

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद /

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'B'**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./ ITA No.322/Ahd/2015

निर्धारण वर्ष/Asstt. Year: 2010-11

Shri Rameshkumar Trikamlal Padhiyar B-604, Prayag Apts., Opp: Nirma Vihar School Bodakdev Ahmedabad 380 054. PAN : ACKPP 6965 H	Vs.	JCIT, Cir.7 Ahmedabad.
--	-----	---------------------------

<i>अपीलार्थी</i> (Appellant)		<i>प्रत्यर्थी</i> (Respondent)
------------------------------	--	--------------------------------

Assessee by :	Shri P.F. Jain, AR
Revenue by :	Shri Santosh Kannan, Sr.DR

सुनवाई की तारीख/Date of Hearing : 14/022019

घोषणा की तारीख/Date of Pronouncement: 30/04/2019

आदेश ORDER

PER RAJPAL YADAV, JUDICIAL MEMBER:

Assessee is in appeal before the Tribunal against order of the Id.CIT(A)-XIV, Ahmedabad dated 3.9.2014 passed for the Asstt.Year 2010-11.

2. Assessee has taken four grounds of appeal, which are not in consonance with Rule 8 of the Income Tax Appellate Tribunal Rules; they are being descriptive and argumentative in nature. In brief, grievance of the assessee is that the Id.CIT(A) has erred in

confirming the disallowance of interest expenditure amounting to Rs.34,76,144/-.

3. Brief facts of the case are that the assessee has filed his return of income electronically on 15.10.2010 declaring total income at Rs.4,82,01,353/-. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) of the Act was issued and served upon the assessee. A perusal of the record would indicate that the assessee has declared income from house property at Rs.13,17,195/-, income from business and profession of Rs.2,03,09,661/-, long term capital gain of Rs.1,67,17,396/-, short term capital gain of Rs.99,40,558/- and income from other sources of Rs.31,543/-. For the purpose of controversy in this appeal, the issue regarding computation of long term capital gain and short term capital is relevant. While computing short term capital gain as well as long term capital gain from sale of immovable property, the assessee has reduced interest of Rs.27,18,866/- from short term capital gain, and Rs.7,57,278/- from long term capital gain as cost of acquisition being interest paid on borrowed capital invested in purchase of the said asset. The Id.AO sought to disallow the above claim and invited explanation of the assessee. In response to the show cause, the assessee has filed written submissions vide letter dated 13.3.2013 which has been reproduced by the on page no.3 to 6 of the assessment order. We deem it appropriate to take note of this explanation of the assessee as under:

"Explanation about interest deduction under the head Capital Gain:

With reference to above, we have to state that the assessee has rightfully claimed a deduction of Rs. 34,76,144/-, being the amount of interest paid for obtaining unsecured loans to source funds for purchasing the land. We are submitting herewith the Balance

Sheets, Profit and Loss A/c and Fund flow statements of the assessee for F.Y. 2005-06 to 2009-10 as **Annexure-A**.

As per Section -48(ii) of the Income Tax Act, 1961, the cost of acquisition of the asset and any cost of improvement thereto has to be deducted from the amount of full value of consideration received to arrive at the capital gain. Further, section 55(ii) of the Income Tax Act, 1961 provided the meaning of Cost of Acquisition as it means all expenditure of a capital nature incurred in making any additions or alterations to the capital asset by the assessee after it became his property,...". Further, the interest expense on money borrowed for purchase of asset is to be included in the cost of acquisition.

According to **Addl. CIT v/s. K. S. Gupta (1979) 119 ITR 372 (AP) and CIT V/s. Mithilesh Kumari (1973) 92 ITR 9 (Del.)**, interest paid by the assessee on money borrowed for the purchase of open plot of land constituted part of the actual cost of the assessee within the meaning of section 55(2) for the purpose of determining the capital gain derived from the sale of the land,

The Ahmedabad Bench of the Tribunal also, in **ITO v/s. Smt. Pushpaben Wadhwani (1986) 16 ITD 704 (Ahd-Trib)**, held that the interest paid on loan taken for construction of flat would form part of the cost of acquisition of flat for purposes of computation of capital gains where it has not been allowed in computation of income from house property in past.

As per the judgment passed in the case of **CIT v. Mithlesh Kumari, (1973) 92 ITR (Del. HC)** it was held that the actual cost of the asset need not be the only those costs incurred on the date of acquisition. The Delhi High Court held that the interest paid on borrowed funds for the purchase of land after its acquisition constituted actual cost of land.

In the present case, the assessee had purchased a plot of land as an investment against which unsecured loans were taken to gather funds to purchase the same. The assessee incurred interest expense against these unsecured loans. Hence, this interest expense is an expense as defined u/s 55(2) and is taken as part of cost of acquisition as also held in the above referred cases. This establishes a clear nexus between the unsecured loans taken and the investments made in the land properties, Further, this also establishes an indirect nexus between invest made in land properties and interest paid on unsecured loans taken, as this expenditure being incurred owing to borrowing of funds which was actually borrowed to make investment.

We have attached herewith the extracts of the assessee's Bank Book, Cash book and ledgers to show the nexus between the loans taken and the investments made as **Annexure-B**.

In the case of **Habib Husein Vs. CIT (1963) 48 ITR 859**, it was held as under:

The dictionary meaning of the word 'cost' is what is laid out or suffered to anything...In our opinion therefore, the meaning of the expression 'actual cost to the assessee' as used in sub-section (5) of section 10 of the Act would be what the assessee has, in fact, expended or laid out for the purpose of acquiring the asset"

The above referred lines clearly ascertain that the assessee's claim of considering the interest expense as a part of cost of the asset is correct and justified. Further, the assessee has not even claimed the amount of such interest expense as deduction in any previous years or under any other head. This makes such interest expense eligible for deduction u/s 48(ii) of the Act, being an expense of cost of acquisition as explained u/s 55(2). The below mentioned summary of fund flow of the assessee, makes it very clear that the assessee's main objective in taking funds has been to source his investments.

SUMMARY OF FUND-FLOW OF THE ASSESSEE FROM F.Y. 2005-06 TO 2009-10

Financial Year	Unsecured Loans Taken (Rs.)	Unsecured Loans Repaid (Rs.)	Net Unsecured Loans (Rs.)	Land Investment (Rs.)	Balance of Unsecured loans as on 31 st March (Rs.)	Remarks
2005-06	1, 07,69,001 / -	36.00.000/-	71.69.020/-	76,48,447/-	77,69,000/-	The net unsecured loans funded 95% of the investment made.
2006-07	2,85, 40,837/-	1,80,70,000 /-	7,04,70,837/-	7,48,57,645/-	7,76,39,837/-	The majority of the investment was sold in this year.
2007-08	4,47,87,928/-	1,78,38,901 7-	26,94;90,277-	7,77,64,762/-	4,45,88,864/-	Previous years' sales proceeds of investments and current year's net loans of Rs. 26 lacs have funded the net investment to the extent of Rs. 95 lacs.
2008-09	3,78,74,157/	3,08,87,980	69,86,777/-	72,85,386/-	5,75,75,047/-	
2009-10	4,97,04,656/	6,24,04,249	(1,26,99,592)	3,45,92,209/-	3,88,75,449/	

4. The Id.AO was not satisfied with the explanation of the assessee. He disallowed the claim of the assessee and recorded a very brief finding which reads as under:

"The assessee's contention has been considered. The assessee has not been able to file evidence regarding nexus of loan taken and investment of the same in purchase of sold properties like copy of bank account highlighting the loans taken and payment made to the particular land and their mentioned in the respective sale deeds though the assessee has filed copy of his bank books. The assessee has agreed for such disallowance of interest portion amounting to Rs.34,76,144/- (Rs. 27,18,866/- under STCG and Rs.7,57,278/- under LTCG) as included in the cost of land against income offered under the head of Short term and Long term gain from sale of land. Therefore the same is being disallowed and added to the income.

(Disallowed interest of Rs.27,18,866/- out of STCG and Rs.7,57,278/- out of LTCG)

5. Dissatisfied with this finding, the assessee carried the matter in appeal before the Id.first Appellate Authority. He contended that he never agreed for disallowance, rather in an alternative plea, he submitted, without *prejudice* to the stand taken by him on merit, that in case the AO differs from his point of view then interest be disallowed. This stand was taken with view to avoid undue litigation and cooperate with the department so that penalty proceedings may not be initiated against the assessee. The Id.CIT(A) has taken into consideration both the arguments of the assessee, and ultimately concurred with the AO. The relevant finding of the Id.CIT(A) reads as under:

"I am not inclined with appellant that A.O. has not appreciated the facts and evidences. With due regards to various case laws relied on by appellant, the issue is not

about inclusion of interest on borrowed capital in cost of acquisition but the issue is about appellant' failed to establish link/nexus of borrowed funds with investment. The table as discussed by A.O. as submitted by appellant does not reflect specific nexus of interest paid on borrowed fund for investment in land. As discussed in first para of this ground discussion, the interest apportioned for various land is the net interest and does not reflect correct picture. Further following observations are worth noting from the details so submitted by appellant.

- (a) *For Tagore Park Flat, the appellant submitted through bank account at Syndicate Bank (A/c.No.70041010001120) that on 4.10.2006 Rs.5 lac borrowed from Shri Mukesh Kumar T Padhiyar and Rs. 2 lac (in aggregate) from Shri Mahesh T.Padiyar HUF of Rs.1.30 lac and from Shri Ramesh T.Padiyar HUF of Rs.0.70 lac and utilized for purchases. In the ledger account appellant debited interest of Rs.27,126 on 4,11.2006, Rs.1,27,672 on 01.03.2008, Rs.2,22,638 on 01.3.2009 and Rs.1,37,514.71 on 01.09.2009. As against this the balance sheet as on 31.03.2008 (after the date of loan taken), does not reflect any loan from Shri Mukesh Kumar T.Padhiyar, while from Shri Mahesh Kumar T.Padhiyar HUF outstanding of Rs.60,000 only and from Shri Rajesh Kumar T Padhiyar HUF outstanding of Rs.70,000 is reflected. It is therefore interest debited thereafter i.e. on 01.03.08, on 01.03.09 and on 01,09.09 cannot be said to have nexus with loan taken.*
- (b) *For Lilapur 18 land, through details of syndicate bank (70041010001120) Rs.10 lac was borrowed from Shri Laxmanbhai on 01.07.2008 and Rs.20 lac from Shri Sukhdevbhai M. Prajapati on 01.07.2008 while Rs.24 lacs was paid on 02.07.2008 for land. In the balance sheet as on 31.03.2009 (after the date of loan), there is no loan remained shown outstanding from Shri Laxmanbhai while from Shri Sukhdevbhai M.Prajapati there is credit balance of Rs.80,508. In the ledger account of Lilapur 18 land, there is no interest cost debited as on 31.03.2009 while Rs.6,85,412.64 is debited on 26.03.2010.*

- (c) *For land at Chiloda survey No.96, through Syndicate Bank, it is reflected that Rs.2,00,000 and Rs.3,00,000 were borrowed on 07.02.2007 from Shri Trambaklal B Sheth while Rs.5 lac from M/s.Shell India Marketing. As against this it was claimed that Rs.7.5 lac was paid on 01.03.2007 for purchase of land. The balance sheet as on 31.03.2007 (after the loan taken), there is no outstanding loan from Shri Trambaklal B Sheth while Rs.5 lacs outstanding shown from M/s.Shell India Marketing but as per balance sheet as on 31.03.2008 there is no such outstanding from M/s.Shell India Marketing. As against this the ledger account of land at Chiloda Survey No.96 reflect debit of interest of rs.1,260 on 31.03.2007 only though the land was sold on 01.05.2009.*

It is therefore, the claim of deduction of interest is not having proper nexus on one hand while on other hand the same appear to be on pro rata basis. The interest on loan to repay earlier loan cannot be held as direct nexus for investment and if at all it is there then appellant failed to submit such detail and demonstrate the same. It is this lacuna that appellant agreed for such disallowances. In such agreement it will not be reasonable or logical to put the condition of non-initiation of penalty. It is therefore, disallowances and additions so made of Rs.34,76,144/- by AO is upheld and confirmed. The ground with sub-ground is dismissed."

6. Before us, the Id.counsel for the assessee reiterated submissions, as were made before the lower authorities. He relied upon the following judgments and copies of which have been placed on record:

- i) Global Assets Holding Corporation Vs. Department of Income Tax, ITA No.4738/Mum/2010
- ii) CIT Vs. Mithleshkumar, 92 ITR 9 (Del)
- iii) K. Rajgopal Rao, 252 IT 459 (Mad)
- iv) ITO Vs. Pushpaben Wadhwani, 25 TTJ (Ahd) 216

v) CIT Vs. Tensile steel Ltd., 104 ITR 581 (Guj)

7. On the other hand, the Id.DR relied upon the orders of the Revenue authorities.

8. We have duly considered rival contentions and gone through the record carefully. There are two angles of the controversy required to be adjudicated by us. In the first fold, the dispute is whether interest expenditure incurred by an assessee for acquiring the capital assets deserves to be capitalized and on its sale, required to be considered as cost of acquisition for the purpose of computation of capital gain. As far this legal issue is concerned, we find that it has been considered by the ITAT, Mumbai Bench in the case of Global Assets Holding Corporation (supra) and the following observations deserves to be noted:

"5. We have perused the records and considered the rival contentions carefully. The dispute is regarding capitalization of interest paid on borrowings for acquisition of shares while computing capital gain from sale of shares. There is no dispute that the shares had been acquired from borrowed funds. The dispute is whether interest on borrowings can be added to the cost of acquisition of shares. We find that similiar situation had been considered by the Hon'ble Delhi High Court in the case of CIT vs. Mithilesh Kumari (92 ITR 9) in which the Hon'ble High Court held that interest paid on borrowings used for purchase of land had to be taken as part of actual cost of purchase of land. The Hon'ble High Court had followed the judgment of Hon'ble Calcutta High Court in the case of CIT vs. Fort Gloster Industries (P.) Ltd. (1971) 79 ITR 48(Cal.) in which it was held that the interest paid on the borrowings had to be taken as part of the actual cost of plant and machinery. In holding so, the Hon'ble High Court of Calcutta had followed the judgment of Hon'ble High Court of Bombay in the case of Habib Hussein vs. CIT (1963) (48 ITR 859) in which it was held as under :-

"The dictionary meaning of the word 'cost' is 'what is laid out or suffered to obtain anything'..... In our opinion, therefore, the meaning of the expression 'actual cost to the assessee' as used in sub-section(5) of section 10 of the Act would be what the assessee has, in fact, expended or laid out for the purpose of acquiring the depreciable assets."

5.1 It is clear from the judgment of the Hon'ble Jurisdictional High Court in the case of Habib Husein (supra), that actual cost is nothing but the expenditure incurred for acquiring the asset, and therefore, the argument of the Id. DR that cost of acquisition was different from actual cost cannot be accepted. The cost of acquisition as to what the assessee incurred for acquiring an asset. In case, in addition to the consideration paid for acquiring the amount, the assessee has also incurred, interest expenditure on borrowings from which the consideration was paid, the interest expenditure would definitely be part of cost of acquisition. We also find that the case of the assessee is covered by the decision of Pune Bench of the Tribunal in the case of S. Balan alias Shanmugam (129 ITD 869), which is directly on the point as in that case also the issue was regarding allowability of interest as part of cost of acquisition of shares. In that case, the CIT(A) had held that since intention of investment in shares was for earning of dividend and as the said dividend income was exempt from tax, the interest expenditure could not be taken into account in view of the provisions of section 14A. The view taken by the CIT(A) was not accepted by the Tribunal. It was held that since the assessee had borrowed funds for acquisition of shares and interest had been capitalized, interest could not be separated from amount of investment. Thus, it was held that interest liability has to be taken into account towards cost of capital asset for the purpose of computation of capital gain. The case of the assessee is identical. We therefore, respectfully following the decision of the Pune Bench of the Tribunal (supra), see no infirmity in the order of the CIT(A) in allowing capitalization of interest to the cost of acquisition of shares. The order of the CIT(A) is accordingly up held."

9. Similarly, the Hon'ble Delhi High Court in the case of Mithleshkumar (supra) has also considered this aspect. The question framed by Hon'ble Delhi High Court reads as under:

"Whether on the facts and in the circumstances of the case, the interest amount of Rs.16,878/- and the ground rent of Rs.3,793 constituted part of the actual cost of the plot to the assessee for the purpose of determining the capital gain ?"

10. This question with regard to the first part i.e. interest amount has been replied in favour of the assessee. This order has been relied upon by the ITAT Mumbai in the case of Global Assets Holding Corporation (supra). The decision of Madras High Court in the case of K. Rajgopal Rao (supra) and the decision of ITAT, Ahmedabad Bench in the case of Pushpaben Wadhvani (supra) are also to same effect. In principle, in all these decisions, Hon'ble High Court and Tribunal concurred with the proposition that if a capital asset is being purchased by way of borrowed funds, the interest expenditure are to be capitalized and on transfer of the capital assets, it is to be treated as part of cost of acquisition. A perusal of the order of the Id.CIT(A) would indicate that the Id.CIT(A) also did not dispute with regard to this proposition and has not rejected the claim of the assessee on legal aspect rather confirmed the disallowance on the ground that the assessee failed to establish nexus between borrowed funds vis-à-vis investment. This second fold of issue involved in this appeal, which we take for adjudication. The Id.CIT(A) has made discussion on facts under three sub-heads; (a), (b) and (c) in para 5.1. According to the Id.CIT(A) a perusal of the bank statements and balance sheet would reveal that a sum of Rs.5.00 lakhs was borrowed from Shri Mukesh Kumar T. Padhiyar on 4.10.2006;

Rs.2.00 lakhs was borrowed from Shri Mahesh T. Padiyar HUF. He thereafter made reference to the balance sheet as on 31.3.2008 and observed that no loans are reflected from Shri Mukesh Kumar T. Padhiyar and Shri Mahesh Kumar T. Padhiyar. By making reference in half-way, the Id.CIT(A) has demonstrated that the assessee failed establish nexus between borrowed funds vis-a-vis investments.

11. With the assistance of the Id.representatives, we have perused profit & loss account and balance sheet. The assessee has submitted fund flow statement in a summarized manner which has been extracted in the assessment order and noticed by us. A perusal of the balance sheet as on 31.3.2005 loan of Rs.1,99,000/- against name of Shri Maheshkumar T. Padhiyar is outstanding. Similarly substantial loan liability has been shown at the end of each accounting year i.e. on 31st March, which is reflected in the table reproduced in the assessment order. How the Revenue authorities have appreciated this aspect. It is the dispute between the parties. For example, unsecured loan of Rs.1,07,69,000/- were taken in the F.Y.2005-06. The outstanding unsecured loans were Rs.71,69,000/-. The assessee has made investment of Rs.76,48,447/-. The expectation of the Id.CIT(A) is to demonstrate that loans taken from "A" remains invested in the capital asset. If assessee has taken loan in subsequent year from "B" and repaid the loan of "A", then it will not be construed that borrowed funds were used for the purchase of the assets. It can be explained by way an example viz. the assessee took loan of Rs.100/- from "A". Made investment in land at Rs.150/-. He took loan in the next year from "B" and repaid Rs.50/- to "A" out of loan of Rs.100/-. Then according to the understanding of the

Id.CIT(A) Rs.100/- was not used for the purchase of the assets till it is sold. On the other hand, the stand of the assessee is, at the end of every year, there is outstanding unsecured loan which has been subsumed in the investment. Thus, on analysis of the details, we are satisfied that the Id.Revenue authorities have failed to appreciate the facts and circumstances in right perspective while holding that nexus has not been proved. The assessee has demonstrated that interest free funds were used for acquiring assets and interest expenditures were capitalized. Unsecured loans were remained outstanding at the end of every accounting year. In such situation, it cannot be construed that nexus has not been demonstrated. We have noticed the order of the AO, which is absolutely silent on any of the aspects though the Id.CIT(A) has made reference to the details in order to demonstrate that the assessee failed to prove the nexus, but on re-appreciation of these very details we are of the view that the Id.CIT(A) has not appreciated the facts in right perspective, and considered them half-heartedly. Therefore, we allow the appeal of the assessee and delete the disallowance.

12. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on 30th April, 2019.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Ahmedabad; Dated 30/04/2019