आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई

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

श्री चंद्र पूजारी, लेखा सदस्य एवं श्री धुव्वुरु आर.एल रेड्डी,
न्यायिक सदस्य के समक्ष

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI DUVVURU RL REDDY, JUDICIAL MEMBER

आयकर अपील सं./**ITA Nos. 383 & 384/Mds/2017**
निर्धारण वर्ष /Assessment Years : 2011-12 & 2012-13

M/s. Trimex Sands Pvt. Ltd., No.1, Subbaraya Avenue, CP Ramaswamy Road, Alwarpet, Chennai – 600 018. **PAN AABCE3846Q** (अपीलार्थी/Appellant)	v.	The Deputy Commissioner of Income-tax, Corporate Circle-3(1), Chennai. (प्रत्यर्थी/Respondent)

आयकर अपील सं./**ITA Nos. 418 & 419/Mds/2017**
निर्धारण वर्ष /Assessment Years : 2011-12 & 2012-13

The Deputy Commissioner of Income-tax, Corporate Circle-3(1), Chennai. (अपीलार्थी/Appellant)	v.	**M/s. Trimex Sands Pvt. Ltd.,** Chennai. **PAN AABCE3846Q** (प्रत्यर्थी/Respondent)

Assessee by : Shri B.S.Purushotham, CA
Department by : Shri N. Madhavan, JCIT

सुनवाई की तारीख/Date of Hearing : 24.05.2017
घोषणा की तारीख/Date of Pronouncement: 26.07.2017

आदेश /O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER

These cross appeals filed by the assessee and by the Revenue are directed against common order of the Commissioner of Income-tax (Appeals)-11, Chennai dated 30.11.2016.

2. **First, we take up the assessee's appeal in ITA Nos. 383 & 384/Mds/2017.**

2.1 The first common ground in these two appeals is with regard to confirming the disallowance made by the AO u/s.14A r.w. Rule 8D of the I.T.Rules.

3. The assessee had advanced money towards investment in Trimex Heavy Minerals Pvt. Ltd. towards purchase of shares, which was not earned any income. Hence, the AO invoking the provisions of sec.14A r.w. Rule 8D, disallowed the sum of ₹31,12,952/- and ₹29,97,140/- for the assessment years 2011-12 and 2012-13 respectively. Aggrieved, the assessee went in appeal before the CIT(Appeals), who confirmed the finding of the

AO. Against this, the assessee is in appeal before us.

4. We have heard both the parties and perused the material on record. Similar issue came for consideration before the judgement of Jurisdictional High Court in the case of Redington (India) Ltd., in T.C No.520/16 dated 23.12.2016 wherein held that:-

> "13. Reliance is also placed on a decision of the jurisdictional High Court in the case of Beach Minerals Company Pvt. Ltd. Vs. Assistant Commissioner of Income Tax in TCA No.681 of 2013, dated 2.12.2013. In that case, payments of interest by the assessee were sought to be disallowed invoking the provisions of s.14A on the premise that the same related to borrowings that had been invested and would yield exempt returns. The assessee contested the disallowance u/s 14A on multiple grounds. It was contended that there were sufficient reserves and surpluses available for the purpose of investments, and borrowed funds, for which the payment of interest had been incurred, had not been invested. The assessee sought to draw a nexus between the borrowed funds and the interest payments, highlighting the position that the quantum of available free funds was far in excess of the investments made. The Bench, in the light of the above submissions, remanded the issue to the file of the assessing officer to be considered de novo and after conducting a proper enquiry. Inter alia a direction was issued to the assessee to tender a proper explanation for the interest payments. The open remand was made in the facts and circumstances of that case and no conclusion was drawn by the Bench on the position of law involved. In fact, the substantial question of law raised in that case for the consideration of the Court was couched in general terms as follows

"Whether on the facts and in the circumstances of the case. the Income Tar Appellate Tribunal is right in law in confirming the disallowance under Section 11.1 of the income Tax Act, of an amount of Rs.55,00.000/- in relation to assessment year 2007-2008?"

14. Nothing much turns on the use of the word 'includable' and the phrase 'under the act' in s. 14A and we are not persuaded to accept the emphasis laid or the interpretation of the same by the Revenue. An assessment in terms of the Income tax Act is specific to an assessment year and the related previous year. S.4 of the Act, which imposes the charge to tax reads thus:

Charge of income-tax

4. (1) Where any Central Act enacts that income —tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person:
Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income tax shall be charged accordingly.

Thus, where the statute indented that income shall be recognized for taxation in respect of any previous other than that immediately preceding the relevant assessment year, the provision shall expressly state so. The provisions of s.1O in Chapter III of the Act dealing with 'Incomes not included in total income' commences with the phrase 'In

computing the total income of a previous year, any income falling within any of the following clauses shall not be included.

15. The exemption extended to dividend income would relate only to the previous year when the income was earned and none other and consequently the expenditure incurred in connection therewith should also be dealt with in the same previous year. Thus, by application of the matching concept, in a year where there is no exempt income, there cannot be a disallowance of expenditure in relation to such assumed income. (Madras Industrial Investment Corporation Ltd. Vs. CIT (225 ITR 802). He languae of S.14A(1) should be read in the context and such that it advances the scheme of the Act rather than distort it."

4.1 The same view was taken by jurisdictional High Court in the case of Chettinadu Logistics in Tax Case No.24 of 2017 vide order dated 13.03.2017. Accordingly, since the investment does not earn any exempted income, there cannot be any applicability of sec.14A r.w. Rule 8D of the Income Tax Rules,1962. Accordingly, this ground of the assessee in both these appeals is allowed.

5. The next common ground in the assesse's appeal is with regard to disallowance of interest expenditure.

6. The assessee had advanced interest free loans to Trimex

Industries Pvt. Ltd. The assessee submitted before the AO that it was advanced to its holding company in the course of business from its own funds. However, the AO disallowed a sum of ₹34,09,190/- out of the total interest expenditure of ₹21,58,59,642/- for the assessment year 2012-13 and ₹2,12,55,381/- for the assessment year 2011-12. Aggrieved, the assessee went in appeal before the CIT(Appeals), who confirmed the disallowance made by the AO. Against this, the assessee is in appeal before us.

7. We have heard both the parties and perused the material on record. The question involved in this case is only about the allowability of the interest on borrowed funds and hence we are dealing only with that question. In this connection, we refer to s. 36(1)(iii) of the IT Act, 1961 which states that "the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession" has to be allowed as a deduction in computing the income-tax under s. 28 of the Act.

7.1 In our considered opinion the expression "for the purpose of business" occurring under the provision is wider in scope than

the expression "for the purpose of earning income, profits or gains".

7.2 In our opinion, the A.O has approached the matter from an erroneous angle. In the present case, even if the assessee borrowed the fund from the bank and lent it to its sister-concern, as interest-free loan, the test in such a case is really whether this was done as a measure of commercial expediency or not.

7.3 In our opinion, the decisions relating to s. 37 of the Act will also be applicable to s. 36(1)(iii) because in s. 37 also the expression used is "for the purpose of business". It has been consistently held in decisions relating to s. 37 that the expression "for the purpose of business" includes expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits thereby.

7.4 In our considered opinion, in order to claim a deduction, it is enough to show that the money is expended, not of necessity and with a view to direct and immediate benefit, but voluntarily and on grounds of commercial expediency and in order to indirectly facilitate the carrying on the business. The above test

has been approved by the Supreme Court in several decisions e.g. Eastern Investments Ltd. vs. CIT (1951) 20 ITR 1 (SC), CIT vs. Chandulal Keshavlal & Co. (1960) 38 ITR 601 (SC), SA Builders Ltd. v. CIT (288 ITR 1(SC)), Hero Cylces Pvt Ltd. Vs. CIT (379 ITR 347)(SC) etc.

7.5 In our opinion, the A.O should have approached the question of allowability of interest on the borrowed funds from the above angle. In other words, the A.O should have enquired as to whether the interest-free loan was given to the sister company, or to a subsidiary of the assessee as a measure of commercial expediency, and if it was, it should have been allowed.

7.6 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 business expenditure if it was incurred on grounds of commercial expediency.

7.7 Thus, the ratio of Madhav Prasad Jatia's case (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 s. 36(1)(iii) of the Act.

7.8 As hold by various courts, the amount advanced to the sister-concern was by way of commercial expediency, and incurred for the purpose of business of its sister concerns which indirectly facilitate the carrying on the business of the assessee, then that interest to be allowed. It has been repeatedly held by Supreme Court that the expression "for the purpose of business" is wider in scope than the expression "for the purpose of earning profits" vide CIT vs. Malayalam Plantations Ltd. (1964) 53 ITR 140 (SC), CIT vs. Birla Cotton Spinning & Weaving Mills Ltd. (1971) 82 ITR 166 (SC), SA Builders Ltd. v. CIT (288 ITR 1(SC)), Hero Cylces Pvt Ltd. Vs. CIT (379 ITR 347)(SC) etc.

7.9 The A.O should have examined the purpose for which the assessee advanced the money to its sister-concern, and what the sister-concern did with this money, in order to decide

whether it was for commercial expediency, but that has not been done by him.

7.10 It is true that the borrowed amount in question was not utilized by the assessee to advance to sister concern, but had been advanced interest-free fund to its sister-concern. What is relevant is whether the assessee advanced such amount to its sister-concern as a measure of commercial expediency and if such a case, no notional interest could be disallowed.

7.11 It is to be noted that the Delhi High Court in CIT vs. Dalmia Cement (Bharat) Ltd. 254 ITR 377 (Del) is applicable to the facts of the present case. It was held 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 lower 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. 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. In such circumstances, it is not possible to us to confirm the disallowance of interest u/s.36(1)(iii) of the Act.

7.12 Thus, in our opinion, even if the money was borrowed for lending to Trimex Industries Pvt. Ltd. and it resulted to promote the business of the assessee as well as helpful to the assessee for having management control over said such company, then the interest expenditure should be allowed u/s.36(1)(iii) of the Act.

7.13 In the present case, as rightly submitted by the ld. A.R that the assessee diverted the funds for making advance to the above company on account of commercial expediency, hence, we are of the opinion that the AO cannot disallow the notional interest, it is not the case of the Revenue that the said companies had misused the funds for any other purpose. In other words, since the sister concern used the funds for their business purpose, and there is nexus between the business of the assessee and the subsidiaries, which facilitated the business advantage of the assessee company, there cannot be any disallowance towards notional interest as held by the Supreme Court in the M/s.S.A Builders (288 ITR 1). Further, this view has also been advanced by the Delhi High Court in the case of Dalmia Cement Ltd. v. CIT (354 ITR 377).

7.14. It is also demonstrated by the assessee that the assessee has not borrowed to lend money to Trimex Industries Pvt. Ltd. and it is having of its own funds to advance to the assessee, i.e. out of fixed deposit maturity proceeds and also form the export packaging credit, which was internally generated funds and having no interest borrowing funds, which were used to advance

to that company. It is also explained by the assessee that outside the borrowings has been reduced from earlier financial year to this financial year and the advance to Trimex Industries Pvt. Ltd., is not resulted in any additional interest cost to the assessee. More so, when the interest free funds are available to make advance to subsidiary companies, the disallowance cannot be made. Accordingly, in our opinion, placing reliance on the above decisions cited supra, the claim of the assessee to be allowed. Hence, this ground of assessee is allowed on its appeals.

8. The next ground in assessee's appeal in ITA No.384/Mds/2017 is with regard to disallowance of ₹1,99,35,914/- towards damages.

9. The facts of the case are that the assessee company has entered into an inclusive fixed price agreement with M/s.Walchandnagar Industries Ltd. (WIL) for construction of the plant for total consideration of ₹ 145.3 crores. The plant was scheduled to be constructed in the year 2008-09 but WIL completed the construction in the year 2009-10. In view of the

delay in construction and the consequent loss to the company, certain payments due to WIL were withheld. After a series of claims and counter claims the issue was finally settled through arbitration tribunal. As per the award of the tribunal, certain amounts determined to be payable to WIL was paid and the balance amount not payable amounting to ₹ 6,78,13,832/- was shown as “other income” in the financials but the same was treated as capital receipt for tax purposes relying on the decision rendered in CIT vs. Saurashtra Cement & Chemical Industries Ltd. [2002], 172 CTR 119(Guj) 11/[2002] 253 ITR 373(Guj.), wherein it was held that liquidated damages received by the assessee for delay in supply of machinery was a capital receipt and was not a receipt in the course of profit-making process, the assessee company, in the computation statement, treating the receipt as capital in nature, claimed deduction of the amount. It may be pertinent to note that the said decision was affirmed by the Apex court in [2010] 233 CTR 0209/[2010] 325 ITR 0422. The assessee company also drew support from the decisions in [1964] 53 ITR 261(SC) and the Bombay High Court decision in Mahindra & Mahindra Ltd. [1973] 91 ITR 130 (Bom.).

9.1 It would appear from a reading of the assessment order that the AO proposed to tax ₹ 1,99,35,914/- under the mistaken impression that the assessee offered lesser amount. The confusion in reconciliation could have been avoided had the assessee was given opportunity to explain. The AO without considering the submissions made by the assessee company disallowed the claim relying on the Apex Court judgment in Goet's case which has been rendered in an entirely different context and has no relevance to the claim made by the assessee in the return of income filed. In the case relied on by the AO, the issue was whether the assessee can make a fresh claim by submitting revised computation and without furnishing a revised return of income. It was held that any fresh claim can be made only by filing a revised return of income. In the assessee's case, the claim was made in the return of income filed under sec.139(1) of the Act and that no revised computation of income was submitted to make any fresh claim. Hence, according to the assessee, the AO's reliance on Goet's case is misplaced. Aggrieved by the disallowance made by the AO, the assessee

went in appeal before the CIT(Appeals), who relying on the decision of the Supreme Court in the case of CIT v. Manna Ramji & Co. (86 ITR 29), observed that the receipt of damage by the assessee has been treated as a taxable revenue receipt and dismissed this ground of appeal of the assessee. Against this, the assessee is in appeal before us.

10. We have heard both the parties and perused the material on record. In this case, assessee received the impugned amount from M/s.Walchandnagar Industries Ltd., towards liquidated damage towards delay in construction of assessee company's plant, which is a capital asset. The liquidated damages have direct nexus with procurement of capital asset of the assessee, which is not an ordinary course of business of assessee. The plant and machinery being in a capital field, receipt of amount towards delay in installation of plant and machinery cannot be considered as in the revenue field, unless the assessee in the business of trading in same plant and machinery. In the present case, the business of assessee is to exploration, extraction and separation of minerals from beach

sand. The installation of plant and machinery by the assessee is an income earning apparatus of the assessee and it is not trading asset of the assessee. Therefore, any income, which is earned having a direct nexus with the installation of plant and machinery to be considered as a capital receipt, cannot be considered as a trading receipt.

10.1. In the present case, the delay in construction of plant and machinery caused in receipt of liquidated damages from M/s.Walchandnagar Industries Ltd. and it is a direct nexus with the delay caused in construction of the plant and machinery and on account of which the assessee received the compensation or damages, which is in the capital field as the source is a capital asset. The said amount was received in the course of installation of capital earning asset and to be considered as capital receipt and judgement relied by the ld.A.R in the course of CIT vs. Saurashtra Cement & Chemical Industries Ltd. [2002], 172 CTR 119(Guj) on the issue, which was delivered after considering the judgement of jurisdictional high court in the case of E. I. D. PARRY LTD. in [1998] 233 ITR 335 (Mad). Hence, in our opinion, it is to be applied in full force and accordingly, we

hold that the amount of damages received by the assessee to be considered as a capital receipt only and cannot be brought into tax. However, that should be reduced from the block of assets as plant and machinery entered in the block of assets. With this observation, we partly allow the ground taken by the assessee.

11. Now, we take up the Revenue's appeal in ITA Nos.418 & 419/Mds/2017. The only common issue in this appeal is with regard to granting of depreciation by the CIT(Appeals).

12. The facts of the case are that the AO has disallowed the depreciation on roads claimed by the assessee on the ground that the land on which roads were laid belonged to Andhra Pradesh Government and hence the assessee could not be said to be the owner of the asset and also held that the roads were being used by public as well and hence the same could not be considered as a private property. Aggrieved, the assessee went in appeal before the CIT(Appeals).

13. On appeal, the CIT(Appeals) relied on the decision of the Tribunal in the case of M/s. Tamil Nadu Road Development

Corporation Ltd. in ITA No.2082/Mds/2008 and 817/Mds/2007 dated 24.10.2008 for the assessment years 2003-04 and 2004-05, wherein similar issue was decided by the Tribunal vide pg. No.24 para No.21, which reads as under:

".....In the above detailed discussion we have come to the conclusion that the assessee has constructed only a road. Now, the question is whether the capital, as expenditure incurred on such road would make it eligible for depreciation under the head "building". The same has been denied by the Department on the basis of the decision of the Hon'ble Supreme Court in the case of Indore Municipal Corporation v. CIT (supra). A careful perusal of this decision would show that this matter arose out of Special Leave by order dated 5.8.2013. Though the Asst. Year is not mentioned in the judgment but from the order regarding Special Leave, it becomes clear that it must be related to the earlier years because it would take some time for the matter to travel to the Supreme Court. A careful perusal of various Appendices which prescribe the table of rates by which depreciation is admissible would show that all Appendix I which was applicable to the Asst. Year 1984-85 to 1987-88 did not mention in the Notes that buildings include roads, bridges, culverts, wells and tube wells. In the later Appendices which is applicable from Asst. Year 1988-89 to 2002-03 and 2003-04 and 2005-06 and the latest Appendix which is applicable for the Asst. Year 2006-07 contain the following Note:-

Note: Building includes roads, bridges, culverts, wells and tube wells. Therefore, it is absolutely clear that the Hon'ble Supreme Court has held in the case of Indore Municipal

Corporation that the buildings would not include roads because Appendix I did not clarify that roads would be included in the building. As pointed out, after the Asst. Year 1988-89 all the Appendices have the note that building would include roads. Therefore, in our view, the Assessee would become entitled to depreciation on the road in the category of building. In these circumstances, we set aside the order of the CIT(Appeals) on legally and rightfully eligible even at the rate of 10% as allowed by the Department.

The learned AO has not passed the rectification orders and hence the assessee has been denied the benefit of Set off Depreciation loss of previous years."

13.1 Respectfully following the aforesaid order of the Tribunal, the CIT(Appeals) directed the AO to allow depreciation @ 10% on the road by treating it as building and this issue is partly allowed.

14. We have heard both the parties and perused the material on record. The Ld.CIT(A) in this case followed the binding decision of the Chennai Tribunal in the case of M/s. Tamil Nadu Road Development Corporation Ltd., for the assessment years 2003-04 and 2004-05, dated 24.10.2008 (supra) as discussed above. Being so, we do not find any infirmity in the order of

Ld.CIT(A) on this issue and grant depreciation @ 10% on the road by treating it as building and the order of Ld.CIT(A) is confirmed. Hence, this ground raised in both the Revenue's appeals stand rejected.

15. In the result, both the appeals of the assessee for assessment years 2011-12 & 2012-13 are partly allowed and both the appeals filed by the Revenue for assessment years 2011-12 & 2012-13 are dismissed.

Order pronounced on 26th July, 2017 at Chennai.

Sd/-	Sd/-
(धुव्वुरु आर.एल रेड्डी)	(चंद्र पूजारी)
(Duvvuru RL Reddy)	(Chandra Poojari)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

चेन्नई/Chennai,
दिनांक/Dated, the 26th July,2017.
K S Sundaram

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF