

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

BEFORE SHRI R. C. SHARMA, AM AND SHRI AMARJIT SINGH, JM

आयकरअपीलसं/I.T.A. No.1914/M/2014

(निर्धारणवर्ष / Assessment Year: 2009-10)

M/s. Ashar Realtors Ashar IT Park, Gr. Floor, Road No. 16Z, Wagle Industrial Estate, Pokhran Rd No.2, Thane (W) 400601	<b>बनाम/</b> Vs.	ACIT, Circle-23(2), 2 <sup>nd</sup> Floor, C-10, Bandra Kurla Complex, Bandra Mumbai- 400051.
स्थायीलेखासं. / जीआइआरसं. / PAN/GIR No. : AAHFA1708J		
(अपीलार्थी/ Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Rahul Hakani (AR)
Department by:	Shri V. Vidyadhar (DR)

सुनवाईकीतारीख / Date of Hearing: 01.03.2018

घोषणाकीतारीख /Date of Pronouncement: 29.05.2018

आदेश / ORDER

**PER AMARJIT SINGH, JM:**

The assessee has filed the present appeal against the order dated 02.12.2013 passed by the Commissioner of Income Tax (Appeals)-33, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y. 2009-10.

2. The assessee has raised the following grounds:-

**"1. Addition of Rs. 2,16,455/- being Interest on Advance given to Jatin Daisaria**

*1.1 The CIT(A) erred in confirming addition of Rs.2,16,455/-as notional interest on interest free advance.*

*1.2 The CIT(A) erred in passing order without considering the relevant materials placed on record by the appellant in support of its submissions.*

*1.3 The CIT(A) failed to understand the fact that advance was given out of non-interest bearing fund and therefore no notional interest can be disallowed.*

*1.4 Your appellant prays that ratio of judgment of Externpore Securities & Investments (P) Ltd. vs. DCIT reported in (2008) 116 TTJ 525 (Mum), wherein, it was held that as long as the nexus between interest bearing funds and interest free advances is not established, the disallowance of Section 36(1) (iii) cannot be made. Other supporting judgements in our favour are that of Bombay High court in case of Reliance Utilities Ltd reported in 313 ITR 340 and judgment of Delhi High court in case of Dalmia Cement Ltd reported in 29 DTL 138. In both judgments, it is stated that no disallowance of interest can be made when advance is given out of interest free fund.*

*1.5 Your appellant prays that ratio of judgment of Honorable Bombay High Court in case of Lokandwala Construction Ltd reported in 260 JTR 579 (Bom) wherein it was held that "interest on borrowed capital cannot be disallowed u/s 36(1)(ii') of IT- Act since project for builder is stock in trade" is squarely applicable in Appellant firm's case and same should be followed and addition of Rs. 2,16,455/-be deleted.*

**II Addition of Rs, 1,32,000/- being Interest on Advance given to Anita ValjiDaisaria.**

2.1 The CIT(A) erred in confirming addition of Rs,1,32,000/- ab notional interest on interest free advance.

2.2 The CIT(A) erred in passing order without considering the relevant materials placed on record by the appellant in support of its submissions.

2.3 The CIT(A) failed to understand facts that advance was given out of non-interest bearing fund and therefore no notional interest can be disallowable,

2.4 Your appellant prays that ratio of judgment of Externpore Securities & Investments (P) Ltd. vs. DCIT (2008) 116 TTJ 525 (Mum), wherein, it was held that as long as the nexus between interest bearing funds and interest free advances is not established, the disallowance of Section 36(1) (iii) cannot be made. Other supporting judgements in our favour are that of Bombay High court in case of Reliance Utilities Ltd reported in 313 TTR 340 and judgment of Delhi High court in case of Dalmia Cement Ltd reported in 29 DTL US. In

both judgments, it is slated that no disallowance of interest can be made when advance is given out of interest free fund.

2.5 Your appellant prays that ratio of judgment of Honorable Bombay High Court in case of *Lokhandwala Construction Ltd reported its 26ft ITK 579 (Bom)* wherein it was held that "interest on borrowed capital cannot be disallowed u/s 36(1)(iii) of I.L Act since project for builder is stock in trade"<sup>1</sup> is squarely applicable in Appellant Finn's case and same should be followed and addition of Rs.1,32,000/-be deleted.

III. The Appellant craves leave to add, alter, modify, amend or drop any of the above Grounds of Appeal on, before or at the time of hearing.”

3. The brief facts of the case are that the assessee filed its return of income on 29.09.2009 declaring total income to the tune of Rs.45,37,620/-. The return was processed u/s 143(1) of the Act. Thereafter, the case was selected for scrutiny under CASS. Notice u/s 143(2) of the Act dated 19.08.2010 was issued and served upon the assessee. Subsequently, notice u/s 142(1) of the Act along with questionnaire was also issued and served upon the assessee. The assessee was in the business of property developers and construction. The assessee was having opening balance of Rs.11,00,000/- in the name of Anita Daisaria and an amount of Rs.11,40,000/- in the name Jatin Daisaria. During the year under consideration, the assessee paid the interest of Rs.3,48,000/-.The assessee was asked for the purpose to pay the loan but no satisfaction was reply received. Therefore, the interest to the tune of Rs.3,48,455/- was disallowed and added to the income of the assessee. The total income of the assessee was assessed to the tune of Rs.48,86,070/-. The assessee filed an appeal before the

CIT(A) who confirmed the said addition, therefore, the assessee filed the present appeal before us.

**ISSUE NO. 1& 2:-**

4. Issue nos. 1 & 2 are inter-connected, therefore, are being taken up together for adjudication. Under these issues the assessee has challenged the confirmation of disallowance of interest to the tune of Rs.2,16,455/- on account of loan given to Jatin Daisaria and confirmation of addition of interest to the tune of Rs.1,32,000/- on account of loan given to Anita Jatin Daisaria. In fact, the assessee paid the interest free loan to the tune of Rs.11,40,000/- to Mr Jatin Daisaria and of Rs.11,00,000/- to Ms. Anita Daisaria. The AO asked the appellant about the purpose to give the loan and to not to receive the interest but finding no justifiable reasons, the Assessing Officer assessed the notional interest upon the interest free loan and added to the income of the assessee. The said finding has been confirmed by the CIT(A). The contention of the assessee is that the assessee has given the loan to these parties out of his own fund. Therefore, no notional interest is liable to be added to the income of the assessee in accordance with law. It is also stated that the no nexus was established by the AO to which it can be assumed that the loan was given to the said person from the interest bearing funds. It is contented that the no notional interest is liable to be assessed and added to the income of the assessee in view of the law settled in **CIT Vs. Sridev Enterprises**

**(1991) 59 taxman 439 (Karnataka) & Extermore Securities & Investments (P) Ltd. Vs. DCIT in ITA. No. 6996/M/2006 dated 8<sup>th</sup> April, 2008 (2008) 116 TTJ (Mumbai) 525.** On appraisal of the assessment order, we nowhere found that the Assessing Officer has recorded the satisfaction to the effect that the loan was given out of interest bearing funds. In this regard, we find that the case of the assessee has duly been covered by the decision of Mumbai Tribunal in case ITA. No. **Extermore Securities & Investments (P) Ltd. Vs. DCIT in ITA. No. 6996/M/2006 dated 8<sup>th</sup> April, 2008 (2008) 116 TTJ (Mumbai) 525** and the relevant para no. 13 to 16 are hereby reproduced as under.:-

"13. As regards ground No. 4. brief facts are that the assesses hail given an interest free advance of Rs, 75 Lakhs to Shri Gaurang Gandhi even though it had incurred interest expenses of Rs,1,38,51,924. The AO came to the conclusion that the advances have been given for non-business purposes and, therefore. Interest @ 15 per cent on the advance of Rs.75 lakhs amounting to Rs.11.25,000 was disallowed. Aggrieved, assessee filed an appeal before the CIT(A) who confirmed the addition following the decisions of the High Courts in the following cases :

(a) *CIT vs. H.R.. Sugar Factory (P) Ltd. 0990) 87 CTR (All) 132: (1990) 187 ITR} (All):*

(b) *CrT us. Motor General Finance Ltd. (2002) 173 CTR (Del) 123 (2GG2J 254 ITR 449 (Del)*

(c) *Indian Metals & Ferro Alloys. as. CIT{1992) 193 ITR 344 (On);*

(d) *Pathan Sugar Works Ltd. us. CWT (1995) 127 CTR (Bom) 359: (1995) 208 ITR 989 (Bom)*

14. The learned counsel for the assesses submitted that the AO. has found that the interest payment of Rs, 1,38,51.954 was on account of bank interest towards loans taken for purchase of shares of Shonkh Technology Ltd. and that there is a direct nexus between the amount borrowed and investment in shares which is stock-in-trade of the share trading business. He submitted that having held so, it cannot be said that interest-free advance is out of Interest-bearing funds. He placed reliance

upon the decision of the Bombay High Court in the case of *CIT Vs. Bombay Samachar Ltd. (1969) 74 ITR 723 (Bom)* that the view taken by the AO that the assessee could have decreased the extent of its borrowing by calculating its outstanding and, therefore, would not be entitled to claim interest paid by it on borrowed capital is not capable of being sustained and further in view that the assessee had diverted the capital borrowed by it for making advances to its sister concern is squarely wrong on the facts of the case and is not capable of being sustained.

15. The Ld. Department Representative, on the other hand, strongly supported the orders of the authorities below.

16. We find that both the AO as well as the CIT(A) have held that the interest paid was towards the loan taken for purchase of shares. As long as the nexus between the interest-bearing funds and the interest-free advances is not established, the disallowance cannot be made. We find that this issue is covered by the decision of the Bombay High Court in the case of *Bombay Samachar Ltd. (supra)* and the assessee is entitled to succeed. This ground of appeal is, therefore, allowed.”

5. The facts of the present case are quite similar to the facts of the case as narrated above because no nexus between the interest bearing funds and interest free fund was established. Therefore, in the said circumstances no notional interest is liable to be added to the income of the assessee. Accordingly, we are of the view that the finding of the CIT(A) on these issues are not correct hence is hereby ordered to be set aside. Accordingly, we decide both the issues in favour of the assessee and allowed the claim of the assessee.

6. In the result, the appeal of the assessee is **hereby ordered to be allowed.**

Order pronounced in the open court on 29.05.2018

Sd/-

**(R. C. SHARMA)**

ACCOUNTANT MEMBER

Mumbai; Dated: 29.05.2018

Sd/-

**(AMARJIT SINGH)**

JUDICIAL MEMBER

*VJAY*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar)  
**ITAT, Mumbai**