

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "B", MUMBAI**

**BEFORE SHRI SHAMIM YAHYA (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 1942/MUM/2017  
Assessment Year: 2012-2013**

Neelkamal Realtors & Erectors (India) Private Limited, 265-E, Bellasis Road, Mumbai Central, Mumbai - 400008 PAN: AABCN9254D	<b>Vs.</b>	The DCIT-5(2)(1), Room No. 571, 5 <sup>th</sup> Floor, Aaykar Bhavan, Mumbai
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA No. 2128/MUM/2017  
Assessment Year: 2012-2013**

The Dy. Commissioner of Income Tax, Circle 5(2)(1), R. No. 571, Aayakar Bhavan, M.K. Road, Mumbai - 400020	<b>Vs.</b>	Neelkamal Realtors & Erectors (India) Private Limited, 265-E, Bellasis Road, Opp. Best Bus Depot, Mumbai Central, Mumbai - 400008 PAN: AABCN9254D
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by : Ms. Aarti Vissanji (AR)

Revenue by : Shri Chaitnya Anjaria/Sh. Saravanan  
(DRs)

Date of Hearing: 30/08/2019  
Date of Pronouncement: 30/08/2019

**ORDER**

**PER RAM LAL NEGI, JM**

These are the cross appeals filed by the assessee and the revenue against the order dated 20.12.2016 passed by the Ld. Commissioner of Income Tax (Appeals)-10, Mumbai (for short 'the CIT (A)'), pertaining to the assessment year 2012-13, whereby the Ld. CIT (A) has partly allowed the appeal filed by the

assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

**ITA No. 1942/MUM/2017 (Assessment Year: 2012-13)**

Brief facts of the case are that the assessee company engaged in the business of real estate development filed its return of income for the assessment year under consideration declaring total loss of Rs.1,32,43,023/-. Since the case was selected for scrutiny, the AO issued notice under section 143(2) and 142(1) of the Act. In response thereof the authorised representative (AR) of the assessee appeared before the AO and filed the details called for and further discussed the case of the assessee. It was seen from the profit and loss account that during the year under consideration, the assessee company had claimed interest expenditure of Rs. 1,68,82,332/-on loan from bank. It was further noticed that the assessee company had granted interest free loan to related parties of a substantial amount. Accordingly the AO asked the AR to explain as to why interest expenditure claimed should not be disallowed under section 36(1)(iii) of the Act. The AR contended that the assessee obtained loan from bank and incurred interest expenses amounting to 1,68,82,322/-. The loan amount was utilised for completion of the project of the company. Subsequently, upon completion of the project flats were sold and out of the sale proceeds the advances to the related parties were made. It was further contended that the project expenditure was much more than the bank loan. The AR further contended that the AO has allowed the interest expenses in the earlier assessment years and there is no change of facts in this year to disallow the interest expenditure claimed by the assessee. However, the AO rejecting the contention of the assessee made disallowance of the said amount under section 36(1)(iii) of the Act. Accordingly, the AO *inter alia* making aforesaid addition determined the total income of the assessee at Rs. 1,14,70,010/-.

2. The assessee challenged the assessment order before the Ld.CIT(A), who after hearing the assessee partly allowed the appeal of the assessee however confirmed the addition made on account of disallowance under section 36 (1)(iii) of the Act. Against the said action of the Ld. CIT(A), the assessee is in appeal before the Tribunal.

3. The assessee has challenged the impugned order passed by the Ld. CIT (A) by raising the following grounds:-

1. *“The Learned Commissioner of Income Tax (Appeals) grossly erred in confirming the disallowances made by Learned Assessing Officer of Rs. 1,68,82,332/- u/s 36(1)(iii) of the Act alleging that the appellant had used interest bearing fund to grant interest free loans and advances to related parties without appreciating the facts of the case.*

2. *The order of the Learned Commissioner of Income Tax (Appeals) is bad in law which deserves to set aside.”*

4. Before us the Ld. counsel for the assessee submitted that the Ld CIT (A) has wrongly confirmed the addition made by the AO. The Ld. counsel further submitted that the loan obtained from the bank was utilised for completion of the project and after completion thereof the flats were sold. Out of the sale proceeds of the flats, the assessee granted interest free loans to the related parties. Hence, the AO has wrongly held that the interest-bearing funds were utilised for advancing loan to the related parties. The Ld. counsel further pointed out that the expenses of Rs. 1,68,82,232/- was incurred towards interest paid to the bank. The Ld. counsel further pointed out that loan of Rs. 27,00,00,000/-was taken in the financial year 2005-06 which was utilised exclusively for the purpose of business. The project expenditure was much more than the aforesaid amount of loan. The Ld. counsel invited our attention to the details of expenses incurred during the year 2004-05 to 2011-12. As on 31.03.2012, the outstanding loan amount due to Allahabad bank was Rs.7,96,98,988/-and the interest payable was Rs. 31,43,747/-which was paid

in financial year 2012-13. The Ld. counsel further pointed out that the AO had allowed interest expenses in the earlier assessment years and in the present year there is no change of facts to deny the same. The Ld. counsel placing reliance on the judgment of the Hon'ble Bombay High Court in the case of *Pr.CIT vs. Quest Investment Advisors Pvt. Ltd.* 409 ITR 545 (Bom.) and the judgment of Hon'ble Karnataka High Court in the case of *CIT vs. Sridev Enterprises* 192 ITR 165 (Kar.), submitted that since the revenue has allowed the interest expenditure claimed by the assessee in previous and subsequent years, and since there is no material change in the facts of the present case, the Ld. CIT(A) ought to have deleted the disallowance made by the AO.

5. On the other hand, the Ld. departmental representative (DR) relying on the order passed by the Ld. CIT(A) submitted that since, each assessment is different, the assessee cannot take the plea that the department should have followed the principle of consistency. Moreover, the assessee's action of granting interest free loans to its related parties cannot be treated as part of its business. Accordingly, the Ld DR submitted that the order passed by the Ld. CIT(A) does not suffer from any infirmity.

6. We have heard the rival submissions of the parties and gone through the material on record including the cases relied upon by the Ld. counsel for the assessee. As pointed out by the Ld. counsel, the authorities below have not made any disallowance of the interest expense claimed by the assessee in the assessment years 2009-10, 2010-11, 2011-12 and 2013-14. We further notice that the authorities below have even not mentioned any reason for making such disallowance in the assessment year under consideration. We further notice that the assessee had not given any loan to Neelkamal Central Apt.LLP during the previous year as the opening balance and the closing balance are Nil. So far as the loan given to Patel Brothers Construction Co. is concerned, the amount of loan granted during the relevant year is Rs. 1,42,500/- only. Since, the entire amount of loan pertains to the earlier years except the

amount of Rs. 1,42,500/- and since the AO had not given any reason as to why the disallowance in question has been made, the Ld. CIT(A) ought to have either given reasons for the same or set aside the findings of the AO. As pointed out by the Ld. counsel, the assessee obtained the loan of Rs. 27,00,00,000/- during the financial year 2005-06 which was utilized exclusively for the purpose of business. The project was completed in the financial year 2011-12 and the expenditure incurred by the assessee was much more than the loan taken by the assessee. These facts have not been rebutted by the revenue. Under these circumstances, we find merit in the contention of the assessee that since the authorities below have not assigned any reason for deviating from the consistent view taken by the revenue in assessee's case for the earlier assessment year and even the subsequent assessment year, the disallowance made by the AO is arbitrary and bad in law, therefore, the Ld. CIT(A) ought to have set aside the findings of the AO.

7. In the case of *Pr.CIT vs. Quest Investment Advisors Pvt. Ltd.* (supra), the Hon'ble Bombay High Court upheld the findings of the Tribunal based on the principle of consistency. The operative part of the judgment reads as under:-

*“The principle accepted by the Revenue for 10 earlier years and 4 subsequent years to the assessment years 2007-08 and 2008-09 was that the entire expenditure is to be allowed against business income and no expenditure is to be allocated to capital gains. Once this principle was accepted and consistently applied and followed, the Revenue was bound by it. Unless of course it wanted to change the practice without any change in law or change in facts therein, the basis for change in practice should have been mentioned earlier in the assessment order or at least pointed out to the Tribunal when it passed the impugned order. None of this has happened. In fact, all have proceeded on the basis that there is no change in the principle which has been consistently applied for the earlier assessment years and also for the subsequent assessment years. Therefore, the view of the Tribunal in*

*allowing the respondent's appeal on the principle of consistency cannot in the present facts be faulted with, as it is in accord with the apex court decision in Bharat Sanchar Nigam Ltd.(supra)."*

8. Similarly, in the case of *CIT vs. Shridev Enterprise* (supra), the Hon'ble Karnataka High Court has upheld the findings of the Tribunal based on the principle of consistency. Admittedly, in the present case the authorities below have not pointed out any change of facts of the case and in law while taking a view inconsistent with the view already taken by the department on identical issue in earlier assessment years discussed above. Even in the subsequent assessment year i.e., in the assessment year 2013-14, no disallowances was made by the authorities below under section 36(1)(iii) on the ground that the assessee had used interest-bearing funds to grant interest free loan and advances to its related parties. In the light of the facts of the case and the principles of law laid down by the Hon,ble High Courts discussed above we are of the considered view that the Ld. CIT(A) has wrongly confirmed the disallowance made by the AO under section 36 (1)(iii) of the Act. Accordingly, we allow the sole ground of appeal of the assessee and set aside the impugned order passed by the Ld. CIT(A) and further direct the AO to delete the addition.

**ITA No. 2128/MUM/2017 (Assessment Year: 2012-013)**

The revenue has challenged the impugned order passed by the Ld. CIT (A) by raising the following effective ground:-

*"Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in directing the Assessing Officer to delete the addition on account of sale of suppression on flats. The A.O has meticulously brought the reason on record on the basis of assessee's own case but Ld. CIT (A) has failed to appreciate*

*the facts. There was a gross variation in the sale price of the flats even in same floor in same direction.”*

2. At the outset, the Ld. counsel for the respondent/assessee pointed out that the tax effect of the relief granted by the Ld. Commissioner of Income Tax (Appeals) is below Rs. 50 lacs and as per Circular No. 17 of 2019 dated 08.08.2019 issued by the Central Board of Direct Taxes (CBDT), Department of Revenue, Ministry of Finance, Government of India, the CBDT has revised the monetary limit for filing appeals before the ITAT from the existing limit of Rs. 20 lacs to Rs. 50 lacs. In the light of the aforesaid facts, the Ld. counsel submitted that this appeal is not maintainable and liable to be dismissed.

3. The Ld. Departmental Representative (DR) fairly conceded that this appeal is not maintainable in light of the aforesaid circular issued by the CBDT. The Ld. DR also did not point out that this appeal falls in any of the exceptions carved out in the above said circular.

4. We have gone through the order of the Ld. Commissioner of Income Tax (Appeals) and the grounds of appeals. We find that the tax effect in the above referred appeal is less than Rs. 50 lacs. Accordingly, we dismiss the aforesaid appeal filed by the Revenue as not maintainable/withdrawn.

In the result, appeal filed by the assessee is allowed and the revenue's appeal is dismissed.

Order pronounced in the open court on 30<sup>th</sup> August, 2019.

*Sd/-*  
(SHAMIM YAHYA)

ACCOUNTANT MEMBER

*Sd/-*  
(RAM LAL NEGI)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 30/08/2019

*Alindra PS*

**आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant

2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT,  
Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**