

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

श्री भागचन्द, लेखा सदस्य एवं श्री कुल भारत, न्यायिक सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, AM AND SHRI KUL BHARAT, JM

आयकर अपील सं./ITA No. 1037/JP/2016
निर्धारण वर्ष / Assessment Year : 2013-14.

Shri Neeraj Purohit, A-153, Man Darpan Nehru Nagar, Jaipur.	बनाम Vs.	ACIT, Circle-4 Jaipur.
स्थायी लेखा सं./जीआईआर सं./ PAN No. AGSPP 2842 B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal (CA)
राजस्व की ओर से / Revenue by : Shri R.A. Verma (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 25.10.2017.
घोषणा की तारीख / Date of Pronouncement : 08/11/2017.

आदेश / ORDER

PER SHRI KUL BHARAT, J.M.

This appeal by the Assessee is directed against the order of Ld. CIT (A)-2, Jaipur dated 28.09.2016 pertaining to Assessment Year 2013-14.

The assessee has raised the following grounds of appeal:-

- “1. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in confirming the disallowance of Rs. 10,67,083/- made by AO by not allowing claim of bad debts u/s 36(1)(vii) and by completely ignoring the submission of assessee. Appellant prays disallowance so sustained deserves to be deleted.
2. On the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in confirming the part of the disallowance of interest made by AO.
- 2.1 That Ld. CIT(A) erred in confirming the disallowance without considering the fact that assessee was in possession of sufficient free funds in the shape of interest free unsecured loans in addition to capital, to make interest free advances. Thus appellant prays disallowance made may please be deleted.

3. On the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in confirming the disallowance of Rs. 1,95,677/- made by AO u/s 40A(3) ignoring the fact that payments were made due to business exigencies and thus disallowance so made is not justified. Appellant prays that disallowance confirmed by Ld. CIT(A) may please be deleted.
4. That the appellant craves the right to add, delete, amend or abandon the ground of this appeal at the time or before the actual hearing of the case.

The assessee has also raised an additional ground that reads as under:-

“ On the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in confirming the disallowance of Rs. 10,50,000/- made by Ld. AO, being sum advanced to a party for purchase of marble clocks (goods) in the ordinary course of business, who eventually neither supplied goods nor refunded the money. Thus loss has arisen to assessee is trading loss and deserves to be allowed u/s 37 of the Income Tax Act, 1961.”

2. Briefly stated the facts are that the case of the assessee was picked up for scrutiny assessment and the assessment under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act) was framed vide order dated 29.02.2016. While framing the assessment, the AO disallowed the claim of bad debts amounting to Rs. 10,67,083.00 and also disallowance of interest on account of interest free loans given to related persons of Rs. 14,10,093.46. The Assessing Officer further made disallowance by invoking the provision of Section 40A(3) of Rs. 1,95,677.00 and disallowance on account of late payment of employees contribution of Rs. 2,97,101.00. Aggrieved by this, the assessee preferred an appeal before Ld. CIT(A), who after considering the submissions, partly allowed the appeal. Thereby, the Ld. CIT(A) deleted the additions made on account of late payment of employees contribution of Rs. 2,97,101.00, in respect of the addition made on account of

disallowance of interest of Rs. 14,10,093/-, Ld. CIT(A), partly allowed this ground. Further, the Ld. CIT(A) confirmed the addition, made on account of disallowance of bad debts. Now, the assessee is in further appeal before this Tribunal.

3. **Ground No. 1 and Additional Ground** are inter-connected.

3.1 Ld. Counsel for the assessee reiterated the submissions as made in the written brief. He submitted that in this case the Assessing Officer was not satisfied with the claim to be allowed as a bad debt, he submitted that same deserves to be allowed u/s 37(1)(vii) of the Act being trading loss. He vehemently argued that the payment was made for the business purposes. In support of this contention, the Ld. Counsel for the assessee has made reliance on the Judgment of the Hon'ble Delhi High Court in the case of the CIT vs. New Delhi Hotels Ltd. in ITA No. 1258/2010. Further, he made reliance on Hon'ble Delhi High Court in the case of Mohan Meakin Ltd. vs. CIT in ITA no. 405/2007.

3.2 Ld. D/R opposed the submissions.

3.3 We have heard the rival contentions, perused the material available on record. As per the assessee the amount was given to the owner of the marble mine. Ld. Counsel drew our attention to the mining lease agreement which enclosed at Paper Book Page No. 44 to 67. Ld. CIT(A) decided the issue by observing as under:-

"2.3 I have perused the facts of the case, the assessment order and the submissions of the appellant. The assessee had claimed bad debts written off of Rs.12,14,277/- which have not been allowed by the Assessing Officer as the debts were not business debts and they did not arise during the normal course of business. It was further held that the amounts had not been taken as revenue by the assessee during the previous year under consideration or any of the earlier previous years. The Assessing Officer further noted that the

assessee failed to even prove that the in the case of advance given to Shri Budh Prakash Dayama, the person was a mine owner or marble trader and that the advance was given for the purchase of marble.

In the present proceedings the Authorized Representative has filed a copy of Registered mining lease agreement dated 4.11.01 to show that the party was dealing in marbles. It was further explained that the advance was given through account payee cheque and for the purchase of marbles. However even in the present proceedings no details in the form of bank statement or ledger copy of the party have been filed. It is further seen that the amount was taken as an advance and has not been taken into account while computing income in the current year or any earlier year in which the debt was written off. Further in the case of M/s Chicago Pneumatics the amount written off related to purchase of a capital asset. In the case of Natco Pharma Pvt. Ltd. (29 taxmann.com 297) where the issue related to tour advances to employees who had left without settling their dues arose, it was held that the same cannot be written off as no evidence could be brought on record to show that the tour advance had gone into computation of its income in any year. In view of the discussion as above the disallowance of the claim of bad debts written off is upheld. Ground of appeal is dismissed."

Before the Ld. CIT(A), the assessee has not claimed at a trading loss. It is for the first time that the assessee has made claim of the trading loss before this Tribunal. Therefore, we deem it appropriate to restore this issue to the AO for decision afresh. This ground is allowed for statistical purpose.

4. **Ground nos. 2 to 2.1** are against confirming the part of disallowance of interest.

4.1 Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. The written submissions of the assessee are reproduced as under:-

"Ground of Appeal No.2 & 2.1:

Under this ground of appeal, assessee has challenged the action of Ld. CIT(A) in confirming part disallowance in respect of interest paid by ignoring the fact that assessee was in possession of sufficient interest free funds in the shape of interest free unsecured loans in addition to capital, to make interest free advances.

Brief facts of this ground of appeal are that during the year under consideration, assessee had debited a total interest of Rs. 60,31,507.57 to Profit & Loss a/c. During the course of assessment proceedings, Ld. AO observed that assessee had made following interest free advances to sister concerns:

(i)	Jyoti Marbles	Rs. 66,92,954/-
(ii)	Taj Granites Pvt. Ltd.	Rs. <u>1,20,96,291/-</u>
		Rs. <u>1,87,89,245/-</u>

Accordingly, Ld. AO sought explanation as to why interest to the extent of funds advanced to above two concerns may not be disallowed.

In this regard, it was submitted that assessee was having interest free funds in his possession in the shape of:

(i)	Capital of proprietorship concern	Rs.144.34 lacs
(ii)	Interest free unsecured loans	<u>Rs. 133.34 lacs</u>
		<u>Rs. 277.68 lacs</u>

It was thus submitted that assessee was having interest free funds much more than interest free advances made. However, Ld. AO disallowed the interest of Rs.14,10,093.46 in respect of advances made to Jyoti Marbles and Taj Granites (P) Ltd.

On appeal, Ld. CIT(A) allowed relief of interest disallowed to the extent of capital balance of assessee, however no relief was allowed in respect of interest free funds available with assessee in the shape of unsecured loans. In this regard, at the outset, detail of interest free unsecured loans is furnished as under:

Sl. No.	Name of Party	Amount (in lacs)
(i)	Agarwal Real Home Dev Pvt. Ltd.	40.00
(ii)	Ajay Pareek	4.71
(iii)	Avon Diamond tools	8.33
(iv)	Dinesh Engg. Works	16.50
(v)	Geeta Sharma	42.00
(vi)	Shree Dharma Marble & Granites	3.28
(vii)	Smt. Rajni Pareek	18.52
		133.34

This complete detail was provided before Ld. AO during assessment proceedings as well as before Ld. CIT(A) during appellate proceedings. No doubt whatsoever was raised by lower authorities regarding claim of assessee that such loans were not interest free. However, claim of assessee regarding utilization of interest free unsecured loans towards making interest free advances was not accepted on the sole premise that assessee could not prove nexus between such loans taken and advances made.

The provisions as contained in section 36(1)(iii) reads as under:

36. (1) *The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—*

*(iii) the amount of the interest paid in respect of capital **borrowed for the purposes 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.]

Thus, once funds are borrowed and utilized for the purpose of business, interest thereon shall be allowed u/s 36(1)(iii). It does not put any restriction on utilization of own funds or funds in the shape of interest free unsecured loans available with assessee, nor does it anywhere mention that an assessee having own funds would not be allowed deduction u/s 36(1)(iii). The only condition for claiming deduction is that funds have been (i) actually borrowed and (ii) utilized for the purpose of business. Thus, before making disallowance, onus lies upon AO to prove nexus between "interest bearing loans" and "interest free advances". that either funds have not been borrowed or if borrowed, have not been utilized for the purpose of business, then only disallowance can be made. However, in the instant case disallowance has been made without proving any such nexus, thus disallowance deserves to be deleted.

Reliance is placed on:

Smt. Chanchal Katyal vs CIT [2008] 298 ITR 182 (All.)

Business Expenditure- Interest on borrowed capital- Condition precedent for allowance-Agreement entered into by assessee for business- Advance of amount by assessee without interest- Assessee entitled to full allowance of amount of interest paid when assessee has sufficient funds other than borrowed money- Income Tax Act, 1961, s.36(1)(iii).

CIT v. Prem Heavy Engineering Works (P). Ltd. [2006] 285 ITR 554 (All.)

Business Expenditure- Interest on borrowed capital- Advances made by assessee to sister concerns interest free sufficient funds available with assessee in form of interest free-advances from customers, share capital surplus and reserve to make advances- Interest on borrowings not to be disallowed- Income Tax Act,1961, s. 36(1)(iii).

378 ITR 128 CIT Vs. Modi Rubber Ltd. (Delhi)

Appeal to High Court — Substantial question of law — Interest on borrowed capital — Assessee having at its disposal its own and borrowed funds — Loans advanced interest free to sister concerns — To be taken to have come from own funds — Tribunal taking plausible view on facts — No question of law arises — Income Tax Act, 1961, ss. 36(1)(iii), 260A.

In view of above, it is requested that interest on borrowed capital claimed by assessee, deserves to be allowed.”

4.2 Ld. D/R opposed the submissions, and supported the order of the Assessing Officer.

4.3 We have heard the rival contentions. The Ld. CIT(A) has decided this issue by observing as under:-

"3.3 I have perused the facts of the case, the assessment order and the submissions of the appellant. The Assessing Officer noted that the assessee has advanced loans to his sister concerns without charging any interest. Advances of Rs.66,92,954/- to M/s Jyoti Marbles and Rs.1,20,96,291/- to M/s Taj Granites Pvt. Ltd were given interest free. The assessee explained the sources from capital of the Proprietor of Rs 144.34 Iakhs and interest free advances received by it of Rs. 133.34 Lakhs. It was submitted that interest free advances were given from this amount of Rs. 277.68 lakhs. The Assessing Officer did not agree as he noted that the assessee failed to

correlate the two and disallowed interest amounting to Rs.14,10,093/- on these advances.

In the present proceedings, the Authorized Representative reiterated the same submissions. It was further submitted that the interest was paid on secured loans taken to finance various assets and had not been utilized for advancing interest free loans. Reliance was placed on ACIT vs Gopal Fabrics ITAT Ahmedabad order dated 29.11.13 and CIT vs Raghuram Synthetics Ltd 217 taxmann.com 178 (Gujarat), It is seen that the amount of Rs 144.34 lakhs was available with the assessee as Proprietors capital and could have been used for advancing interest free loans to sister concerns but regarding the interest free loans available, the appellant has not been able to establish any nexus between the interest free loans and the interest free advances made on various dates. Further the exigency of advancing interest free loans to sister concerns was also not proved. In view of the above, the Assessing Officer to modify the interest chargeable after considering the amount of capital of an amount of Rs. 144.34 lakhs available with the assessee as own funds and on the balance amount the interest is to be charged. The ground of appeal is allowed partly."

The contentions of the assessee are twofold. One is that the assessee is having interest free funds more than interest free advances. Secondly, when there is a mixed fund available with the assessee the presumption is that the assessee has given advances out of its own funds. The reliance has been placed on the Judgments of the Hon'ble Allahabad High Court rendered in the case of Smt. Chanchal Katyal vs. CIT [2008] 298 ITR 182 (All.) and another Judgment of the Hon'ble Allahabad High court in the case of CIT vs. Prem Heavy Engineering Works (P.) Ltd. [2006] 285 ITR 554 (All.)

We have considered the submissions of the Ld. Counsel for the assessee and the case laws relied by him. The Revenue has not disputed the fact that the assessee is having unsecured interest free advances. Under these facts, the Assessing Officer ought not to have made disallowance of interest. Accordingly, we hereby direct the AO to delete the disallowance. The Ground no. 2 and 2.1 of assessee's appeal are allowed.

5. **Ground no. 3**, is against confirming the disallowance of Rs. 1,95,677/- made by invoking the provision of Section 40A(3) of the Act.

5.1 Ld. Counsel for the assessee submitted that the authorities below failed to appreciate the fact in right perspective. He submitted that these payments are not out of free will and violation of assessee. It was in fact, out of business exigencies as the instalments of EMI at few instances cheque were disowned, the finance company force the assessee to make payment by cash and not accepting any other mode of payment. In support of this, Ld. Counsel for the assessee place reliance on the Judgment of the Hon'ble Supreme Court rendered in the case of Attar Singh Gurmukh Singh vs. ITO (1991) 191 ITR 667 (SC) and Prabir Kumar Mullick vs. ITO rendered in the Co-ordinate Bench of this Tribunal. The reliance was also placed in the Judgment of the Hon'ble Gujarat High Court in the case of Anupam Tele Services vs. ITO [2014] 222 Taxman 318 (Guj.), [2014] 268 CTR 121 (Guj.).

5.2 On the contrary, Ld. D/R opposed the submissions and relied upon the decision of the Special Bench rendered in the case of ITO vs. Kenaram Saha & Subhash Saha (2008) 116 TTJ 0289.

5.3 We have heard the rival contentions, perused the material available on record. The Hon'ble High Court in the case of Anupam Tele Service vs. ITO (Supra)

under the identical facts decided the issue in favour of the assessee held that payment between the assessee and the Tata Teleservice Ltd. were genuine. The Tata TeleServices Ltd. had insisted that such payments be made in cash, which Tata Teleservices Ltd. in turn assured and deposited the amount in a bank account. In the facts of the case of assessee, rigors of Section 40A(3) must be lifted. Since, the facts are identical and the assessee has demonstrated that the assessee made payment in cash at the instances of the finance company, therefore rigors of section 40A(3) must be lifted. Respectfully, following the Judgment of the Hon'ble Gujarat High Court in the case of Anupam Tele Services (Supra), we direct the AO to delete the disallowance. Thus, this ground of assessee's appeal is allowed.

6. **Ground No. 4**, is general in nature and needs no separate adjudication.

7. In the result, appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on Wednesday, the 08th day of November 2017.

Sd/-
(भागचन्द,)
(BHAG CHAND)

लेखा सदस्य / Accountant Member

Jaipur

Dated:- 08/11/2017.

Pooja/

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

1. The Appellant- Shri Neeraj Purohit, Jaipur.
2. The Respondent – The ACIT, Circle-4, Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 1037/JP/2016)

Sd/-
(कुल भारत)
(KUL BHARAT)

न्यायिक सदस्य / Judicial Member

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar

