

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA. No. 10/JP/13
निर्धारण वर्ष / Assessment Year : 2009-10

M/s Allen Career Institute, CP-6, Indra Vihar, Kota.	बनाम Vs.	The JCIT, Range-2, Kota.
स्थायी लेखा सं./जीआईआर सं./ PAN No. AAIFA3972B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Mahendra Gargieya (Adv) &
: Shri Hemang Gargieya (Adv)
राजस्व की ओर से / Revenue by : Shri R.A. Verma (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 30/06/2017
घोषणा की तारीख / Date of Pronouncement : 27/09/2017

आदेश / ORDER

PER SHRI VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Ld. CIT(A), Kota dated 26.11.2012 for A.Y. 2009-10 wherein the assessee has taken the following grounds of appeal are as under:-

"1. The impugned additions and disallowance made in the order dated 29.12.2011 u/s 143(3) of the Act, bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly be deleted.

2. Rs. 20,45,751/-: The Id. CIT(A) erred in law as well as on the facts of the case in confirming the disallowance of Rs. 20,45,751/- out of interest expenses alleging not for business purpose and further erred in

also invoking Sec. 14A of the Act. The disallowance so made and confirmed by the Id. CIT(A), is contrary to the provisions of law and facts hence, kindly be deleted in full.

3. Rs. 11,57,453/-: The Id. CIT(A) erred in law as well as on the facts of the case in confirming the disallowance of Rs. 11,57,453/- out of interest expenses alleging incurred on capital expenditure. The disallowance so made and confirmed by the Id. CIT (A), is contrary to the provisions of law and facts hence, kindly be deleted in full.

4. Rs. 4,920/-: The Id. CIT(A) erred in law as well as on the facts of the case in confirming the disallowance of Rs. 4,920/- out of interest payment on account of alleged notional interest on interest free advance. The disallowance so made and confirmed by the Id. CIT (A), is contrary to the provisions of law and facts hence, kindly be deleted in full.

5. The Id. AO further erred in law as well as on the facts of the case in charging interest u/s 234A, 234B, 234C & 234D of the Act and as also in withdrawing of interest u/s 244A of the Act. The appellant totally denies its liability of charging and withdrawal of any such interest. The interest so charged/withdrawn, being contrary to the provisions of law and facts, kindly be deleted in full.”

2. Firstly, regarding ground No. 1 and ground No. 4, the same were not pressed during the course of hearing. Hence, the same are dismissed as not pressed.

3. Regarding ground No. 5 relating to charging of interest u/s 234A, 234B, 234C & 234D and withdrawal of interest u/s 244A of the Act, no arguments have been advanced by the Id. AR during the course of hearing and the levy and withdrawal of interest being consequential in nature, the said ground taken by the assessee is dismissed.

4. Now coming to ground No. 2 where the assessee has challenged the disallowance of Rs. 20,45,751/- out of interest expenses incurred by the assessee on availing the bank overdraft facility which was debited in the profit and loss account and claimed in the return of income.

Facts and findings of the Assessing officer

5. During the course of assessment proceedings, the Assessing Officer observed that the assessee has made following investments towards purchase of mutual funds units in fixed maturity plans out of the funds withdrawn from the bank overdraft account:

Date	Mutual Fund Units	Amount (Rs)
12.06.2008	UTI Mutual fund-FMP	1.00 Crore
20.06.2008	HDFC Mutual Fund-FMP	1.00 Crore
05.09.2008	SBI Mutual fund-FMP	1.00 Crore

A show cause notice was issued by the Assessing officer to the assessee to explain why disallowance of Rs. 20,45,751/- being interest @ 9.5% paid on the borrowed funds which are used for making the investment in the Mutual Funds units should not be disallowed.

6. In response, the assessee submitted that it is engaged in providing coaching to students preparing for the competitive examinations and coaching fees are received through the bank drafts at the beginning of the course from the students. It was further submitted that the assessee firm does not maintain a current account with any bank rather it deposits the fees received from the students in bank FDR accounts and for meeting monthly recurring expenses, avail overdraft facility on such FDRs. It was further submitted that all types of receipts including fees and all types of payments whether capital or revenue are made through the bank overdraft account.

7. It was further submitted that the assessee firm did not borrow any fresh funds during the year and there is no opening balance of borrowed funds at the beginning of the year which has been brought forward from previous financial year. It was submitted that the bank overdraft account is not borrowed money, because overdraft account is against the assessee own bank FDRs and it is assessee own money taken out of FDR account temporarily.

8. It was further submitted that from the perusal of the balance sheet, it can be noted that the assessee firm has sufficient funds of its own and need not to borrow any funds. The current year profit before allocation between partners is Rs. 41.5 Cr. and investment in Mutual Funds fixed term debt fund scheme was made for just Rs 3 Cr. The bank overdraft against FDR is just for better utilization of funds of the business. There is no direct nexus between the amount borrowed and investment in the Mutual Funds, as no amount was invested by raising an interest bearing loan. Investment in Mutual Fund was made out of capital and reserves (retained earnings and current year earnings). Therefore no disallowance on account of interest on borrowed money should be made.

9. In support, the assessee relied upon the decision of CIT vs. Dalmia Cement (Bharat) Ltd.(2002) 254 ITR 377 (Del), S.A. Builders Ltd. vs. CIT(Appeal) (2007) 288 ITR 1 (SC) , CIT Vs. Prem Heavy Engg. Works Pvt. Ltd. 285 ITR 554 (All) and CIT Vs. Radico Khaitan Ltd. (2005) 142 Taxman 681 (All).

10. Alternatively, the assessee submitted that had the investment in mutual fund was made not from the overdraft account, then FDR would be break for investment in mutual fund and total interest income on that much of amount would be lesser. The assessee is having overdraft facility @ 0.25%

against its bank deposits. The bank charged 9.5% on bank overdraft account during the year and the assessee earned 9.25% on its FDR accounts. If the assessee incurred interest on overdraft on account of investment in mutual fund, the assessee earned interest on FDRs at the same time for non-breaking the same for investment in mutual fund. At the most, one may say that the assessee incurred interest @ 0.25% (not 9.5%) on overdraft. Therefore disallowance on account of interest on borrowed money should be restricted to net interest outgo calculated @ 0.25%.

11. The Assessing Officer however did not find any of the contentions of the assessee acceptable and relying on the decision of the Hon'ble Punjab and Haryana High Court in the case of CIT Vs. Abhishek Industries Ltd. 286 ITR 1, held that onus is on the assessee to prove that whatever loans were raised by the assessee, the same were used for business purposes. It was further held that the business of the assessee is running of coaching classes for students and not purchase & sale of Mutual Funds Units. It was further held that the assessee has failed to prove any business expediency to make aforesaid investments in Mutual Funds Units. The Assessing Officer distinguished the decisions relied upon by the assessee and thereafter concluded the matter with the following final findings which are reproduced as under:-

"It is observed that interest @ 9.5% per annum has been paid by the assessee on Bank Over Draft Account. Therefore, interest related to investment in Mutual Funds Units is worked out as under:-

<i>On Rs. 1.00 Crore from 12.06.08 to 19.06.08</i>	<i>Rs. 20,821/-</i>
<i>On Rs. 1.00 Crore from 20.06.08 to 04.09.08</i>	<i>Rs. 4,00,821/-</i>
<i>On Rs. 1.00 Crore from 05.09.08 to 31.03.09</i>	<i><u>Rs. 16,24,109/-</u></i>
	<i><u>Rs. 20,45,751/-</u></i>

Therefore, disallowance of Rs. 20,45,751/- being interest @ 9.50% on Bank Over Draft Account in respect of investments totalling Rs. 3.00 Crore in Mutual Fund Units will be made out of interest paid on Bank Over Draft Account."

12. On perusal of the above, it is noted that the contention of the assessee before the Assessing Officer was the bank overdraft facility is not in the nature of borrowing of funds rather it is assessee's own money taken out of FDR account temporarily. It was further contended that all type of payments and receipts are routed through the bank overdraft account and by virtue of that, it cannot be held that every payment made out of the overdraft account is out of the borrowed funds. Thirdly, the assessee contended that it has sufficient internal reserves which far exceed the value of investment which has been made during the year and there are no borrowing and in turn, no direct nexus in terms of any borrowings and investment in the mutual funds. The assessee also contended that it has incurred net interest cost of 0.25%, and if the disallowance has to be made, the same has to be restricted to 0.25% and not the whole of 9.5%. Per contra, the contention of the Assessing officer is that funds withdrawn from the bank overdraft account have been utilised for making the investment in the mutual fund units and accordingly, the borrowed funds have been utilised for making the said investments. It was further held by the Assessing officer that the business of the assessee is running of coaching classes for students and not purchase & sale of Mutual Funds Units and the assessee has failed to prove any business expediency to make aforesaid investments in Mutual Funds Units.

Findings of the Id CIT(A)

13. Being aggrieved, the assessee carried the matter in appeal and reiterated its submission made during the assessment proceedings before the

the Id CIT(A). It was further submitted by the assessee that fixed term maturity plans of mutual funds in which the assessee has made investment during the year were simply an alternative of bank FDRs. It was submitted that bank FDRs are managed by banks while Fixed maturity plans (FMP) are issued and managed by mutual funds. Both are debt instruments wherein the mutual funds invest in government security and corporate debt and the object behind making such investment is getting better post tax returns than Bank FDRs due to indexation benefit where mutual funds units are held for a period of greater than one year.

14. The assessee further relied on the decision of Bombay High Court in the case of CIT vs. Reliance Utilities and Power Ltd. 313 ITR 340 and the decision of Hon'ble Delhi High Court in the case of CIT V. Bharti Televenture Ltd. 51 DTR 98. The assessee has relied upon the decision of Coordinate Bench in case of ACIT vs. Sh. Ram Kishan Verma Prop. M/s Resonance, Kota stating that the facts of the said case are exactly identical to the facts of the assessee.

15. The Id. CIT(A) however did not accept the assessee's contentions and confirmed the disallowance of interest with the following findings which are reproduced as under:-

"It was seen that the surplus funds of assessee were kept in the form of FDRs and the income from same was to be taxed as income from other sources.

On the security of these FDRs the assessee availed overdraft facility and part of the funds out of over draft were used for purchasing mutual fund Units.

As the income from mutual funds were exempt, any expenditure related to same has to be disallowed in view of specific provisions of section 14A of the I.T. Act.

The assessee's plea that overdraft is its own money is not acceptable as FDRs were used as security for Over Draft and the source of investment was Over Draft and not its own money. This will be clear from following example:-

If an assessee has placed house property as security for taking overdraft would we allow interest expenses against income from house property? The answer is clear no.

The Case laws cited by assessee are not relevant as in the case of assessee nexus between borrowed funds and investment was clearly established. The payments were directly made from overdraft account only and also admitted by assessee.

Considering the above disallowance of interest of Rs. 20,45,751/- is confirmed.

This ground of appeal is, therefore, dismissed."

16. During the course of hearing, the Id AR vehemently argued the matter and raised various contentions as per the written submissions which are reproduced as under.

"1. Invoking of sec. 14A without jurisdiction: At the outset, it is submitted that the AO proceeded on complete misconception of law in as much as Sec. 14A can be invoked only when the AO finds that some expenditure has been incurred in relation to some exempted income. In other words, any income which is exempted e.g. u/s 10, is an exempted income. To take an example, the share of profit received by a partner u/s 10(2A), dividend income u/s 10(34) etc., are completely exempted from income tax hence, the expenditure incurred in relation to such income can be disallowed. However, here in this case the factual matrix is different and the AO has wrongly understood that the earning on account of the subjected investment made in the mutual funds was an exempted income. It is submitted that the assessee made investment

in the fixed Term Debt Fund Scheme- FMP (Fixed Maturity Plan) [wherein, the assessee provided options for the period of mostly 380/390 days] was under the provisions of Income Tax Act i.e. Sec. 112, it is submitted that such mutual funds are taken less than 1 year, the interest earning thereon shall be treated as short Term Capital Gain and tax @ 30% flat shall be levied thereon. However, if the interest earning occurs after a period of 1 year shall be treated as Long Term Capital Gain and tax @ 10% flat it shall be levied thereon (where indexation benefit is claimed) and @ 20% wherein, it is not claimed. Thus, such interest earnings are taxable and cannot be said to be exempted income. In view of this factual matrix, Sec. 14A could and should not have been invoked and confirmed.

Interestingly, the AO though made disallowance invoking Sec. 14A this year, however, in the same circumstances in A.Y. 2010-11, no such disallowance was made u/s 14A (although it was disallowed u/s 36(i)(iii) of the Act). This speaks of the fallacy in the case made out by the AO.

2. Further the written submissions filed before the Id. CIT(A), are reproduced hereunder:-

"1. M/s Allen Career Institute is a partnership firm engaged in the coaching of competitive Examination. The coaching fees for the year are received only through bank drafts at the beginning of the courses, while mostly expenses are incurred monthly throughout the year. All types of receipts and payments are made through bank overdraft account and the assessee do not have current account in the bank.

2. If the firm kept fee received in bank current account and make payment of expenses from that account, no interest income could be earned and a handsome amount remain idle in bank current account earning no income. Therefore the assessee firm do not have current account with bank and has

only overdraft account against FDRs, at a nominally higher rate of interest (.25 extra). Accordingly as a prudent businessman and to maximize its earning, assessee firm is in the regular practice to keep the fee received from the students in Bank in FDR's account and availing overdraft facility on the FDR's.

All types of receipts (including fees) and all types of payments (whether capital or revenue) are made through overdraft account. But it does not mean that every payment made out of borrowed money. This is totally a part of the assessee's business financial management planning. Needless to say by not investing in FDRs the assessee of course would not have incurred interest cost but at the same time would not have earned interest. The net result would have been loss to the revenue.

Here it should be clear that fixed term debt fund scheme – FMP (Fixed Maturity Plan) of mutual fund is simply an alternative of Bank FDRs. Bank fixed deposits are managed by banks while FMPs are issued and managed by mutual funds. Bank fixed deposits (FDs) are deposits in bank debt instruments, FMPs are also debt instruments managed by mutual funds in Govt. securities, and corporate debt. That means that fixed maturity plans, typically have no equity component.

The object behind making investment is getting tax efficient income similar to bank interest. FMP offer better post tax return than Bank FDs due to indexation benefit for a period of greater than one year.

3. The assessee firm did not borrow any fresh money during the year and even have no opening borrowed money. Bank overdraft account is not borrowed money, because overdraft account is against the assessee own bank FDRs. It means bank overdraft is assessee own moeny taken out of FDR account temporarily.

Extract of Balance Sheet and Profit and Loss Account for the current year :

Opening Capital	47.57 Cr.	Closing Capital	70.65 Cr.
Opening Fixed Assets	19.92 Cr.	Closing Fixed Assets	22.43 Cr.
Opening Investments	0.00 Cr.	Closing Investments	3.00Cr.
Opening Bank FDRs	62.98 Cr.	Closing Bank FDRs	98.04 Cr.
Opening Bank overdraft	29.81 Cr.	Closing Bank O/D	41.12 Cr.
Interest on Bank FDRS	8.30 Cr.	Interest to Bank O/D	1.73 Cr.
Net Interest Income			6.57 Cr.

The current year profit (before allocation between partners) is 41.5 Cr. and investment in mutual fund fixed term debt fund scheme was made for just 3 Cr. investment in mutual fund was made out of capital and reserves (including current year profit).

It is very clear from the balance sheet that the assessee firm has sufficient fund of its own and need not to borrow any money. Bank overdraft against FDRs is just for better utilization of Funds of the business. There is no nexus between the any amount borrowed and investment in the mutual fund made, as no amount was invested by raising an interest bearing loan. Therefore no disallowance on account of interest on borrowed money should be made.

4. We believe in the view taken by the Delhi High Court in CIT v. Dalmia Cement (Bharat) Ltd. (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 viewpoint but that of a prudent businessman.

In another case, where the assessee argued that

(a) The advance has been made to sister company out of bank account account wherein both its own and borrowed funds were mixed up, so that there was no direct nexus between borrowing and advance: and

(b) The loan to a sister company which in this case was a subsidiary company is one which should be treated as promoted by commercial expediency,

The Supreme Court upheld the argument of the assessee and interest was not disallowed in the case of S.A. Builders Ltd. Vs. CIT(Appeal) (2007) 288 ITR 1 (SC) Also see CIT vs. Prem Heavy Engg. Works Pvt. Ltd. (2006) 285 ITR 554 (All), CIT vs. Radico Khaitan Ltd. (2005) 142 Taxman 681 (All.).

Reliance is also placed on the decision of the Hon'ble Bombay High Court in the case of CIT v. Reliance Utilities and Power Ltd. 313 and Hon'ble Delhi High Court in the case of CIT v. Bharti Televenture Ltd.

We are also enclosing herewith the copy of ITAT, Jaipur case of A.C.I.T v. Sh. Ram Kishan Verma Prop. M/s Resonance, Kota. The facts of the above case are identical to the case of assessee."

3.1 In addition to be above, it is submitted that the following decisions strongly supports the contentions raised by the assessee in the above submission. These decisions relate to disallowance of any expenditure incurred in connection to the payment of any income tax. In these cases where some interest expenditure was incurred because of the payment of the taxes made out of the loan/OD a/c, the Hon'ble Courts in similar factual matrix (as available in this case) has taken a view in favour of the assessee.

3.2 For this proposition, reliance is placed on *Wollcombers of India Ltd. v/s CIT (1982) 134 ITR 219 (Cal)*, wherein it was held the assessee having overdraft account in bank entire profits in relevant year deposited in overdraft account amount of profits far exceeding advance tax liability monies withdrawn from overdraft account both for business purposes and also for payment of advance tax there is presumption that advance tax was paid out of profits and not out of overdraft account disallowance of interest on overdraft as being relatable to payment of advance tax is not justified.

3.3 In *East India Pharmaceutical Works Ld. v/s CIT (1997) 224 ITR 627 (SC)*, provided a guideline in such case in these words "(ii), the question whether a presumption could be drawn that the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business, would essentially depend upon whether the entire profits had been pumped into the overdraft account, whether such profits were more than the tax amount paid for the relevant year and other germane factors....."

3.4 In *British Paints (India) Ltd. v/s CIT 190 ITR 196 (Cal)* held (i) that the Tribunal was not right in presuming that payments of the assessee-company's income-tax liability were made during the previous year out of its overdraft from the bank when all the company's sale proceeds and receipts during the year covering its profits far in excess of such tax liability were being deposited in that overdraft account and as such in holding that a proportionate part of the interest on the said overdraft was referable to the tax payments. (ii) That the entire interest paid by the assessee on the overdraft account was an allowable deduction. It was held that if the amount of the profit generated were higher than the amount of the advance tax paid, it should be presumed that the profit itself were invested/diverted in the payment of the advance tax

and therefore, the deduction claimed on account of the interest on loan even for the purpose of payment of tax is allowance.

3.5 Recently this view has been taken by the Hon'ble ITAT M/s Madhu Silica Pvt. Ltd. v/s ACIT in ITA No. 2230/Ahd/2010 vide order dated 20.09.2013 (DPB 38-43) following the decision in the case of Munjal Sales Corporation v/s CIT (2008) 298 ITR 298 (SC).

3.6 On this aspect also kindly refer decision ACIT v/s Ramkishan Verma (2012) 143 TTJ (Jp) (UO) 1 (DPB 10-22) wherein, para 9.5 the relevant portion is as under:

"We have heard both the parties. The assessee is having sufficient capital. If there are mixed funds then non-interest-bearing funds are to be considered as utilized for non-interest-bearing advances. It is the assessee who has to take a business decision. Fees is generally received at the beginning and surplus funds are used for making fixed deposits as receipts are in advances while expenses are spread out throughout the year. Since interest-free advances are less than the capital and the AO has not brought on record any nexus of interest-bearing loans being used the AO could not have disallowed the interest. There is no onus on the assessee to establish that interest-free advances are out of interest-bearing advances if non-interest-bearing funds are more. Reliance is placed on the decision of the Hon'ble Bombay High Court in the case of CIT vs. Reliance Utilities & Power Ltd. (2009) 221 CTR (Bom) 435 : (2009) 18 DTR (Bom) 1 : (2009) 313 ITR 340 (Bom) and Hon'ble Delhi High Court in the case of CIT vs. Bharti Televenture Ltd. (2011) 51 DTR (Del) 98 : 2010 TIOL-51-HC-Del. There is no provision in the Act which may compel an assessee to earn income.

The assessee in the cross-objection is aggrieved against confirming of addition.

After considering the facts as above, we feel that the AO was not justified in making any disallowance. Hence, disallowance is deleted.”

3.7 It was submitted that the above cited decisions strongly supports the contentions raised by the assessee. These decisions relate to disallowance of the interest expenditure incurred on the loan amount used for payment of income tax/investment in the securities/capital expenditure etc. or for giving interest free advances to its sister concerns etc. sourced out of the loan/OD a/c. The Hon'ble Courts in similar factual matrix (as available in this case) has taken a view in favour of the assessee.

4. The law is well settled that where assessee is having mixed i.e. interest free/interest bearing funds both, but the interest free funds are larger than the interest free advances than there will be a presumption that the interest free advances were given out of the interest free funds (but not out of interest bearing fund/OD) and hence, no interest can be disallowed (as was not claimed).

5. It was submitted that the controversy involved in the present case is directly covered by the case of **ACIT v/s Ram Kishan Verma (2012) 143 TTJ 1 (Jp)**, wherein the factual matrix is also the same. In fact, the cited case also of a coaching institute of Kota itself and there also the assessee used to receive the entire fees at the beginning of the year/session whereas it had to incur recurring expenditure on monthly basis. As a part of financial management/planning and to maximize its income, that assessee also used to deposit the entire fees in the FDRs and got OD A/c from which funds were utilized as per need. This way, it was claimed that it was assessee's own money only who did not borrow any fresh money. the disallowance made by the AO u/s 36(i)(iii) was fully deleted by holding that

"10.4 We have heard both the parties. The assessee is having sufficient capital. If there are mixed funds then non-interest-bearing funds are to be considered as utilized for non-interest-bearing advances. It is the assessee who has to take a business decision. Fees is generally received at the beginning and surpluses are used for making fixed deposits as receipts are in advances while expenses are spread out throughout the year. Since interest-free advances are less than the capital and the AO has not brought on record any nexus of interest-bearing loans used the AO could not have disallowed the interest. There is no onus on the assessee to establish that interest-free advances are out of interest-bearing advances if non-interest-bearing funds are more. Reliance is placed on the decision of the Hon'ble Bombay High Court in the case of CIT vs. Reliance Utilities & Power Ltd. (2009) 221 CTR (Bom) 435 : (2009) 18 DTR (Bom) 1 : (2009) 313 ITR 340 (Bom) and Hon'ble Delhi High Court in the case of CIT vs. Bharti Televenture Ltd. (2011) 51 DTR (Del) 98 : 2010-TIOL-51-HC-Del. There is no provision in the Act which may compel an assessee to earn income.

11.2 After considering the facts as above, we feel that the AO was not justified in making any disallowance. Hence, disallowance is deleted."

6. The Hon`ble Rajasthan High Court has also affirmed the above orders vide para 12 & 14 in the case of CIT v/s Ram Kishan Verma (2016) 132 DTR 107 (Raj.) holding as under:

"12. As far as the disallowance of interest is concerned, admittedly the assessee had an opening capital of Rs. 5,70,74,967/- of his own and the advances, if at all, being interest free, is to the extent of Rs. 98,93,950/- which is far below the capital of the assessee and, therefore, the tribunal has rightly come to the conclusion that to the extent of his own capital the assessee could advance money without interest for business expediency or/and relatives, and none can be forced to charge interest. It is also noticed by the lower authorities that assessee earned bank interest to the extent of Rs. 24,48,843/- out of which he paid total amount of Rs. 10,99,099/- to the bank against loan

and over draft, and it is out of the amount which has been paid by the assessee at 10,99,099/- that the AO has disallowed the interest.

13. Taking into consideration the fact as noticed hereinabove, in our view as well, when there was no agreement to charge interest from the persons to whom the assessee advance short term loan/advance, the AO could not disallow part of interest. It is also an admitted fact, as observed by the tribunal, that the AO was not able to pin pointedly come to a definite conclusion that how interest bearing loans has been diverted towards interest free advances and since the AO was not able to prove nexus between interest bearing loans vis-à-vis interest free loans/advances, therefore, in our view as well, once the AO was not able to come to a definite conclusion as to nexus having been established about interest bearing loans having been diverted towards interest free loans/advances, and such being a finding of fact based on application of evidence, in our view no substantial question of law arise on this question as well. It can be observed that this court in similar circumstances and on identical facts, when the capital of the partner/proprietor being more than the interest free short term advances, has in the case of CIT v/s M/s. Vijay Solvex Ltd. (2015) 274 CRT (Raj.) 384 while relying on the judgments rendered in (a) S.A. Builders Ltd. V/s CIT (2007) 288 ITR 0001 (SC); (b) Munjal Sales Corporation v/s CIT (2008) 298 ITR 298 (SC) ; (c) CIT V/s Radico Khaitan Ltd. (2005) 274 ITR 354; (d) CIT v/s Dalmia Cement (Pvt.) Ltd. (2002) 254 ITR 377; (e) CIT v/s Britannia Industries Ltd. (2006) 280 ITR 525; and (f) CIT v/s Motors Sales Ltd. (2008) 304 ITR 123 (Allahabad), held as under:-

14. Therefore, the finding reached by the Tribunal is essentially a finding of fact based on the appreciation of the evidence, and we find no perversity or infirmity in the order impugned, and no question of law arises out of the order of ITAT."

7. It was further submitted that the Id. CIT(A) proceeded on misconception & misreading of the judicial guidelines provided through various decisions which were in the context that where there are borrowed

funds and also interest free funds both, discretion lies with the assessee for the utilization of the funds in whatever manner it wants. What has been held is that where there are funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that interest free loans & advances would be out of interest free fund generated or available with the assessee, if the interest-free funds were sufficient to meet the investments and in such situation the specific nexus between utilization being of interest bearing bank overdraft towards interest free advances, loses significance/relevance.”

17. The Id. DR is heard who has vehemently argued the matter, took us through the findings of the AO and the Id CIT(A) and supported the order of the lower authorities.

Our findings

18. We have heard the rival contentions and perused the material available on record. In the above factual matrix, the issues that arise for consideration are firstly, whether the bank overdraft account, out of which the funds have been withdrawn and invested in the mutual fund units during the year, is in the nature of loan account or not. Alternatively, whether it is assessee’s own money which has been taken out of the FDR account temporarily and invested in the mutual fund units as contended by the Id. AR. The second issue which arise for consideration is whether the transactions in the bank overdraft account are limited to the borrowings and subsequent withdrawal for meeting expenditure and making the investments or it also includes other transactions in form of deposit of various business receipts including course fees as contended by the Id. AR. In other words, whether investment has been made out of mixed funds or solely from the borrowed funds. The third issue which arise for consideration is where assessee is having mixed funds and interest

free funds are larger than the amount of investments made during the year, can a presumption be drawn that the investments in the mutual fund units have been made out of interest- free funds and not out of interest bearing funds. The fourth issue is whether the provisions of section 14A are attracted in the instant case.

19. Regarding the first issue regarding the nature of the bank overdraft account, the Id AR has submitted a copy of certificate dated 27.01.2017 issued by the Branch Manager, Central Bank of India in support of its contentions and it would be relevant to reproduce the same in verbatim as under:

"This is to certify that M/s Allen Career Institute has been given overdraft facility upto 90% of FDRS amount during the financial year 2009-10, 2010-11 & 2011-12. This is not a CC facility. The customer was not entitled to take loan or advance over and above 90% amount of the FDR."

20. Drawing support from the said certificate, the Id AR has contended that it was a normal Overdraft A/c which was against the FDRs of the assessee pledged with the bank and the assessee was entitled to withdraw only up to 90% of the FDR. In other words, there was a margin of 10%. The assessee was not entitled to withdraw more than 90%. Also it was not a CC A/c. Thus, there was no possibility for the assessee to have borrowed funds more than the FDR amounts. Thus, effectively it was nothing but assessee's own money which was put into the FDRs to earn handsome amount of interest thereon and at the time of need of funds, the same could be made available by paying a marginally extra amount of interest thereon being 0.25 and was a part of its financial management.

21. On review of the above certificate and contentions so advanced by the Id. AR, we find that the Id AR has tried to make a distinction between a bank

overdraft account against pledge of the FDRs and cash credit account and it has been contended that in case of former, it is assessee's own money while the latter results in borrowing of bank funds. We have given a careful consideration and are unable to accept the said contention advanced by the Id AR. In our view, both the overdraft account and cash credit accounts are clearly in the nature of borrowings advanced by the banks however carrying their individual characteristics in terms of tenure, rate of interest, quantum of borrowing, repayment terms, utilization of such borrowings and the underlying security against which the borrowing have been so advanced. Both these facilities are well-recognised line of credit/finance in the banking industry. In the instant case, the certificate of the Central Bank of India itself suggests that the assessee has been granted an overdraft facility whereby the assessee is entitled to take loan or advance up to 90% value of the FDRs. The FDRs are basically underline security which are placed with the banks providing the overdraft facility and provides necessary security to the bank to offer a better rate of interest as compared to any other unsecured loans without underlying security which carried a higher rate of interest. The assessee on basis of such pledge of FDR has been granted facility to borrow upto 90% of value of FDRs so pledged. In case of cash credit facility which is again a line of credit provided by the banks to its customers for working capital purposes, the principle distinction is the underlying security which is typically stock, trade receivables, etc as against pledge of FDRs in case of overdraft facility.

22. The placing of fixed deposits by the assessee with the bank and subsequent borrowing or overdraft facility based on the pledge of the FDRs are two independent transactions and has been so treated by the banks. In the case of banks, the deposits are basically the liabilities of the bank towards its customers and the amount advanced in form of borrowings are basically its

assets and are reflected accordingly in the financial statements. Similarly, the customers investing in FDRs treat it as their investments and the borrowings against the pledge of such FDRs are clearly in the nature of its liabilities. In the instant case, the assessee has not brought on record any verifiable evidence which is contrary to above understanding. Infact, the assessee has shown interest on fixed deposits in his return of income as income under the head "Income from other sources" and interest paid on bank overdraft facility has been claimed as expenditure under the head "business income". The said treatment in the financial statements doesn't merely show the accounting treatment and reflection thereof but also underscore the basic essence and character of both the transactions being independent of each other. Therefore, we are unable to accept the contention of the Id AR that the assessee has incurred net interest cost of 0.25% and not 9.5% at which overdraft facility was availed from the bank.

23. In light of above discussions, we are of the considered view that the bank overdraft account, out of which the funds have been withdrawn and invested in the mutual fund units during the year, is clearly in the nature of loan account and certificate issued by the Central Bank of India supports the case of the Revenue. Accordingly, we are unable to accede to the contention of the Id AR that it is assessee's own money which has been taken out of the FDR account temporarily and invested in the mutual fund units.

24. Regarding second issue as to whether the transactions in the bank overdraft account are limited to the borrowings and subsequent withdrawal for meeting expenditure and making the investments or it also includes other transactions in form of deposit of various business receipts including course fees as contended by the Id. AR, we find, on review of bank overdraft accounts summary details available at APB 45, that the assessee has an overdraft account with the Central Bank of India, Talwandi Branch, Kota

wherein the opening credit balance is Rs. 28 Cr. and closing credit balance is Rs. 33 Cr and during the year, we find that there are deposits of Rs. 115.53 Cr and withdrawal of Rs. 120.85 Cr. The said numbers therefore supports the contention advanced by the Id. AR during the course of the assessment proceedings that all types of business receipts and all type of payments are routed through the bank overdraft account. It also proves the fact that the assessee was having mixed funds both in form of business receipts and borrowings in the form of overdraft from the bank from time to time. However, there is nothing which has been brought on record to prove that the investments have been made at the relevant point in time out of the borrowed funds. In absence of establishing the necessary nexus being between the borrowings and the investments in the mutual funds, it can safely be concluded that the investments in the mutual fund units have been made out of mixed funds.

25. Now coming to the third issue as to where assessee is having mixed funds and interest free funds are larger than the amount of investments made during the year, can a presumption be drawn that the investments in the mutual fund units have been made out of interest- free funds and not out of interest bearing funds. In this regard, we find that the assessee is having opening bank balance in their FDR account at the beginning of the year amounting to Rs. 62.99 Cr. and closing balance of Rs. 98.03 Cr with fresh FDRs made during the year amounting to Rs 58.03 Cr and FDRs matured during the year amounting to Rs 22.99 Cr. The funds in the FDRs accounts clearly reflect the interest free funds which are available with the assessee which is far in excess of the amount of investments which has been made in the Mutual Funds units amounting to Rs. 3 Cr. Accordingly, on appreciation of the said facts and in absence of anything to the contrary, as per the settled legal proposition, a presumption can be drawn that the investments in the

mutual fund units have been made out of interest- free funds and not out of interest bearing funds.

26. Lastly coming to the contention of the Id.CIT(A) that provisions of section 14A are applicable as income from the Mutual Funds are exempt, we find that the said finding is contrary to the facts on record. The appellant has invested in the fixed maturity plans of the various Mutual Funds which are basically fixed term debt funds schemes. Where the amount is invested in such funds for less than a year, the maturity proceeds are taxable as short term capital gain @ 30% and where the amount is invested in such funds for the period exceeding one year, the maturity proceeds are taxable @ 10% with the indexation benefit and @ 20% without indexation benefits. In other words the investment in Mutual Funds schemes are not tax free investments. In support of its contentions, the Id. AR has also submitted a copy of the computation of income for the subsequent assessment year 2010-11 wherein the maturity proceeds amounting to Rs 3,32,35,500 of all these Mutual Funds units wherein the assessee has invested Rs 3,00,00,000 during the impugned assessment year have been offered to tax as long term capital gains. In light of the same, we do not think that the Id. CIT(A) was correct in invoking provisions of section 14A of the Act.

27. In light of above discussions and in the entirety facts and circumstances of the case, we are of the view that the Assessing officer was not correct in disallowing interest expense of Rs. 20,45,751/- in the hands of the assessee and ground No. 2 of the assessee's appeal is accordingly allowed.

Ground no. 4

28. In respect of ground no. 4, briefly the facts of the case are that during the assessment proceedings, the AO observed that the assessee had used

borrowed funds out of Bank Over Draft Account for acquisition of the following capital assets during the year:-

i) Advance Given for Purchase of Land

The assessee has given advance of Rs. 1.00 Crore on 20.12.2008, Rs. 1.00 Crore on 23.01.2009 and Rs. 2.00 Crore on 04.03.2009 to M/s Trafco Agencies P. Ltd., Kota for purchase of plot of land. This plot was subsequently purchased on 22.05.2009 and construction of the building known as CP-7 was started on this plot.

ii) Construction of Shed in the Building CP-14

As per the fixed assets chart, the assessee has made addition to building known as CP-14 to the tune of Rs. 1,18,66,163/-. The construction continued during the year. The assessee constructed a Shed with ploycarbonated roof which was put to use in March, 2009. The assessee made withdrawals of various amounts from Bank Over Draft Account for construction of the Shed during the year.

iii) Worked-in-progress regarding Building at Ragiv Gandhi Nagar

The fixed assets chart also shows that the assessee has shown construction work-in-progress amounting to Rs. 1,45,52,709/-. The assessee explained that this related to construction of a new building at Rajiv Gandhi Nagar which was completed next year.

29. The assessee was asked to explain the amount of interest paid on borrowed funds which were utilized for acquisition of fixed assets and also to explain why the interest should not be disallowed as per proviso to section 36(1)(iii). In response, the assessee replied as under:

“The assessee firm has no current account in the bank, it has only overdraft account. It does not been understood that every payment made out of borrowed money. The advance payment made for plot was out of current year profit. The current profit (before allocation between partners) is 41.5 Crore and advance made for plot was just 4.00 Crore.”

The assessee was again asked to explain why interest of Rs. 5,77,808/-, Rs. 1,94,863/- and Rs. 3,84,782/- calculated @ 9.5% per annum on the borrowed funds used for paying advance of Rs. 4.00 Crore for purchase of land, construction work-in-progress and construction of shed in CP-14 be not disallowed in view of proviso to section 36(1)(iii) since while land and construction work-in-progress were not put to use during the year, the shed was put to use only at the fag end of the year.

In response, the assessee contended as under:-

“Section 36(1)(iii) reads as under:

“the amount of the interest paid in respect of capital borrowed for the purpose of the business or profession:

Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset for extension of existing business or profession (whether capitalised in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction”

Section 36(1)(iii) is applicable only in case of capital borrowed. As explained in earlier para, there was no borrowed money in the case of the assessee. Simply payment through bank overdraft account against FDRs, where the

assessee have no bank current account and sufficient own funds, could not be mean as capital borrowed for the applicability of Section 36(1)(iii)."

The assessee's contentions were not found acceptable to the AO and he held that the assessee has met the expenditure mentioned above but of Bank over Draft Account i.e. out of bank loan taken against its FDRs, which constitutes borrowed money. The assessee has also claimed deduction in respect of interest paid on bank over draft account. Therefore, proviso to Section 36(1)(iii) is squarely applicable to the case of assessee. Accordingly, disallowance of Rs. 11,57,453/- (577808-194863+3847827) was made out of interest paid on bank over draft account.

30. The relevant findings of the Id. CIT(A) is reproduced as under:-

"In view of specific provisions of Section 36(1)(iii) (proviso), no interest can be allowed on borrowed capital till the date such asset is not put to use. The Assessing Officer has clearly established that money from overdraft account was paid for capital work in progress. In view of above the disallowance of Rs. 11,57,453/- is upheld. This ground of appeal is", therefore, dismissed."

31. During the course of hearing, Id. AR reiterated its submissions as made in respect of ground no. 2 as discussed supra. It was further submitted that the disallowances made of interest on the alleged borrowings utilized for capital investment, our contentions can better be understood by referring to the facts involved and the decision rendered in the case of CIT v/s Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Mum), which is also a case where for making capital investment in the shares of two companies, disallowance was made. It was held that

"The facts of that case were that the Assessee viz. M/s Reliance Utilities and Power Ltd. had invested certain amounts in Reliance Gas Ltd. and Reliance Strategic Investments Ltd. It was the case of the Assessee that

they themselves were in the business of generation of power and they had earned regular business income therefrom. The investments made by the Assessee in M/s Reliance Gas Ltd. And M/s Reliance Strategic Investments Ltd. were done out of their own funds and were in the regular course of business and therefore no part of the interest could be disallowed. It was also pointed out that the Assessee had borrowed Rs.43.62 crores by way of issue of debentures and the said amount was utilised as capital expenditure and inter-corporate deposit. It was the Assessee's submission that no part of the interest bearing funds (viz. Issue of debentures) had gone into making investments in the said two companies. It was pointed out that the income from the operations of the Assessee was Rs.313.53 crores and with the availability of other interest free funds with the Assessee the amount available for investments out of its own funds were to the tune of Rs.398.19 crores. In view thereof, it was submitted that from the analysis of the balance-sheet, the Assessee had enough interest free funds at its disposal for making the investments. The CIT (Appeals) on examining the said material, agreed with the contention of the Assessee and accordingly deleted the addition made by the Assessing Officer and directed him to allow the same under the provisions of the Income Tax Act, 1961. The Revenue being aggrieved by the order preferred an Appeal before the ITAT who upheld the order of the CIT (Appeals) and dismissed the Appeal of the Revenue. From the order of the ITAT, the Revenue approached this Court by way of an Appeal."

On the above factual matrix, the Hon'ble court held as under:

"10. If there be interest-free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest-free funds available. In our opinion the Supreme Court in East India Pharmaceutical Works Ltd. (supra) had the occasion to consider the decision of the Calcutta High Court in Woolcombers of India Ltd. (supra) where a similar issue had arisen. Before the Supreme Court it was argued that it should have been presumed that in essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business and in

these circumstances the appellant was entitled to claim the deductions. The Supreme Court noted that the argument had considerable force, but considering the fact that the contention had not been advanced earlier it did not require to be answered. It then noted that in Woolcomber's case (supra) the Calcutta High Court had come to the conclusion that the profits were sufficient to meet the advance tax liability and the profits were deposited in the overdraft account of the assessee and in such a case it should be presumed that the taxes were paid out of the profits of the year and not out of the overdraft account for the running of the business. It noted that to raise the presumption, there was sufficient material and the assessee had urged the contention before the High Court. The principle therefore would be that if there are funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available with the company, if the interest-free funds were sufficient to meet the investments. In this case this presumption is established considering the finding of fact both by the CIT(A) and Tribunal."

32. It was submitted that in the instant case also the facts are the same as were obtaining in the case of Reliance Utilities (supra) in as much as in both the cases, the investments were made in capital asset (whether in the shares of the two companies as was the case with Reliance Utilities (supra) or investment in the capital asset i.e. plot purchase, construction etc which makes no difference but at both the places, the common contentions of the assessee are that there were no borrowing made as such in as much as the assessee was already having sufficient interest free funds at its disposal therefore, such investment/outgoing on capital account should be treated to have gone out of the availability of interest free funds but not from the interest bearing funds, if any. This way, there was no occasion for the assessee to make a claim of deduction nor for the AO to have made disallowance u/s 36(1)(iii) of the Act.

33. In the case of CIT vs. HDFC Bank LTD. (2016) 284 CTR 0409 (Bom), it was held that

"Where assessee's capital, profit reserves, surplus and current account deposits were higher than the investment in tax-free securities, it would have to be presumed that investment made by the Assessee would be out of the interest-free funds available with Assessee and no disallowance was warranted u/s 14A."

34. It is further submitted that a comparatively recent decision in the case of Hero Cycle P. Ltd vs CIT (2015) 128 DTR 0001 / 379 ITR 347 (SC) also directly supports the case of the assessee.

In that case, the company had given Loans & Advances of Rs.34 lacs to its directors and charged interest @ 10% only, whereas it availed the loan @ 18% hence, disallowance was made by the AO saying that the money borrowed by the assessee can't be treated for the purposes of the business of assessee. Before the CIT(A), the assessee demonstrated that there was a sufficient credit balance, while advancing loan to the directors and even that still there was a credit balance of Rs.4.95 lacs left. The CIT(A) therefore held that such loan was not given out of the borrowed funds and the interest liability in relation to the banks borrowing, had no bearing because the assessee had its own sufficient funds, which the assessee could advance and the AO should have established a nexus between the borrowing and the advancing for non-business purposes however, the AO failed to do so. Further appeal of the revenue was dismissed by the ITAT also. In further appeal, the High Court merely quoted its earlier judgement in CIT vs Abhishek Industries ltd dated 04.08.16. In this factual background, it was held:

"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, utilise those funds for giving advance to its Directors."

The ratio laid in the said decision squarely apply on the facts of the present case, hence the impugned disallowance kindly be deleted in full.

35. Also kindly refer Alkali & Chemical Corporation Of India Ltd. vs. CIT (1986) 50 CTR 0139(Kol HC) (DPB 71-74) and CIT v/s M/s. Vijay Solvex Ltd. (2015) 274 CTR 384 (Raj.) (DPB 75-80).

36. It was submitted that the AO stressed over the alleged absence of the commercial expediency behind giving of the subjected loans & advances in as much as, such a consideration was relevant only in a case where the interest free funds were given out of the interest bearing funds only and there was admittedly no availability of the interest free funds. In our case, such facts are not available and even otherwise the utilization of the funds was for commercial expediency in as much as the major utilization of the funds was towards capital investment in building for coaching, and partly in the mutual funds but income from both were duly taxed. It was not the case of AO that assessee diverted the funds to relatives etc. for personal purposes.

In the case of SA Builders also, the decision was rendered in the context of diversion of the interest bearing funds to the interest free advances. The Hon'ble Rajasthan High Court in Ram Kishan Verma (Supra) has also taken a note and interpreted the decision of SA Builder (Supra) in the same manner and therefore, held that *to the conclusion that to the extent of his own capital the assessee could advance money without interest for business expediency or/and relatives, and none can be forced to charge interest.*

37. In DCIT v/s Gujarat Narmada Valley Fertilizers Co. Ltd. (2014) 31 ITR Trib) 668 (Ahd) at page 671, it is held that

"....., the decision of the Supreme Court in the case of S.A. Builders Ltd. v. CIT(Appeals) [2007] 288 ITR 1 (SC) would not be applicable to the facts of the present case....."

38. Further the case of Abhishek Industries has already been impliedly overruled in Munjal sales (supra) and was also so considered in the case of Ram Kishan Verma by ITAT Jaipur. The AO wrongly ignored the decisions in the case of Dalmia cement (Supra) and Radico Khaitan (Supra), merely on misconception and mis-reading thereof and without any valid reason.

39. The Id.AO completely failed to deny and disprove the facts as argued although vide first para at pg 9, he alleged that the assessee had used a part of the borrowed funds available in the OD a/c and worked out the disallowable amount of the interest yet however, he completely failed to prove/ to bring contrary material to disprove that the assessee was having sufficient interest free funds, as aforesaid. He wrongly confused the OD a/c with an interest bearing loan/borrowings. admittedly the assessee neither took any such loan in the past nor in this year, as evident from the Audited Balance Sheet as on 31.03.2009.

40. We have heard the rival contentions and perused the material available on record. The facts and circumstances of the case are similar to the one which we have examined in detail in ground no. 2 above. Our findings and directions contained in ground no. 2 shall *mutatis mutandis* to this ground of appeal as well. In the result, the ground no. 3 of the assessee's appeal is allowed.

In the result, the appeal of the assessee is partly allowed with above directions.

Order pronounced in the open court on 27/09/2017.

Sd/-
(कुल भारत)
(Kul Bharat)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

Jaipur

Dated:- 27/09/2017

Santosh*

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s Allen Career Institute, CP-6, Indra Vihar, Kota.
2. प्रत्यर्थी / The Respondent- JCIT, Range -2, Kota.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT,
6. गार्ड फाईल / Guard File (ITA No. 10/JP/2013)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant Registrar.