

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "B", JAIPUR
श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA No. 1194/JP/2018
निर्धारण वर्ष / Assessment Year :2013-14

M/s Trimurty Buildcon Pvt. Ltd., 601, Geeta Enclave, Vinobha Marg, C-Scheme, Jaipur.	बनाम Vs.	I.T.O. Ward 2(2) Jaipur.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AABCT 7285 Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Rohan Sogani (CA) &
Shri Rajeev Sogani (CA)
राजस्व की ओर से / Revenue by : Smt. Monisha Choudhary (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 23/03/2021
उदघोषणा की तारीख / Date of Pronouncement : 06/04/2021

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)-I, Jaipur dated 13/09/2018 for the A.Y. 2013-14 in the matter of order passed U/s 143(3) of the Income Tax Act, 1961 (in short, the Act), wherein following grounds have been taken.

"1. (a) In the facts and circumstances of the case and in law, Id. CIT(A) has erred in enhancing the income by disallowing interest expenditure of Rs. 53,78,282. The action of the Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by allowing the said expenditure of Rs. 53,78,282.

(b) In the facts and circumstances of the case and in law, Id. CIT(A) has erred in exercising the powers of enhancement under section 251(1)(a).

The action of Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the very action of enhancement being illegal and outside the scope of powers of CIT(A) in the instant case.

2. *In the facts and circumstances of the case and in law, Id. CIT(A) has erred disallowing the interest expenditure, incurred by the assessee company, of Rs. 53,78,282, u/s 36(1)(iii). The action of the Id. CIT(A) is illegal, arbitrary, unjustified and against the facts of the case. Relief may please be granted by deleting the said disallowance of Rs. 53,78,282 as such interest expenses has been incurred for the purpose of business.*
3. *The assessee company craves its rights to add, amend or alter any of the grounds on or before the hearing.”*

2. The hearing of the appeal was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.

3. The brief facts of the case are that the assessee company is engaged in business of construction, purchase and sale of immovable properties. The assessee filed its return of income on 29/09/2013 declaring total income of Rs. 18,610/-. The case was selected for scrutiny on the basis of CASS. Notices were issued to the assessee and after making enquiry, the A.O. completed the assessment U/s 143(3) of the Act on 12/03/2016 determining total income of assessee at Rs. 10,50,939/- by making addition on account of disallowance U/s 14A read with Rule 8D.

4. Being aggrieved by the order of the A.O., the assessee carried the matter before the Id. CIT(A), who after considering the facts and

circumstances of the case deleted the entire disallowance U/s 14A of the Act. However, Id. CIT(A) enhanced the income of assessee company by making disallowance of Rs. 53,78,282, u/s 36(1)(iii) of the Act on account of interest expenses incurred on loan taken from Shri Udai Kant Mishra. Against the said action of the Id. CIT(A), the assessee has preferred the present appeal before the ITAT on the grounds mentioned above.

5. All these grounds taken by the assessee in the present appeal are interrelated and interconnected and relates to challenging the order of the Id. CIT(A) in enhancing the income by disallowing interest expenditure by invoking provisions of Section 251(1)(a) of the Act and disallowed Rs. 53,78,282/- U/s 36(1)(iii) of the Act. In this regard, the Id. AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the Id. CIT(A) and also relied on the written submissions filed before the Bench and the same is reproduced below:

1.1. *In the present case, Id. CIT(A) enhanced income by disallowing interest expenditure, which was not the subject matter of assessment. Ld. AO had made addition u/s 14A on account of expenditure in relation to income, not includible in total income, which was deleted by Id. CIT(A).*

1.2. *Whenever, the question of taxability of income from a new source in concerned, which had not been considered by AO, the right manner to tax such new source is by invoking Section 147/ 148 or Section 263. In view*

of such specific provisions, it is inconceivable that a similar power is available to CIT(A) u/s 251.

- 1.3. *It is a trite law that CIT(A) cannot touch upon issues which do not arise from the order of assessment and was outside the scope of order of assessment.*
- 1.4. *Reliance in this regard is placed on the below mentioned judicial precedence: -*
 - 1.4.i. *Bikram Singh in [2017] 82 taxmann.com 230 (Del-Trib)*
 - 1.4.ii. *Sundaram Medical Foundation in (2016) 45 ITR (Trib) 500 (Chennai-Trib)*
- 1.5. *As per Explanation to Section 251 – "...in disposing of an appeal, CIT(A) may consider and decide any matter arising out of the proceedings, in which the order appealed against was passed...."*

Thus, if any matter is not arising "out of the proceedings" before the AO, Id. CIT(A) has no power of enhancement apropos such matters. In the present case, the issue of whether interest expenses incurred on loan taken from Shri Udai Kant Mishra was for the purpose of business or not was not arising out of the proceedings before the Id. AO. This is for the reasons that the Id. AO himself, in the past, in the preceding two years, had allowed the claim of such expenditure, by being fully aware that such expenditure incurred and the loan so taken, was utilized for the purpose of business of the assessee company. (Refer Para 1.1 to 1.6 below)
- 1.6. *In the Show Cause Notice issued by Id. CIT(A), u/s 251(2), the sole basis through which Id. CIT(A) proposed to enhance the income of the assessee company, by disallowing interest expenses u/s 36(1)(iii), was that no*

business activities were carried out by the assessee company, during the relevant previous year. (CIT(A) order Pg. 30)

- 1.6.i. *However, ultimately, when such expenses were disallowed by the Id. CIT(A), the reason given was that such interest expenses claimed by the assessee company in its Profit and Loss account had no relation with the interest income earned by the assessee company, during the relevant previous year. (CIT(A) order Pg. 43).*
 - 1.6.ii. *Thus, there was a complete u- turn made by the Id. CIT(A) from the time of issuing the Show Cause Notice, till the time of finally enhancing the income of the assessee company. The reason of no business being carried out by the assessee company changed to the nexus not being proved between the interest income and the interest expenses for the relevant previous year.*
- 1.7. *Although, Id. CIT(A) u/s 251 has been given powers of enhancing the income of any assessee, however, such powers are not unfettered and come with riders. One such rider is that Id. CIT(A) before enhancing the income of the assessee is duty bound to give reasonable opportunity to the assessee of showing cause against such enhancement.*
- 1.7.i. *This requirement has been included in section 251(2), so that assessee, before its income getting enhanced, is given a reasonable opportunity to rebut/ make submissions against (i) quantum with which the income is proposed to be enhance and also (ii) the reason because of which such enhancement is proposed to be done.*
 - 1.7.ii. *The reason in the Show Cause Notice is vital so that the assessee can make a pointed rebuttal and convince the CIT(A), if possible, with the legal or factual position involved in the case.*

- 1.7.iii. *Thus, if a particular basis has been given by Id. CIT(A) in the Show Cause Notice, the Id. CIT(A) has to stick to the same basis while ultimately making the enhancement. Id. CIT(A) cannot "shift his goal posts" at his own will.*
- 1.8. *Ld. CIT(A), although alleged that no business activities were carried out by the assessee company, however, he himself noted the fact of sale transaction undertaken by the assessee company, during the year of Rs. 24,64,224. (CIT(A) order Pg. 40)*
- 1.9. *Any enhancement being made without giving the same basis in the Show Cause Notice, would tantamount to no opportunity being given to the assessee, before making such enhancement and thus would be against the legal position set out in section 251(2).*
- 1.10. *The specific requirement of issuing SCN contained in section 251(2) is issue based. The power of Enhancement is different from power of Assessment. In section 143, there is no specific requirement of SCN which is there in 251(2). The SCN issued on a particular aspect gets exhausted if Id. CIT(A) is convinced with the reply of the appellant on that issue. Ld. CIT(A) has to mandatorily issue a fresh SCN if Id. CIT(A) is changing the basis of enhancement. Therefore, in this view of the legal position, the power of enhancement is exercised by the Id. CIT(A) without jurisdiction and also against the principle of natural justice.*
- 1.11. *In the present case, in the SCN Id. CIT(A) raked up the issues of no business activities being undertaken by the assessee company, the entire reply to such SCN by the assessee company was based on explaining the legal position whether business activities and revenue generated out of it is pre-condition for claiming deduction u/s 36(1)(iii) or not. Whereas, no opportunity, at all, was provided to the assessee company to explain the*

nexus between the interest income and the interest expenses and whether such nexus was, at all, required to be proved.

1.12 *Year on year balance of the loan obtained from Shri Udai Kant Mishra by the assessee company is as under: -*

<i>Particulars</i>	<i>FY 2010-11</i>	<i>FY 2011-12</i>	<i>FY 2012-13 (Relevant Year)</i>
<i>Outstanding balance as at the end of the relevant year</i>	<i>1,54,26,352 (PB: 52)</i>	<i>3,61,15,187 (PB: 61)</i>	<i>3,72,21,141 (PB: 61)</i>
<i>Rate of Interest paid on loan outstanding</i>	<i>18%</i>	<i>18%</i>	<i>15.25%</i>

1.13 *As seen from the table above there was no major increase in the outstanding loan amount taken by the assessee company from Shri Udai Kant Mishra, as seen during the relevant previous year vis a vis the immediately preceding year.*

1.14 *For the reason of good market standing of Shri Udai Kant Mishra, the possibility of him getting loan from the market was more, in comparison to any of the group companies. Resultantly, on one hand loan was taken by Shri Udai Kant Mishra and subsequently was passed on to different group companies, including the assessee company. Such loan amount was then utilized by the assessee company for the purpose of its business.*

1.15 *The fact of loan from Shri Udai Kant Mishra having been taken for the purpose of business was even accepted by the Department for the immediately preceding two years, wherein, for both such years order u/s 143(3) was passed by the Id. AO. Details of the proceedings for the immediately two preceding years is as under:*

<i>Particulars</i>	<i>FY 2010-11</i>	<i>FY 2011-12</i>
<i>Date of order passed u/s 143(3)</i>	<i>27.03.2014 (PB : 15)</i>	<i>08.01.2015 (PB : 31)</i>

<i>Rate at which loan taken from Shri Udai Kant Mishra</i>	<i>18%</i>	<i>18%</i>
<i>Rate % accepted by the Id. AO in assessment proceedings</i>	<i>12.5%</i>	<i>12.5%</i>
<i>Date of order of Id. CIT(A) upholding the rate % applied by the Id. AO</i>	<i>01.01.2016 (PB : 25)</i>	<i>07.02.2017 (PB : 41)</i>
<i>Date of the order passed by Hon'ble ITAT, Jaipur Bench</i>	<i>29.08.2017 ITA No. 293/JP/2016 and 313/JP/2017 (PB : 3-5)</i>	
<i>Rate % upheld by Hon'ble ITAT, Jaipur Bench</i>	<i>14%</i>	<i>14%</i>

- 1.16 *As can be seen from the table above, the loan obtained by the assessee company from Shri Udai Kant Mishra in the preceding years, the balance of which has been carried forward during the current year as well, has been accepted by the Department, to have been utilized for the purpose of business.*
- 1.17 *Resultantly, interest expenses on such loan were allowed by the Id. AO u/s 36(1)(iii) for both the preceding years. The only quarrel of the Id. AO, in the preceding years, was with respect to the rate at which such loan was taken. Resultantly, part of such interest expenses was disallowed by the Id. AO u/s 40A(2)(b).*
- 1.18 *However, Hon'ble ITAT, Jaipur Bench, allowed the rate of interest on such loan taken from Shri Udai Kant Mishra to the extent of 14%. Even Id. CIT(A), in the preceding years, did not make any disallowance u/s 36(1)(iii) and accepted the loan to have been utilized for the purpose of business of the assessee company.*

1.19 *As can be seen from the facts stated, hereinbefore, the loan outstanding in the books of the assessee company, as taken from Shri Udai Kant Mishra, was nothing but obtained in the preceding years. During the current year, the interest expense of Rs. 53,78,282 incurred on the loan taken from Shri Udai Kant Mishra was credited to his account, which resulted into increase in the balance outstanding of such loan as at the end of the current year.*

<i>Particulars</i>	<i>Amount</i>
<i>Opening balance of loan outstanding as on 01.04.2012</i>	<i>Rs. 3,61,15,187</i>
<i>Add: Interest expenses</i>	<i>Rs. 53,78,282</i>
<i>Less: Closing balance of loan outstanding as on 31.03.2013</i>	<i>Rs. 3,72,21,141</i>
<i>Payouts (Balancing Figure)</i>	<i>Rs. 42,72,328</i>

1.20 *Thus, no fresh infusion of funds, in the form of loan taken from Shri Udai Kant Mishra, had taken place during the year under reference. The funds as taken in the preceding years, for the purpose of business, remained parked in different avenues for which they were taken. Undisputedly, the fact of the loans taken in the preceding years, having been utilized for the purpose of business, has even been accepted by the Department, the matter having attained finality.*

1.21 *Therefore, the interest expenses incurred on the same loan amount during the relevant previous year were for the purpose of business, allowable u/s 36(1)(iii).*

1.22 *Both the Income Tax Authorities, Id. AO, as well as Id. CIT(A), having co-terminus powers, with that of the Id. AO, are bound by the Rule of Consistency. Thus, even if Id. CIT(A), exercised his power of enhancement, he was duty bound to follow the outcome of the proceedings, in the case of the assessee company, in the preceding two years.*

- 1.23 *As per section 36(1)(iii), any interest expense which has been incurred for the purpose of business is allowed as an expenditure under the head Business and Profession. This is irrespective of the fact whether the assessee has generated any corresponding income or not. However, in the case of the assessee company, revenue from operations of Rs. 24,64,224, was booked.*
- 1.24 *Ld. CIT(A) erred in linking the interest income, of Rs. 53,74,368, received by the assessee company on account of capital contribution in M/s Ambience Colonizers, with the interest expense, of Rs. 53,78,282, on loan taken from Shri Udai Kant Mishra. Whereas, the fact remains that such interest expense incurred by the assessee company was on account of investments in avenues for the purpose of business in the preceding years and had no direct co-relation with the income generated.*
- 1.25 *Ld. CIT(A) also stressed upon the fact that no revenue was generated by the assessee company, without appreciating that generation of revenue is not the condition precedent for allowability of expenses under the head Profits and Gains from Business and Profession.*
- 1.25.A *Section 36(1)(iii) allows deduction of the amount of interest paid in respect of capital borrowed for the purpose of business or profession.*
- 1.25.B *On the contrary, Section 57 which allows deductions from the income chargeable under the head Income from Other Sources states that "any other expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income"*
- 1.25.C *The pre requisite for claiming deduction u/s 36 is that the expenditure should be incurred "for the purpose of business". There is no requirement of generating any corresponding income, as a result of such expenditure.*

- 1.25.D *For instance, if any assessee incurred expenditure on advertisement, then for claiming such expenditure the assessee need not demonstrate whether any corresponding revenue was generated, as a result of the advertisement. Till the time the advertisement is for the purpose of business the same would be allowed.*
- 1.25.E *However, for claiming expenditure u/s 57 under the head Income from Other Sources the assessee is required to showcase the corresponding income generated and then only expenditure is allowed to be claimed under such section.*
- 1.26 *Ld. CIT(A) has confused himself with the deductibility of expenditure, interest or otherwise, u/s 36 with the deductibility, as provided under the head Income from Other Sources u/s 57. It is pertinent to note that Id. CIT(A) has not even changed the head of income of the assessee company while disallowing the interest expenditure. Ld. CIT(A) has even at Page 41 of his order given reference of Section 28 which falls under the head Profits and Gains from Business and Profession.*
- 1.27 *The borrowings from Shri Udai Kant Mishra, on which interest expenses were incurred by the assessee company in the current and the preceding years, were all parked in various Fixed Assets, at different points of time during the current and the preceding years. None of the assets including investment in group companies or partnership firms have been held by the Id. CIT(A) to be not for the purpose of business. Unless there was any allegation that the borrowings were utilized for purposes other than for business, disallowance of interest expenses on such borrowings is unwarranted.*
- 1.28 *For instance, an assessee has interest free funds, in the form of Share Capital, of Rs. 100 and the same is invested in Interest bearing funds and interest income is received. Thereafter, say after a gap of six*

months, assessee borrows interest bearing loan, of Rs. 100, and utilizes the same for making interest free investment. The balance sheet position would be as under:

Liabilities			Amount	Assets		Amount
Interest Free Funds (Share Capital)			Rs. 100	Interest Bearing Funds		Rs. 100
Interest Bearing Loans			Rs. 100	Interest Free Investment		Rs. 100
			Rs. 200			Rs. 200

Now assessee, earns interest income of Rs. 18 and incurs interest expenditure of Rs. 15. In the present case, Rs. 15 cannot be disallowed for the reason that no nexus could be proved for earning interest income. Thus, till the time the money borrowed is utilized for making investment for the purpose of business, interest expenditure on such money borrowed cannot be disallowed u/s 36(1)(iii)."

- 1.29 Even investment in the partnership firm from which interest income was earned was not held by the Id. CIT(A) to be not for the purpose of business. Interest expenses were disallowed solely for the reason that no nexus could be proved by the assessee company of such expenditure with the earning of interest income from the partnership firm.
- 1.30 The fact that Id. CIT(A) deleted the disallowance, made by the Id. AO, u/s 14A, goes to prove that no part of the expenses so incurred were utilized for the purpose of earning exempt income.
- 1.31 Ld. CIT(A) in his entire order has confused himself with the correct legal and factual position, the same can be demonstrated as under: -

Contention of CIT(A)	CIT(A) Page No.
There were <u>no business activities</u> during the relevant previous year	Page 31
Assessee company could not prove <u>nexus</u> between earning of interest from M/s Ambience Colonizers and payment of interest on loan taken from Shri Udai	Page 40

<i>Kant Mishra</i>	
<i>There was no business activity except for a <u>solitary sale transaction</u> during the relevant previous year</i>	<i>Page 40</i>
<i>The assessee has <u>stopped</u> its business activity of real estate</i>	<i>Page 40</i>

Thus, Id. CIT(A) was himself not sure of the reason making disallowance of the interest expenditure claimed by the assessee company u/s 36(1)(iii), thereby enhancing its income. On one hand Id. CIT(A) stated that no business activities were carried out by the assessee company, however on the other hand Id. CIT(A) himself at page 40 of his order referred to the sale of inventory by the assessee company.

- 1.32 Ld. CIT(A), at page 39 of his order, for no reason has made irrelevant reference to the Audit Report.*
- 1.33 The observation of Id. CIT(A) that the assessee company stopped its business operations is un-warranted and devoid of the business realities. Business is a complex affair. Lot of factors such as the market condition, availability of funds, risk taking capacity etc. drive the business decision. Simply because less revenue/ no revenue is generated by the assessee, that does not mean that the business of the assessee has been stopped.*
- 1.34 Ld. CIT(A) at page 42 of his order has relied upon the decision of Hon'ble Delhi Court in the case of Karan Raghav Export (P.) Ltd. [2011] 196 Taxman 504 (Delhi). The facts of this case are completely different from the facts of the case at hand. In the said case certain expenses incurred by the assessee were clearly held to be not for the purpose of the business and thus were disallowed. In the present case, the allegation of Id. CIT(A) is not that the interest expenses were not for the purpose of the business or that the borrowings, on which such expenses were incurred, were utilized for other than for the purpose of business. Ld. CIT(A), as stated above, has confused himself with the legal position u/s 36 with that u/s 57, for claiming deduction of expenses.*

In view of above, the disallowance of Rs. 53,78,282 deserves to be quashed and relief may be granted to assessee company."

6. On the other hand, the Id. DR has vehemently supported the order of the Id. CIT(A) and submitted that the Id. CIT(A) has power for enhancing the income of the assessee U/s 251 of the Act.

7. We have heard the rival contentions and perused the material available on record. As per facts of the present case, the assessee company is engaged in business of Real Estate development and filed its Return of Income on 29.09.2013 at total income of Rs. 18,610. Assessment was completed u/s 143(3) of the Act *vide* order dated 12.03.2016, resulting into addition of Rs. 10,32,329 on account of disallowance u/s 14A, read with Rule 8D. The Id. CIT(A) had deleted the deleted the entire disallowance U/s 14A of the Act but enhanced the income of assessee company by making disallowance of Rs. 53,78,282/- u/s 36(1)(iii) of the Act on account of interest expenses incurred on loan taken.

8. From perusal of the record, we observe that the Id. CIT(A) had enhanced the income of the assessee by disallowing interest expenditure, which was not the subject matter of assessment. Whenever, the question of taxability of income from a new source is concerned, which had not been considered by AO, the right manner to tax such new source is by invoking

Section 147/ 148 or Section 263 of the Act. In view of such specific provisions, it is inconceivable that a similar power is available to CIT(A) u/s 251 of the Act. In this regard, we draw strength from the decision of Coordinate Bench of this Tribunal in the case of **Jagdish Narayan Sharma, ITA 751/JP/2015**, wherein the Coordinate Bench has held as under

"We have also look at the recent decisions on the subject and find that the Hon'ble High Court of Kerala in case of Commissioner of Income Tax, Thrissur v. B.P. Sherafudin reported in [2017] 87 taxmann.com 330 (Kerala) had an occasion to examine a similar issue as to whether the Appellate Authority has the power under section 251 of the Act to add income not at all considered by the AO? Referring to the catena of decisions including the decisions of Hon'ble Supreme Court in case of CIT vs Shapoorji Pallonji Mistry (supra) and in case of CIT v. Rai Bahadur Hardutory Motilal Chamaria [1967] 66 ITR 443 (SC), the decision of the Full Bench of the Hon'ble Delhi High Court in case of CIT v. Sardari Lal & Co. [2001] 251 ITR 864 (Delhi) (FB), besides various other decisions, it held that the powers under section 251 are, indeed, very wide; but, wide as they are, they do not go to the extent of displacing powers under, say, sections 147, 148 and 263.

We also draw strength from the decision in the case of **BP Sherafudin in [2017] 87 taxmann.com 330**, wherein the Hon'ble Kerala High Court has held as under

"Undeniably, the precedential position on the powers of the first appellate authority under section 251 undulates. There are seeming contradictions. But, as held by Union Tyres, and as affirmed on reference by Sardari Lal, there is a consistent judicial assertion that the powers under section 251

are, indeed, very wide; but, wide as they are, they do not go to the extent of displacing powers under, say, sections 147, 148 and 263.”

9. It is a trite law that the Id. CIT(A) cannot touch upon issues which do not arise from the order of assessment and was outside the scope of order of assessment. In this regard, we draw strength from the following decisions of different Coordinate Benches of the Tribunal.

(i) Bikram Singh in [2017] 82 taxmann.com 230 (Del-Trib)

(ii) Sundaram Medical Foundation in (2016) 45 ITR (Trib) 500 (Chennai-Trib)

10. We observe that as per Explanation to Section 251 – “....*in disposing of an appeal, CIT(A) may consider and decide any matter **arising out of the proceedings**, in which the order appealed against was passed.....” Thus, if any matter is not arising “**out of the proceedings**” before the AO, Id. CIT(A) has no power of enhancement apropos such matters. In the present case, the issue of whether interest expenses incurred on loan taken from Shri Udai Kant Mishra was for the purpose of business or not was not arising out of the proceedings before the AO. This is for the reasons that the AO himself, in the past, in the preceding two years, had allowed the claim of such expenditure, by being fully aware that such expenditure incurred and the loan so taken, was utilized for the purpose of business of the assessee company. In the Show Cause Notice issued by Id. CIT(A), u/s 251(2) of the*

Act, the sole basis through which Id. CIT(A) proposed to enhance the income of the assessee company, by disallowing interest expenses u/s 36(1)(iii) was that no business activities were carried out by the assessee company, during the relevant previous year. However, ultimately, when such expenses were disallowed by the Id. CIT(A), the reason given was that such interest expenses claimed by the assessee company in its Profit and Loss account had no relation with the interest income earned by the assessee company, during the relevant previous year. The reason of no business being carried out by the assessee company changed to the nexus not being proved between the interest income and the interest expenses for the relevant previous year. Although, Id. CIT(A) u/s 251 has been given powers of enhancing the income of any assessee, however, such powers are not unfettered and come with riders. One such rider is that Id. CIT(A) before enhancing the income of the assessee is duty bound to give reasonable opportunity to the assessee of showing cause against such enhancement. This requirement has been included in section 251(2), so that assessee, before its income getting enhanced, is given a reasonable opportunity to rebut/ make submissions against (i) quantum with which the income is proposed to be enhanced and also (ii) the reason because of which such enhancement is proposed to be done. The reason in the Show Cause Notice is vital so that the assessee can make a pointed rebuttal and convince the CIT(A), if possible, with the legal

or factual position involved in the case. Thus, if a particular basis has been given by Id. CIT(A) in the Show Cause notice, the Id. CIT(A) has to stick to the same basis while ultimately making the enhancement. Id. CIT(A) cannot "shift his goal posts" at his own will. Id. CIT(A), although alleged that no business activities were carried out by the assessee company, however, he himself noted the fact of sale transaction undertaken by the assessee company, during the year of Rs. 24,64,224/-.

11. We further observe that any enhancement being made without giving the same basis in the Show Cause notice, would tantamount to no opportunity being given to the assessee, before making such enhancement and thus would be against the legal position set out in section 251(2) of the Act. The specific requirement of issuing SCN contained in section 251(2) is issue based. The power of Enhancement is different from power of Assessment. In section 143, there is no specific requirement of SCN which is there in 251(2). The SCN issued on a particular aspect gets exhausted if Id. CIT(A) is convinced with the reply of the appellant on that issue. Id. CIT(A) has to mandatorily issue a fresh SCN if Id. CIT(A) is changing the basis of enhancement. Therefore, in this view of the legal position, the power of enhancement is exercised by the Id. CIT(A) without jurisdiction and also against the principle of natural justice. In the present case, in the SCN, Id. CIT(A) raked up the issues of no business activities being undertaken by the

assessee company, the entire reply to such SCN by the assessee company was based on explaining the legal position whether business activities and revenue generated out of it is pre-condition for claiming deduction u/s 36(1)(iii) or not. Whereas, no opportunity, at all, was provided to the assessee company to explain the nexus between the interest income and the interest expenses and whether such nexus was, at all, required to be proved.

12. It is an undisputed fact that the assessee company, being engaged in the Real Estate Development, in the preceding years, had taken loan from Shri Udai Kant Mishra for utilizing the same for the purpose of its business. Shri Udai Kant Mishra is the main person behind Trimurty Group, to which the assessee company belongs. The year wise details of loan taken from Shri Udai Kant Mishra by the assessee company is as under: -

Particulars	FY 2010-11	FY 2011-12	FY 2012-13 (Relevant Year)
Outstanding balance as at the end of the relevant year	1,54,26,352	3,61,15,187	3,72,21,141
Rate of Interest paid on loan outstanding	18%	18%	15.25%

As seen from the table above, there was no major increase in the outstanding loan amount taken by the assessee company from Shri Udai Kant Mishra, as seen during the relevant previous year *vis a vis* the

immediately preceding year. For the reason of good market standing of Shri Udai Kant Mishra, the possibility of him getting loan from the market was more, in comparison to any of the group companies. Resultantly, on one hand, loan was taken by Shri Udai Kant Mishra and subsequently was passed on to different group companies, including the assessee company. Such loan amount was then utilized by the assessee company for the purpose of its business. The fact of loan from Shri Udai Kant Mishra having been taken for the purpose of business was even accepted by the Department for the immediately preceding two years, wherein, for both such years order u/s 143(3) was passed by the AO. Details of the proceedings for the immediately two preceding years is as under:

Particulars	FY 2010-11	FY 2011-12
Date of order passed u/s 143(3)	27.03.2014	08.01.2015
Rate at which loan taken from Shri Udai Kant Mishra	18%	18%
Rate % accepted by the Id. AO in assessment proceedings	12.5%	12.5%
Date of order of Id. CIT(A) upholding the rate % applied by the Id. AO	01.01.2016	07.02.2017
Date of the order passed by the ITAT, Jaipur Bench	29.08.2017 ITA No. 293/JP/2016 and 313/JP/2017	
Rate % upheld by the ITAT, Jaipur Bench	14%	14%

As can be seen from the table above, the loan obtained by the assessee company from Shri Udai Kant Mishra in the preceding years, the balance of which has been carried forward during the current year as well, has been accepted by the Department, to have been utilized for the purpose of business. Resultantly, interest expenses on such loan were allowed by the AO u/s 36(1)(iii) for both the preceding years. The only quarrel of the AO, in the preceding years, was with respect to the rate at which such loan was taken. Resultantly, part of such interest expenses was disallowed by the AO u/s 40A(2)(b). However, the Coordinate Bench of this Tribunal allowed the rate of interest on such loan taken from Shri Udai Kant Mishra to the extent of 14%. Even Id. CIT(A), in the preceding years, did not make any disallowance u/s 36(1)(iii) and accepted the loan to have been utilized for the purpose of business of the assessee company.

13. We have seen from the facts as stated hereinbefore that the loan outstanding in the books of the assessee company as taken from Shri Udai Kant Mishra was nothing but obtained in the preceding years. During the current year, the interest expenses of Rs. 53,78,282/- incurred on the loan taken from Shri Udai Kant Mishra was credited to his account, which resulted into increase in the balance outstanding of such loan as at the end of the current year. The details of the same are as under:

Particulars	Amount
Opening balance of loan outstanding as on 01.04.2012	Rs. 3,61,15,187
Add: Interest expenses	Rs. 53,78,282
Less: Closing balance of loan outstanding as on 31.03.2013	Rs. 3,72,21,141
Payouts (Balancing Figure)	Rs. 42,72,328

Thus, no fresh infusion of funds, in the form of loan taken from Shri Udai Kant Mishra had taken place during the year under reference. The funds as taken in the preceding years for the purpose of business, remained parked in different avenues for which they were taken. Undisputedly, the fact of the loans taken in the preceding years, having been utilized for the purpose of business, has even been accepted by the Department, the matter having attained finality. Therefore, the interest expenses incurred on the same loan amount during the relevant previous year were for the purpose of business, allowable u/s 36(1)(iii).

14. It is a trite law that both the Income Tax Authorities i.e. the AO as well as Id. CIT(A), having co-terminus powers, with that of the Id. AO, are bound by the Rule of Consistency. Thus, even if Id. CIT(A) exercised his power of enhancement, he was duty bound to follow the outcome of the proceedings, in the case of the assessee company, in the preceding two years. As per section 36(1)(iii) of the Act , any interest expense which has been incurred

for the purpose of business is allowed as an expenditure under the head Business and Profession. This is irrespective of the fact whether the assessee has generated any corresponding income or not. However, in the case of the assessee company, revenue from operations of Rs. 24,64,224/- was booked. Ld. CIT(A) in linking the interest income of Rs. 53,74,368 received by the assessee company on account of capital contribution in M/s Ambience Colonizers with the interest expense of Rs. 53,78,282 on loan taken from Shri Udai Kant Mishra. Whereas, the fact remains that such interest expense incurred by the assessee company was on account of investments in avenues for the purpose of business in the preceding years and had no direct correlation with the income generated. Ld. CIT(A) also stressed upon the fact that no revenue was generated by the assessee company without appreciating that generation of revenue is not the condition precedent for allowability of expenses under the head Profits and Gains from Business and Profession. Section 36(1)(iii) allows deduction of the amount of interest paid in respect of capital borrowed **for the purpose of business or profession.** On the contrary, Section 57 which allows deductions from the income chargeable under the head Income from Other Sources states that "*any other expenditure (not being in the nature of capital expenditure) laid out or expended **wholly and exclusively for the purpose of making or earning such income**"* The pre requisite for claiming deduction u/s 36 is

that the expenditure should be incurred "for the purpose of business". There is no requirement of generating any corresponding income, as a result of such expenditure. For instance, if any assessee incurred expenditure on advertisement, then for claiming such expenditure the assessee need not demonstrate whether any corresponding revenue was generated, as a result of the advertisement. Till the time the advertisement is for the purpose of business the same would be allowed. However, for claiming expenditure u/s 57 under the head Income from Other Sources the assessee is required to showcase the corresponding income generated and then only expenditure is allowed to be claimed under such section.

15. We further observed that the Id. CIT(A) has himself with the deductibility of expenditure, interest or otherwise u/s 36 with the deductibility, as provided under the head 'Income from Other Sources' u/s 57 of the Act. It is pertinent to note that Id. CIT(A) has not even changed the head of income of the assessee company while disallowing the interest expenditure. Id. CIT(A) has even at **Page 41** of his order given reference of Section 28 which falls under the head Profits and Gains from Business and Profession. The borrowings from Shri Udai Kant Mishra, on which interest expenses were incurred by the assessee company in the current and the preceding years, were all parked in various Fixed Assets, at different points of time during the current and the preceding years. None of the assets

including investment in group companies or partnership firms have been held by the Id. CIT(A) to be not for the purpose of business. Unless there was any allegation that the borrowings were utilized for purposes other than for business, disallowance of interest expenses on such borrowings is unwarranted. For instance, an assessee has interest free funds, in the form of Share Capital of Rs. 100 and the same is invested in Interest bearing funds and interest income is received. Thereafter, say after a gap of six months, assessee borrows interest bearing loan of Rs. 100 and utilizes the same for making interest free investment. The balance sheet position would be as under:

Liabilities	Amount	Assets	Amount
Interest Free Funds (Share Capital)	Rs. 100	Interest Bearing Funds	Rs. 100
Interest Bearing Loans	Rs. 100	Interest Free Investment	Rs. 100
	Rs. 200		Rs. 200

Now assessee earns interest income of Rs. 18 and incurs interest expenditure of Rs. 15. In the present case Rs. 15 cannot be disallowed for the reason that no nexus could be proved for earning interest income. Thus, till the time the money borrowed is utilized for making investment for the purpose of business, interest expenditure on such money borrowed cannot be disallowed u/s 36(1)(iii).

16. Even investment in the partnership firm from which interest income was earned was not held by the Id. CIT(A) to be not for the purpose of business. Interest expenses were disallowed solely for the reason that no nexus could be proved by the assessee company of such expenditure with the earning of interest income from the partnership firm. The fact that Id. CIT(A) deleted the disallowance made by the AO u/s 14A of the Act goes to prove that no part of the expenses so incurred were utilized for the purpose of earning exempt income. Id. CIT(A) in his entire order has confused himself with the correct legal and factual position, the same can be demonstrated as under: -

Contention of CIT(A)	CIT(A) Page No.
There were <u>no business activities</u> during the relevant previous year	Page 31
Assessee company could not prove <u>nexus</u> between earning of interest from M/s Ambience Colonizers and payment of interest on loan taken from Shri Udai Kant Mishra	Page 40
There was no business activity except for a <u>solitary sale transaction</u> during the relevant previous year	Page 40
The assessee has <u>stopped</u> its business activity of real estate	Page 40

Thus, Id. CIT(A) was himself not sure of the reason making disallowance of the interest expenditure claimed by the assessee company u/s 36(1)(iii), thereby enhancing its income. On one hand Id. CIT(A) stated that no business activities were carried out by the assessee company, however on

the other hand Id. CIT(A) himself at **page 40** of his order referred to the sale of inventory by the assessee company. Ld. CIT(A) at page 39 of his order, for no reason has made irrelevant reference to the Audit Report. The observation of Id. CIT(A) that the assessee company stopped its business operations is un-warranted and devoid of the business realities. Business is a complex affair. Lot of factors such as the market condition, availability of funds, risk taking capacity etc. drives the business decision. Simply because less revenue/ no revenue is generated by the assessee, that does not mean that the business of the assessee has been stopped. Ld. CIT(A) at **page 42** of his order has relied upon the decision of Hon'ble Delhi High Court in the case of **Karan Raghav Export (P.) Ltd. [2011] 196 Taxman 504 (Delhi)**. The facts of this case are completely different from the facts of the case at hand. In the said case certain expenses incurred by the assessee were clearly held to be not for the purpose of the business and thus were disallowed. In the present case, the allegation of Id. CIT(A) is not that the interest expenses were not for the purpose of the business or that the borrowings, on which such expenses were incurred, were utilized for other than for the purpose of business. Ld. CIT(A), as stated above, has confused himself with the legal position u/s 36 with that u/s 57 for claiming deduction of expenses. Considering the totality of facts and circumstances of the case, we found merit in the contentions of the Id. AR of the assessee and we set

aside the order of the Id. CIT(A) and direct to delete the disallowance made and confirmed by the Id. CIT(A). We order accordingly.

17. In the result, this appeal of the assessee is allowed.

Order pronounced in the open court on 06th April, 2021.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member
जयपुर / Jaipur
दिनांक / Dated:- 06/04/2021

Sd/-
(संदीप गोसाईं)
(SANDEEP GOSAIN)
न्यायिक सदस्य / Judicial Member

*Ranjan

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

1. अपीलार्थी / The Appellant- M/s Trimurty Buildcon Pvt. Ltd., Jaipur.
2. प्रत्यर्थी / The Respondent- The I.T.O. Ward 2(2), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 1194/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar