आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ "बी", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL,
CHANDIGARH BENCH 'B', CHANDIGARH

श्रीमती दिवा सिंह, न्यायिक सदस्य एवं, एवं श्रीमती अन्नपूर्णा गुप्ता, लेखा सदस्य
BEFORE: SMT.DIVA SINGH, JM & SMT.ANNAPURNA GUPTA, AM

आयकर अपील सं./ **ITA No.699/Chd/2018**
निर्धारण वर्ष / Assessment Year : 2012-13

Sh.Saurabh Jain, 617, Mandi Kesar Ganj, Ludhiana.	बनाम	The Income Tax Officer, Ward-2(3), Ludhiana.
स्थायी लेखा सं./PAN NO: ABDPJ6781B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by: S/Shri Ashwani Kumar
Aditya Kumar, CAs
राजस्व की ओर से/ Revenue by : Shri Manjit Singh, Sr.DR

सुनवाई की तारीख/Date of Hearing : 04.09.2018
उदघोषणा की तारीख/Date of Pronouncement: 29.11.2018

आदेश/Order

PER ANNAPURNA GUPTA, A.M. :

The present appeal has been filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-1, Ludhiana (in short CIT(A) dated 16.3.2018 passed u/s 250(6) of the Income Tax Act, 1961 (in short referred to as 'Act').

2. Ground No.1 raised by the assessee reads as under:

> "1. *That order passed u/s 250(6) of the Income Tax Act, 1961 by the Ld. Commissioner of Income Tax (Appeals)-l, Ludhiana is against law and facts on the file in as much as he was not justified to arbitrarily uphold the disallowance of interest amounting to Rs. 2,36,579/- made by the Ld. Assessing Officer of by resort to provisions of Section 36(1)(iii) of the Income Tax Act, 1961."*

3. The above ground relates to disallowance of interest made u/s 36(1)(iii) of the Act and the facts leading to the

disallowance are that during assessment proceedings the A.O. noted that the assessee had advanced interest free loans to family members amounting to Rs.22,36,100/- as under:

Sr. no.	Name of person	Amount
1	Smt. Padma wati Industries	250000
2	Sh. Sushil Kumar Jain	321100
3	Mrs. Nidhi Jain W/o Sanjeev Jain	400000
4	Mrs. Shruti Jain	365000
5	Sh. Pardeep jain	900000
	Total	2236100

and had at the same time debited interest of Rs.2,36,579/- on secured and unsecured loans taken The A.O. asked the assessee to show cause as to why interest @ 12% may not be disallowed u/s 36(1)(iii) of the Act in view of the judgment of the Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Abhishek Industries Ltd., 286 ITR 1. In response to which the assessee contended that the advance had been made out of own interest free funds and interest bearing loans taken and had all been utilized in the business of the assessee. It was also contended that no disallowance of interest had ever been made in the past when the advances were made. In support of this contention, copy of the assessment order for assessment year 2010-11 was placed on record. The A.O. brushed aside all the contentions of the assessee stating that no benefit can be derived from the assessment order passed in assessment year 2010-11 since no queries with regard to disallowance of interest u/s 36(1)(iii) of the Act was made

while passing the assessment order. It was further pointed out that no documentary evidence had been filed by the assessee in support of its contention that no loan was taken when the said advances were made. The A.O., therefore, following the judgment of the Hon'ble Jurisdictional High Court in the case of Abhishek Industries Ltd. (supra) disallowed the interest @ 12% of the impugned advances, which worked out to Rs.2,48,270/-.

5. Before the Ld.CIT(A) the assessee reiterated the contentions made before the A.O. and further pointed out that no disallowance of interest free loans had been made in the assessee's case for assessment years 2010-11, 2013-14 and 2014-15 The Ld.CIT(A) dismissing the contention of the assessee reiterated the findings of the A.O. that the assessee has been unable to demonstrate the availability of non interest bearing funds for the purpose of making the impugned advances. The relevant finding of the CIT(A) at para 4 of his order is as under:

> "*4. The submissions of the appellant have been considered, It is an admitted fact that interest-free advances have been made to family members. Though it has been contended that the same was for the purposes of business and there was an element of expediency in such advances, it could not be so demonstrated by the appellant either at the assessment stage or in the instant appellate proceedings. It is also not the contention of the appellant that such interest free advances were made out of own funds which did not carry any cost. The appellant, in order to get relief on this issue needed to demonstrate the availability of non-interest -'bearing funds so as to obviate the need of such disallowance within the meaning of section 36'(l){Hi) of the Act. Had that been done/it could have been presumed, as ruled by the jurisdictional Tribunal and the High Court that non-interest-bearing fund; were used for making such advances without charging any interest. Since the appellant has not*

discharged that either at the assessment stage or at this stage there cannot be any relief for the appellant qua this issue. Merely stating that such disallowances were not made in some of the assessment years would not suffice. In the circumstances, the ground of appeal pertaining to this issue is dismissed, it is ordered accordingly."

6. Before us the Ld. counsel for assessee reiterated the contention made before the lower authorities. The Ld. counsel for assessee drew our attention to the list of persons to whom the advances had been made as reproduced above. Referring to the same, the Ld. counsel for assessee pointed out that out of the above all advances except that relating to Smt.Padma Wati Industries of Rs.2,50,000/- were shown as outstanding in assessment year 2010-11. Our attention was drawn to the relevant schedule of the Balance Sheet for the financial year ending 31.3.2010 relevant to assessment year 2010-11, placed at Paper Book page No.6 reflecting the above fact. Our attention was also drawn to the findings of the A.O. at para 3.3 of the order wherein he had mentioned that the assessment record for assessment year 2010-11 had been perused and it had been noticed that the assessee had advanced loans to S/Sh./Smt. Pardeep Jain, Nidhi Jain, Shruti Jain and Sushil Kumar Jain which were shown in schedule-VII of the Balance Sheet,but loan to M/s Padma Wati Industries was advanced thereafter. The Ld. counsel for assessee thereafter drew our attention to the fact that re-assessment proceedings were initiated in the case of the assessee for assessment year 2010-11 on account of disallowance of interest u/s 36(1)(iii) of the Act by

recording reasons to this effect but after obtaining reply from the assessee no disallowance was made. Our attention was drawn to the reply filed to the A.O. in the course of re-assessment proceedings for assessment year 2010-11, placed at Paper Book page Nos.30 to 35, more specifically to the facts of the case and the arguments on merits:

"ON FACTS OF THE CASE:

Assessment of the assessee for the Assessment Year was completed on 14/12/2012 u/s. 143(3) during the course of assessment year details of all expenses including details of interest, loans and advances were dully submitted in the shape of explanation as per letter submitted during the assessment proceeding alongwith Copy of Trading, Profit and Loss Account and Balance Sheet duly audited alongwith annexure. Then assessing officer 'was well aware of the facts regarding interest paid and charged and as per pervading Laws, Ruling and Act and after due discussions and submissions on the facts of the case inclusive of interest paid and addition of Rs.39125.00 were made on account of disallowance of expenses debited to profit and loss account. In the light of facts and proceeding initiated u/s 147/148 adding back any interest is illegal, unlawful, unjustified and is void abnitio.

2. ON MERITS:

a) The notice is based on fictitious and imagenary figures. In the notice interest to be added has been calculated at Rs.321732/- whereas interest debited in Profit and loss account on account of business is Rs.71000/- paid to bank and Rs.26989/- paid to unsecured loans. Total interest comes to Rs.97989/~ only. When total interest paid / debited for business is Rs.97989/-how an addition of Rs.321832/- can be proposed to be added back on account of any disallowance.

b) The reason to believe the escaped assessment has been based on the opinion made by the audit party on the basis of judgment of Honble Punjab and Haryana High Court in the case of M/s. Abhishek Industries in 286 ITR J which was passed in the year 2006 whereas the assessment in the case was completed on 14/12/2012 and the assessing officer was well aware of the judgment and the case was decided considering the merits circumstances, facts and explanation exchanged during the course of assessment proceeding. It may be submitted that system of internal audit for the purpose of department to check out the mistake and omissions appearing on (he face of the file. Giving of any opinion regarding judgments and ruling by the audit

party is nothing but an excessive stoke on the wisdom of assessing officer and power given to him under the act. If the final assessment power is west with auditor than the assessment should have been framed by the auditor instead of assessing officer. Issuance of any notice u/s I47/J48 on the opinion of auditor is a laughing stroke and challenge to the wisdom of the predecessor assessing officer and it cannot be taken as fair, reasonable and justified. Removal and reply to the objection on any opinion by the auditor is the duty of assessing officer. It is totally illegal and excessive to issue any notice u/s 147/148 on the assessee it is nothing but just stepping in the shoes of auditor. The assessee cannot be harassed or panelized on the opinion of the auditor. It is submitted that it is an established law that notice u/s 147/148 cannot be issued on the change of opinion particularly against the view taken by the predecessor assessing officer. In the light of the facts if at any action to be taken on the opinion of the audit party the explanation is likely to be called from the than assessing officer. At present even it is nothing but challenging the wisdom of the assessing officer.

Reliance may please be given in the case of Delhi High Court in the case of COMMISSIONER OF INCOME TAX Vs THE SIMBHAOLI SUGAR MILLS LTD, 2011-TIOL-293-HC-DEL-IT. Reopening on the basis of an opinion formed by the internal auditor of the department, cannot be treated valid because it amounts to change of opinion.

In the case of IL & FS Investment Managers Ltd. vs. ITO & Ors (2008) 298 ITR 32 (Bom) Vijaykumar M. Hirakhanwala (HUF) vs. ITO & Ors (2006) 287 ITR 443 (Bom) AO having allowed assessee's claim in the regular assessment and reopened the assessment pursuant to audit objection, it cannot be said that he had formed his own opinion that the income had escaped assessment, and the reopening being based on mere change of opinion, same was not valid.

In the case of ***Calcutta Discount Co. Ltd. v. ITO 41 ITR 191*** *(SC). it was observed that it is the duty of the assessee to disclose all the primary facts which have a bearing on the liability of the income earned by the assessee being subjected to tax. It is for the Assessing Officer to draw inferences from the facts and apply the law determining the liability of the assessee. The assessee cannot draw the conclusions drawn by the Assessing Officer and once the conclusion is drawn and the assessment order framed, the Assessing Officer cannot at a later point of time form a different opinion by giving a second thought to the facts disclosed by the assessee, holding that he committed an error in computing taxable income and reopen the assessment under section 147.*

Discovery of new and important matters or knowledge of fresh facts which were not present at the time of original assessment would constitute a 'reason to believe that income had escaped

assessment' within the meaning of section 147. Similar view has been taken by the apex court in the following cases :—

(i) Phool Chand Bajrang Lai v. ITO 203 FTR 456, 477:

(ii) ALA Firm v, CIT 189 ITR 285, 298;

(iii) Indian and Eastern Newspaper Society v. CIT 1 19 ITR 996, 1004; and

(iv) ITO v. Lakhmani Mewal Das 103 ITR 437, 445.

Reliance may please be given in the case of ***DCIT V, SMITHKLINE BEECH AM CONSUMER BRANDS LTD., IT AT CHD.*** *[2003/ 126 TAXMAN* ***104 (CHD.)(MAG),*** *Reopening of an assessment completed under section 143(3) of the Act is not permissible merely on the basis of new opinion formed on the same material which happened to be the material of Sec 143(3) assessment. However, merely change of opinion in the mind of AO on interpretation of law cannot be basis for forming 'reason to believe'. Section 147 does not empower the Assessing Officer to review on the same set of facts the assessment order which had already been framed merely by fresh application of mind to its own decision or to the decision of predecessor.*

Fresh application of mind by the Assessing Officer on similar facts would tantamount to review of own decision. Amended section 147 does not authorize the Assessing Officer to reopen assessment under the garb of 'reason to believe' to review its own decision. If Assessing Officer does not bring any fresh/new material on record and neither receives any fresh information, then this would be a case of absence of jurisdiction on the part of the Assessing Officer to militate proceedings under section 147/148 and in the absence of jurisdiction, reassessment framed would be illegal and void. If on perusal of the reasons recorded by the AO for initiating reassessment proceedings clearly shows that on the very same material which was available while completing the assessment under section 143(3) of the Act he had on a mere change of opinion issued notice for reassessment. It is not permissible for the AO to resort to proceedings under section 147merely on change of opinion.

Therefore in the light of above explanation and decisions it is justified coming to the conclusion that notice issued u/s 147/148 is void abnitio and the same should be withdrawn. In any case before taking any contrary action an opportunity of hearing may please be afforded."

7. Our attention was thereafter drawn to the assessment order passed thereafter u/s 143(3) r.w.s. 147 of the Act for assessment year 2010-11, placed at Paper Book page Nos.20

to 24 making no addition and accepting the assessed income u/s 143(3) of the Act. The Ld. counsel for assessee, therefore, stated that vis-à-vis the advance made to the aforesaid persons the issue of disallowance of interest u/s 36(1)(iii) had been specifically examined in re-assessment proceedings for assessment year 2010-11 and no disallowance had been made. Therefore, there was no reason for making disallowance with respect to the aforesaid advances made in the impugned year. Vis-à-vis advance made to M/s Padma Wati Industries it was pointed out that the same had been made during the impugned year on 22.11.2011, amounting to Rs.2,50,000/-. Our attention was drawn to the copy of account of the said party in the books of account of the assessee placed at Paper Book page No.29 bringing out the relevant fact. Our attention was thereafter drawn to the profits of the proprietorship concern of the assessee for the impugned year placed at Paper Book page No.16 ,reflecting the net profit of Rs.8,02,235/- .The Ld. counsel for assessee contended that it was evident that the assessee had sufficient profits and thus sufficient interest free funds for the purpose of making advance to M/s Padma Wati Industries and the said documents were very much before the lower authorities also and, therefore, the findings of the CIT(A) to this effect that the assessee had not substantiated its claim of availability of own funds was incorrect. The Ld. counsel for assessee contended that as per the Ld.CIT(A) himself, no disallowance u/s 36(1)(iii) was warranted in case sufficiency of availability of own

funds was demonstrated. It was contended, therefore, that the said fact being clearly evident from the books of account of the assessee itself, there was no occasion to uphold the disallowance of interest, vis-à-vis the advances made to Padma Wati Industries.And considering the fact that no disallowance had been made in relation to advances made to other parties also in assessment year 2010-11 when the same were outstanding and the issue had been specifically examined in re-assessment proceedings, the entire disallowance made u/s 36(1)(iii) needed to be deleted,it was contended.

8. The Ld. DR, on the other hand, relied upon the orders of the authorities below.

9. We have considered the submissions of both the parties and gone through the orders of the authorities below. We find merit in the contention of the Ld. counsel for assessee. Admittedly, the issue of disallowance of interest u/s 36(1)(iii) of the Act with respect to the impugned advances made, except M/s Padma Wati Industries, had been examined in the re-assessment proceedings in assessment year 2010-11 and no disallowance had been made. The Ld. DR has been unable to controvert this fact before us. Therefore, the Revenue having accepted that no disallowance of interest u/s 36(1)(iii) was warranted on account of advances made in assessment year 2010-11 cannot now change its stand and make the disallowance in the impugned year. Therefore, with respect to advances

made, except M/s Padma Wati Industries, we agree with the Ld. counsel for assessee that the Revenue having accepted that no disallowance of interest u/s 36(1)(iii) of the Act was warranted in assessment year 2010-11 the disallowance made in the impugned year is uncalled for and is, therefore, directed to be deleted. Vis-à-vis the advance made to M/s Padma Wati Industries it is not disputed that the quantum of advances is Rs.2,50,000/- made in the month of November of the impugned year and the profits shown by the assessee in the entire year amounts to Rs.8,02,235/- The aforesid facts have remained uncontroverted before us and undeniably the said facts were before the lower authorities also. Therefore, we agree with the Ld. counsel for assessee that the availability of sufficient funds were clearly evident from the financial statements of the assessee itself for making advances to M/s Padma Wati Industries and in the light of the said fact as stated by the CIT(A) also, there was no occasion to make any disallowance of interest u/s 36(1)(iii) of the Act. The disallowance, therefore, made on account of advances made to M/s Padma Wati Industries, is also directed to be deleted. In effect the entire interest disallowed u/s 36(1)(iii) of the Act amounting to Rs.2,36,579/- is directed to be deleted. Ground of appeal No.1 raised by the assessee is allowed.

10. Ground of appeal NO.2 raised by the assessee reads as under:

> *"2. That he was further not justified to arbitrarily uphold the disallowance of Rs. 87,573/- out of*

interest account by resort to provisions of Section 40(a)(ia).”

11. The above ground relates to disallowance made on account of non deduction of tax at source on interest paid of Rs.87,573/- to M/s Balaji Finance Ltd. (NBFC). The Ld.CIT(A) upheld the said disallowance stating that the assessee is not saved by amendment made to section 40(a)(ia) w.e.f. 1.4.2013 as per which if the assessee is not deemed to an assessee in default under the 1st proviso to sub-section (1) of section 201 of the Act, no disallowance u/s 40(a)(ia) can be made. The Ld.CIT(A) held that t take shelter of the said proviso the assessee was required to file certain documents, being a certificate in the prescribed format evidencing the compliance of the conditions stipulated in the section by the recipient of income, which the assessee had failed to do so and, therefore, no relief could be allowed to the assessee in this regard.

12. Before us the Ld. counsel for assessee fairly conceded that it had neither complied with the procedural requirement of furnishing documents as required under the 1st proviso to section 201 proving that the recipient of income,M/s Balaji Finance Ltd., had included the said interest in its income returned for taxation and paid taxes thereon and further expressed its inability to furnish the same before us also. But at the same time, the Ld. counsel for assessee pleaded that the matter be restored to the A.O. directing him to verify this fact of inclusion of the interest

income in the income of M/s Balaji Finance Ltd. and payment of taxes thereon by making requisite enquiry by the A.O.

13. The Ld. DR, on the other hand, stated that as per the requirements of law the onus rested on the assessee to furnish necessary documents in order to claim relief as per amended provisions of section 40(a)(ia) of the Act and having failed to do so the assessee is not entitleld to any relief under the same.

14. We have heard rival contentions and perused the orders of authorities below. The issue before us relates to disallowance of interest expenses amounting to Rs.85,473/- paid to M/s Balaji Finance Ltd., on account of non deduction of tax at source thereof and the same has been denied for the reason that the assessee has neither deducted tax at source nor furnished necessary documents as required by law proving that the said income has been included by the recipient in its return of income and taxes have been paid thereon. Since furnishing of the documents for availing benefit of the amended provisions of section 40(a)(ia), is admittedly a mandatory requirement, which the assessee has to fulfill and the assessee having conceded that it shall be unable to fulfill the said requirement, the Ld.CIT(A), we hold, has rightly upheld the disallowance u/s 40(a)(ia) of the Act. Since the Legislature has fixed the onus of furnishing the impugned documents on the assessee and the assessee has given no reason for its inability to furnish

the same we do not find any reason whey the onus should be shifted to the A.O. to procure the said documents from M/s Balaji Finance Ltd. We, therefore, dismiss the contention of the assessee to this effect. The disallowance, therefore, made of interest expenses amounting to Rs.85,573/- u/s 40(a)(ia) is, therefore, upheld. Ground No.2 raised by the assessee is, therefore, dismissed.

15. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the Open Court.

Sd/-	Sd/-
दिवा सिंह	**अन्नपूर्णा गुप्ता**
(DIVA SINGH)	**(ANNAPURNA GUPTA)**
न्यायकि सदस्य/ Judicial Member	**लेखा सदस्य/ Accountant Member**

दिनांक /Dated: 29th November, 2018

रती

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar