IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI

BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 3545/MUM/2016
Assessment Year: 2011-12

Allied Media Network Pvt. Ltd., P-2, Level 3, Percept House, 22 Raghuvanshi Estate, 11/12 Senapati Bapat Marg, Lower Parel, Mumbai-400013. **PAN No. AADCP9975H**	Vs.	DCIT, Range-7(1), Aayakar Bhavan, M.K. Marg Mumbai-400020
Appellant		**Respondent**

Assessee by : Mr. Pankaj Jain, AR
Revenue by : Ms. S. Padmaja, CIT(DR)

Date of Hearing : 05/04/2018
Date of pronouncement: 27/06/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2011-12. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-12, Mumbai [in short 'CIT(A)']and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The 1st ground of appeal

> The Commissioner of Income Tax (Appeals) - 12, Mumbai [hereinafter referred to as CIT(A)] erred in holding that the Deputy Commissioner of Income Tax, Range-7(1), Mumbai [hereinafter referred to as DCIT] was right in disallowing the interest cost of Rs.1,93,4167/- under section 36(1)(iii) out of interest of Rs.49,84,033/- paid by the Appellant on the secured loan taken during the year on the ground that the same was attributable to interest free advances made by the Appellant to its group concern/concerns, without appreciating the fact that no interest free loans/advances have been and there is only a repayment of the unsecured loan taken during the year from the another group concern. The Appellant further submits that the interest paid is on amounts borrowed is wholly and exclusively for the purposes of their business and pray that the disallowances of Rs.11,93,416/- be deleted.

3. Briefly stated, the facts are that during the year under consideration, the assessee-company had paid interest of Rs.49,84,033/- on secured loan of Rs.4,55,00,000/- taken from Yes Bank Ltd. Also it had given loans and advances to its subsidiary companies to the tune of Rs.4,04,00,000/- on which it had not charged any interest. The Assessing Officer (AO) worked out the disallowance on pro-rata basis and made an addition of Rs.11,93,416/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) observed that in the instant case the appellant has not brought out any evidence that the advances given to the associated concern were utilized for their business purpose. As the appellant failed to produce evidence in support of utilization of

borrowed funds for business purpose, the Ld. CIT(A) confirmed the above disallowance of Rs.11,93,416/- made by the AO.

5. Before us, the Ld. counsel of the assessee files a Paper Book (P/B) containing (i) computation of income, (ii) annual accounts as on 31.03.2011, (iii) copy of letter filed with DCIT giving details of loans taken/loan given, (iv) ledger account of Percept Ltd. in the books of appellants and (v) order of Percept Ltd. showing that the Percept picture company is division of Percept Ltd.

Also reliance is placed by him on the judgment of the Hon'ble Bombay High Court in *CIT v. Reliance Utilities and Power Ltd*. (2009) 313 ITR 340 (Bom).

6. On the other hand, the Ld. DR relies on (i) the judgment dated 18 August 2011 of the Hon'ble Delhi High Court in *CIT v. M/s Tulip Star Hotels Ltd.* (ITA No. 43 of 2009 and 505 and 562 of 2010) and subsequent order of the Hon'ble Supreme Court stating that the decision in SA Builders v. CIT reported in 288 ITR 1 needs reconsideration, (ii) the order of the Ahmadabad Bench of the Tribunal in *Shree Saras Spices & Food P. Ltd. v. DCIT* (ITA No. 2527/Ahd/2010 for AY 2007-08 and ITA No. 1220/Ahd/2012 for AY 2009-10).

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.

In the assessment order dated 19.03.2014, the AO has disallowed interest of Rs.11,93,416/- at para 5.2 on the following ground:

> "As can be seen from records the advances are given by the assessee to its associate concern probably to help them improve their business. This act of the assessee of doing charity is not objectionable but same being done at the cost of revenue is not only highly objectionable but the contrary to the provisions of section 36(1)(iii) of the Income Tax Act. Therefore, not charging any interest on such loans is not in conformity with provisions of statue."

Let us examine the above reasons given by the AO against the backdrop of the relevant decisions. In *CIT v. Neel Kanth Synthetics & Chemicals Pvt. Ltd.* (2011) 330 ITR 463 and *CIT v. Dalmia Cement Bharat Ltd.* (2011) 330 ITR 595 (Del), it has been held that interest-free advance giving to sister concern need not inhibit the deduction if such loan or advance has been given for business purposes. Also as held in *Madhav Prasad Jatia v. CIT* (1979) 118 ITR 200 (SC), the expression "for the purpose of business" occurring in section 36(1)(iii) is wider in scope than the expression "for the purpose of making or earning income".

Examined in the background of the above position of law, the reasons given by the AO for making disallowance u/s 36(1)(iii) is vague and based on presumptions. Therefore, we delete the disallowance of Rs.11,93,416/- made by the AO u/s 36(1)(iii).

Thus the 1st ground of appeal is allowed.

8. <u>The 2nd ground of appeal</u>

> The CIT (A) erred in holding that DCIT was right in disallowing a sum of Rs34,88,180/- out of "Other Expenses" debited in the Profit & Loss Account on the ground that the said amount represented interest paid on account of

delay in depositing the TDS into Government treasury and adding the same in computing the Appellant's total income for the above year

The Appellant submits that interest paid on the delay in depositing the TDS is not covered by section 40(a)(ii) and qualifies for a deduction under section 36(1)(iii) of the Act and prays that the same be allowed as a deduction in computing total income.

9. During the course of assessment proceedings, the AO noted that the assessee had paid interest on TDS of Rs.34,88,180/- for delay in deposit of the same. However, the aforesaid amount was not added back to the total income computed by the assessee. The AO asked the assessee to explain why the same should not be disallowed and added to the total income. But there was no explanation filed by the assessee before the AO. In view of the above, the AO drew a conclusion that under the provisions of Income Tax Act, any income tax or wealth tax liability or interest paid on late payment or short payment of regular tax/advance tax/self-assessment tax or TDS is not allowable deduction Therefore, the AO relying on case laws made an addition of Rs.34,88,180/-.

10. In appeal, the Ld. CIT(A) observed that the liability to pay TDS in Government account cannot be termed as capital borrowed for business purpose. Therefore, he confirmed the disallowance of Rs.34,88,180/- made by the AO u/s 36(1)(iii) of the Act.

11. Before us, the Ld. counsel of the assessee relies on the order of the Tribunal 'A' Bench Kolkata in *DCIT v. M/s Narayani Ispat Pvt. Ltd*. (ITA No. 2127/Kol/2014 for AY 2010-11).

On the other hand, the Ld. DR relies on the judgment dated 5th March, 1998 of the Hon'ble Supreme Court in *Bharat Commerce and Industries Ltd. v. CIT* (CA No. 5509 of 1985).

12. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.

In the case of *M/s Narayani Ispat Pvt. Ltd*. (supra), relied on by the Ld. counsel, the assessee had claimed interest paid on service tax of Rs.15,880/- and interest paid on TDS of Rs.70,777/-. The AO placing reliance on the decision in *Bharat Commerce Industries Ltd*. (supra) disallowed the claim of above interest expenses. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A) submitting that the interest expense was incurred on account of late deposit of service tax and TDS which is allowable expense u/s 37(1) of the Act. The Ld. CIT(A) after considering submission of the assessee deleted the above addition on the ground that these were incurred wholly and exclusively for the purpose of business. On appeal by the revenue, the Tribunal held that (i) the assessee claims the specified expenses of certain amount in its profit and loss account and thereafter the assessee, from the payment to the party deducts certain percentage as specified under the Act as TDS and pays to the Government exchequer, (ii) the amount of TDS represents the amount of income tax of the party on whose behalf, the payment was deducted and paid to the Government exchequer, (iii) the TDS amount does not represent the tax of the assessee but it is the tax of the party which has been paid by the assessee, (iv) any delay in the payment of TDS by the assessee cannot be

linked to the income tax of the assessee and consequently, the principles laid down in *Bharat Commerce Industries Ltd*. (supra) cannot be applied to the instant case.

With the above reasons, the Tribunal concluded that the interest expenses claimed by the assessee on account of delayed deposit of service tax as well as TDS liability are allowable expenses u/s 37(1) of the Act.

12.1 In *Bharat Commerce & Industries Ltd*. (supra) relied on by the Ld. DR, the AO at the time of completing the assessment for the AY 1972-73 levied interest u/s 139 to the extent of Rs.11,470/- and interest u/s 215 to the extent of Rs.1,04,399/-. The assessee claimed deduction of these amounts of interest u/s 37 of the Act in computing its business income. This claim was rejected. The Hon'ble Supreme Court held that the payment of interest in the aforesaid case cannot be said, in any way an expense incurred wholly or exclusively for the purpose of assessee's business. Nor was it a payment made for the purpose of preserving and protecting the assessee's business. The Hon'ble Supreme Court held that the claim for deduction made by the assessee u/s 37(1) as well as 36(1)(iii) was misconceived.

12.2 We now turn to the following direct decisions on the above issue.

In *Ferro Alloys Corpn. Ltd. v. CIT* [1992] 196 ITR 406 (Bom), the assessee was required to pay interest under sections 201(1A), 215 and 220 of the Act. These amounts were claimed as business expenditure under section 37 of the Act. The ITO, the Commissioner in first appeal

and the Tribunal in second appeal, rejected the said claim as not allowable under section 37. On reference, the Hon'ble High Court, following the decision in *Aruna Mills Ltd. v. CIT* [1957] 31 ITR 153, *CIT v. Ghatkopar Estate and Finance Corporation (P) Ltd*. [1989] 177 ITR 222 (Bom), *Bharat Commerce Industries Ltd.* (supra) , *Federal Bank Ltd.* v. *CIT* [1989] 180 ITR 37 held that the claim for deduction of interest levied u/s 220(2), u/s 215 and u/s 201(1A) was rightly rejected as not allowable under section 37 of the Act.

In *Martin & Harris (P) Ltd. v. CIT* [1994] 73 TAXMAN 555 (Cal), for the assessment year 1977-78, the assessee-company claimed deduction of a sum of Rs. 35,769 being the expenditure incurred for the payment of interest under section 201(1A) on the amount of tax which was not deposited within the stipulated time after deducting the same from the salaries paid to its employees. The Assessing Officer disallowed the claim on the grounds, *inter alia*, that income-tax being a disallowable item, interest thereon could not be allowed and that the interest was in the nature of penalty for infraction of law and, hence, inadmissible. On appeal, the Commissioner (Appeals) as well as the Tribunal upheld the finding of the Assessing Officer. On reference, the Hon'ble High Court held that interest paid by company under section 201(1A) for delayed payment of tax deducted at source from employees' salary, is not allowable as deduction in computation of total income.

In *CIT v. Chennai Properties & Investment Ltd*. [1999] 105 Taxman 346 (Mad), the assessee claimed as business deduction the amount paid as interest under section 201(1A). The Assessing Officer rejected the

assessee's claim. On appeal, the Commissioner (Appeals) affirmed the order of the Assessing Officer. However, on second appeal, the Tribunal held that the interest paid was incidental to the business of the assessee and, therefore, allowed the amount as business deduction.

On reference, the Hon'ble High Court held:

> "The liability for deduction of tax arises by reason of the provisions of the Act. Under section 201, the consequence of failure to comply with the same renders that person liable to be deemed as an assessee in default with all the consequences attached thereto. The liability to pay interest on the amount not deducted or deducted, but not paid is directly related to the failure to deduct or remit the amount. The amount required to be deducted is the amount payable as income-tax. The interest paid for the period of delay takes colour from the nature of the principal amount required to be paid but not paid within time. The principal amount here would be the income-tax and the interest payable for delayed payment is the consequence of failure to pay the tax and in the circumstances, is in the nature of a penalty though not described as such in section 201(1A). The fact that the income-tax required to be remitted is not income-tax payable by the assessee but is ultimately for the benefit of and to the credit of the recipient of the income on which that tax is payable, does not in any manner alter the character of the payment, namely, its character as income-tax. The interest paid under section 201(1A), therefore, would not assume the character of business expenditure and could not be regarded as a compensatory payment.
>
> Income-tax is not allowable as business expenditure. The amount deducted as tax is not an item of expenditure. The amount not deducted and remitted has the character of tax and has to be remitted to the State and cannot be utilised by the assessee for its own business. The Supreme Court in the case of Bharat Commerce & Industries Ltd. v. CIT [1998] 230 ITR 733/ 98 Taxman

151 rejected the argument that retention of money payable to the State as tax or income-tax would augment the capital of the assessee and the expenditure incurred, namely, interest paid for the period of such retention, would assume the character of business expenditure. It held that an assessee could not possibly claim that it was borrowing from the State the amounts payable by it as income-tax, and utilising the same as capitalization in its business, to contend that the interest paid for the period of delay in payment of tax amounted to a business expenditure. Therefore, the interest paid under section 201(1A) could not be allowed as business deduction."

Thus, the Hon'ble High Court held that interest paid takes colour from nature of principal amount required to be paid but not paid in time and this principal amount being income-tax, interest is in nature of a direct tax and settlement of income-tax payable under Act and, therefore, same cannot be regarded as compensatory payment and allowed as business expenditure.

12.3 Examined on the touch-stone of the aforenoted legal principles laid down in *Bharat Commerce Industries Ltd.*, *Ferro Alloys Corpn. Ltd., Martin & Harris (P) Ltd., Chennai Properties & Investment Ltd,* we uphold the order of the Ld. CIT(A) confirming the disallowance of Rs.34,88,180/- made by the AO. Thus the 2nd ground of appeal is dismissed.

14. In the result, the appeal is partly allowed.

Order pronounced in the open Court 27/06/2018.

Sd/-	Sd/-
(C.N. PRASAD)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 27/06/2018
Rahul Sharma, Sr. P.S.

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