, I find that the appellant diverted the borrowed funds against which the interest was payable. I further find that the appellant did not earn any interest income from the said group concern M/s Abhitex International. On the contrary, I find that the appellant has earned the share profit of Rs.39,24,346/-being partner in the said firm. The share profit amounting to Rs.39,24,346/- was a tax free income in the hand of the appellant. In this situation, the provision of section 14A of the I.T. Act, 1961 is applicable in this case.

(iv) I further find that the appellant has earned the share profit of Rs.39,24,346/-from the said firm of M/s Abhitex International being partner and such profit is exempt from tax in the hand of the appellant. Thus, the AO was justified to disallow the interest of amounting to Rs.3,63,73,505/- which was an expenditure for the earning of exempted income. Though, the AO did not mention the provision of Section 14A I.T. Act, 1961 while disallowing the said interest of Rs.3,63,73,505/- yet the provision of section 14A is clearly applicable. Hence, the disallowance made by the AO of Rs.3,63,73,505/-is upheld u/s14A of the I.T. Act, 1961.

(v) I further find that the appellant is entitled for deduction u/s 80IA(4)(iii) of the I.T. Act, 1961. The AO is directed to determine the quantum of deduction after considering the disallowance of

interest of Rs.3,63,73,505/- as upheld in this order in preceding para and allow the same on revised income after giving the appeal effect.

(vi) I further find that the provision of section 115JB is also applicable in this case. The AO is directed to re-compute the book profit as per law after giving the appeal effect to this order.

This ground of appeal is disposed off in the manner indicated above.”

9. Now the assessee is in appeal. The Id. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the assessee borrowed the funds from the bank and lent some of it to its associate concern as capital contribution for becoming the business partner. Therefore, the test was to be applied whether this was done as a measure of commercial expediency and if it was so, the interest should have been allowed. It was further stated that the assessee alongwith its shareholders held 88% share in M/s Abhitex International and the balance 12% had been held by the daughters of the Promoters of the assessee company, hence, the assessee company and the firm are under the same management. It was contended that the intention of the assessee was not to reduce incidence of Income Tax by doing so, because the profits of the Industrial Park are eligible for 100%

deduction under clause (iii) of sub-section (4) of Section 80IA of the Act, whereas its associate concern's profits are fully taxable. It was further contended that even if the addition has been made it will not attract any tax incidence because the claim of deduction u/s 80IA(4)(iii) is allowable. It was stated that the assessee made the investment in M/s Abhitex International, as partner's capital for exclusively for business consideration and there was no loss of revenue from this investment to the Income Tax Department. It was further stated that if M/s Abhitex International had taken loan from the bank by not accepting capital funds from the assessee, the returned loss had been Rs.96,28,134/- instead of returned income of Rs.3,35,98,390/- declared by the firm as per following calculation:

<i>“Secured Loans from bank for working capital As on 31.03.2007</i>	<i>Rs.84,03,24,249/-</i>
<i>Investment by P. Infra in Partners Capital As per order of P.Infra Asstt. Year 2007-08</i>	<i>Rs.48,40,77,480/-</i>
<i>Returned Income of the Firm Asstt. Year 2007-08</i>	<i>Rs.3,35,98,390/-</i>
<i>Interest on above Investment as per order I/tax Asstt. Order of P. Infra. (presuming loan was taken by the Firm from Bank)</i>	<i>Rs.4,32,26,524/-</i>
<i>Net Income/Loss</i>	<i>(-) Rs.96,28,134/”</i>

10. It was submitted that if the assessee had not taken loan for its investment in M/s Abhitex International, it would have to pay the Income Tax on the same returned income of Rs.5,88,57,074/- as business income of the assessee is

exempt u/s 80IA(4)(iii) of the Act as per the following calculation:

<i>“Income from Indl. Park claimed</i>	<i>Rs.6,21,06,011/-</i>
<i>Add interest on loan (Presuming that if investment was not made by P.Infra in Abhitex International it had to pay less interest to Bank)</i>	<i>Rs.4,32,26,524/-</i>
<i>Net Business Income</i>	<i>Rs.10,53,32,535/-</i>
<i>Exemption u/s 80IA(4)(iii)</i>	<i>Rs.10,53,32,535/-</i>
<i>Returned Income from other sources</i>	<i>Rs.5,88,57,074/”</i>

11. It was stated that the assessee was having the surplus funds on account of depreciation, rent receipts and net profit which were sufficient for making the investment in the partnership firm as a partner. It was contended that the investment in the partnership firm was made for the business exigency, therefore, the disallowance made by the AO was not justified. The reliance was placed on the judgment of the Hon^oble Supreme Court in the case of Hero Cycles (P) Ltd. Vs CIT (Central), Ludhiana (2015) 43 SCD 134 (copy of the said order was furnished which is placed on the record).

12. The reliance was also placed on the decision of the Hon^oble Jurisdictional High Court in the case of CIT Vs Dalmia Cement (B.) Ltd. reported at 254 ITR 377. It was

emphasized that interest free funds were available with the assessee company which were used as a contribution of capital in the partnership firm. Therefore, the disallowance made by the AO and sustained by the Id. CIT(A) on account of notional interest was not justified. The reliance was placed on the following case laws:

- *CIT (Central), Ludhiana Vs Rockman Cycle Industries (P.) Ltd. 238 CTR 363*
- *Commissioner of Income-tax vs. Excel Industries Ltd. 358 ITR 295*

13. In her rival submissions the Id. DR strongly supported the orders of the authorities below and reiterated the observations made by the Id. CIT(A) in the impugned order. She further submitted that the assessee earned share profits of Rs.31,24,346/- from M/s Abhitex International being partner and such profit was exempt from tax in the hands of the assessee, therefore, the AO was justified in disallowing the proportionate interest amounting to Rs.3,63,73,505/- which was an expenditure for the earning of exempted income and that the AO did not mention the provisions of Section 14A of the Act yet, the provisions of said Section were clearly applicable as has been held by the Id. CIT(A).

14. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is noticed that the assessee had entered as a partner in M/s Abhitex International, Panipat w.e.f. 01.04.2006 having 12% share in profit and contributed Rs.45,81,77,955/- as share capital in the said firm out of which 5,34,00,000/- was withdrawn during the year under consideration. The assessee made the investment in lieu of commercial expediency i.e. to manage the firm belonging to the same group to which the assessee belonged. In the instant case, the assessee earned a profit of Rs.39,24,346/- for the year ending on 31.03.2007 from the partnership firm in which it was having 12% shares. The ld. CIT(A) mentioned that the said profit was a tax free income in the hands of the assessee, therefore, the provisions of Section 14A of the Act were applicable. In our opinion, the provisions of Section 14A of the Act were not applicable to the facts of this case because the profit earned, was taxed in the hands of the partnership firm in which the assessee is a partner, so, it could not be said that no tax was paid on the above said share profit earned by the assessee. The AO made the disallowance of Rs.3,63,73,505/- by presuming that said interest was to be paid @ 8.9% on the closing outstanding balance of Rs.40,87,02,301/- in the partnership

firm M/s Abhitex International. However, he did not consider this vital fact that the investment was made by the assessee due to commercial expediency and not to earn any interest, this investment has been made by the assessee as a contribution of capital in the partnership firm in which the assessee entered as a partnership for acquiring ownership. In the present case, it is also noticed that for the year under consideration, the assessee was having internal accrual in the form of depreciation amounting to Rs.11.60 crores and also having a surplus fund amounting to Rs.31.68 crores, so, it cannot be said that whole of the investment amounting to Rs.40,87,02,301/- was out of the borrowed funds. Therefore, the Id. CIT(A) was not justified in confirming the action of the AO for making the disallowance by presuming that the interest @ 8.9% amounting to Rs.3,63,73,505/- was to be paid by the assessee on the amount contributed as a partner's capital in the firm M/s Abhitex International. In the present case, whatever interest bearing funds were raised by the assessee from the AB Ambro Bank were utilized in the business for the business purposes and even the investment in partnership firm M/s Abhitex International was made for business exigency. Therefore, the disallowance made by the AO and sustained by the Id. CIT(A) was not justified as the interest paid by

the assessee, if any, on the funds raised for business purpose was allowable u/s 36(1)(iii) of the Act. On a similar issue the Honorable Jurisdictional High Court in the case of CIT Vs Dalmia Cement (B.) Ltd. (supra) held as under:

“Under Section 37(1) of the Income-tax Act, 1961, the jurisdiction of the Revenue is confined to deciding the reality of the business expenditure, viz., whether the amount claimed as deduction was factually expended or laid out and whether it was wholly and exclusively for the purpose of the business. It must not, however, suffer from the vice of collusiveness or colourable device. The reasonableness of the expenditure could be gone into only for the purpose of determining whether, in fact, the amount was spent. Once it is established that there was nexus between the expenditure and the purpose of the business, the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profits.”

It has been further held:

“That if all the requisite conditions in section 36(1)(iii) for allowance of interest were fulfilled, it was not possible and open for the Revenue to make a part disallowance, unless there was a positive finding recorded that a part of the amount borrowed was not used for the purposes of the assessee’s business.”

15. Recently their Lordships of the Honøble Apex Court in the case of Hero Cycles (P) Ltd. Vs CIT (Central), Ludhiana vide judgment dated November 5, 2015 in Civil Appeal No. 514 of 2008 reported at (2015) 43 SCD 134 observed as under:

“Insofar as loans to the sister concern / subsidiary company are concerned, law in this behalf is recapitulated by this Court in the case of

'S.A. Builders Ltd. v. Commissioner of Income Tax (Appeals) and Another' [2007 (288) ITR 1 (SC)].

After taking note of and discussing on the scope of commercial expediency, the Court summed up the legal position in the following manner:-

“26. The expression “commercial expediency” is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency.

27. No doubt, as held in Madhav Prasad Jatia v. CIT [1979 (118) ITR 200 (SC)], if the borrowed amount was donated for some sentimental or personal reasons and not on the ground of commercial expediency, the interest thereon could not have been allowed under section 36(1)(iii) of the Act. In Madhav Prasad's case [1979 (118) ITR 200 (SC)], the borrowed amount was donated to a college with a view to commemorate the memory of

the assessee's deceased husband after whom the college was to be named, it was held by this court that the interest on the borrowed fund in such a case could not be allowed, as it could not be said that it was for commercial expediency.

28. Thus, the ratio of Madhav Prasad Jatia's case [1979 (118) ITR 200 (SC)] is that the borrowed fund advanced to a third party should be for commercial expediency if it is sought to be allowed under section 36(1)(iii) of the Act.

29. In the present case, neither the High Court nor the Tribunal nor other authorities have examined whether the amount advanced to the sister concern was by way of commercial expediency.

30. It has been repeatedly held by this court that the expression "for the purpose of business" is wider in scope than the expression "for the purpose of earning profits" vide CIT v. Malayalam Plantations Ltd. [1964 53 ITR 140 (SC), CIT v. Birla Cotton Spinning and Weaving Mills Ltd. [1971 82 ITR 166 (SC)], etc."

In the process, the Court also agreed that the view taken by the Delhi High Court in

'CIT v. Dalmia Cement (B.) Ltd.' [2002 (254) ITR 377]

wherein the High Court had held that once it is established that there is nexus between the expenditure and the purpose of business (which need not necessarily be the business of the assessee

itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. It further held that no businessman can be compelled to maximize his profit and that the income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman.

Applying the aforesaid ratio to the facts of this case as already noted above, it is manifest that the advance to M/s. Hero Fibres Limited became imperative as a business expediency in view of the undertaking given to the financial institutions by the assessee to the effect that it would provide additional margin to M/s. Hero Fibres Limited to meet the working capital for meeting any cash loses.

It would also be significant to mention at this stage that, subsequently, the assessee company had off-loaded its share holding in the said M/s. Hero Fibres Limited to various companies of Oswal Group and at that time, the assessee company not only refunded back the entire loan given to M/s. Hero Fibres Limited by the assessee but this was refunded with interest. In the year in which the aforesaid interest was received, same was shown as income and offered for tax.

Insofar as the loans to Directors are concerned, it could not be disputed by the Revenue that the

assessee had a credit balance in the Bank account when the said advance of Rs.34 lakhs was given. Remarkably, as observed by the CIT (Appeal) in his order, the company had reserve/surplus to the tune of almost 15 crores and, therefore, the assessee company could in any case, utilize those funds for giving advance to its Directors.

On the basis of aforesaid discussion, the present appeal is allowed, thereby setting aside the order of the High Court and restoring that of the Income Tax Appellate Tribunal.”

16. In the present case also the assessee company made the contribution in the partnership firm M/s Abhitex International wherein it was having 12% share. The amount was invested keeping in view the business expediency as the group to which the assessee belonged acquire the entire share holdings of RMZ Corporation Holdings Pvt. Ltd., so it was not a case of diversion of borrowed fund, rather it was investment as a capital in the firm M/s Abhitex International for the business purposes and in the light of commercial expediency. Therefore, by keeping in view the ratio laid down of the Hon~~o~~ble Jurisdictional High Court and the Hon~~o~~ble Apex Court in the aforesaid referred to cases, we are of the view that the disallowance of interest made by the AO and sustained by the Id. CIT(A) was not

justified. In that view of the matter the impugned disallowance is deleted.

17. In ITA No. 1979/Del/2011 for the assessment year 2008-09, the facts are identical as were involved in ITA No. 1978/Del/2011 for the assessment year 2007-08, the only difference is in the figure of the disallowance made by the AO and sustained by the ld. CIT(A). Therefore, our findings given in former part of this order shall apply *Mutatis Mutandis* for the assessment year 2008-09.

18. In the result, appeals of the assessee are allowed.

(Order Pronounced in the Court on 08/02/2016)

Sd/-

(Beena Pillai)
JUDICIAL MEMBER

Dated: 08/02/2016

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(N. K. Saini)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR