आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' SMC'' BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

आयकर अपील सं./**ITA No. 683/AHD/2018**
निर्धारण वर्ष/**Asstt. Year:2014-2015**

Archit Corporation LLP, (earlier known as Archit Corporation) 54, Ganesh Krupa, Vijayraj Nagar, Bhavnagar. **PAN: AAHFA5013E**	Vs.	I.T.O., Ward-2(3), Bhavnagar.

(Applicant)		**(Respondent)**

Assessee by :	Shri Parimalsinh B. Parmar, A.R
Revenue by :	Shri R.R. Makwana, Sr.D.R

सुनवाई की तारीख/**Date of Hearing : 29/11/2021**
घोषणा की तारीख /**Date of Pronouncement: 03/01/2022**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax(Appeals)-6, Ahmedabad, dated 31/01/2018 arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2014-2015.

2. The assessee has raised following grounds of appeal:

1. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of interest expense of Rs.4,72,860/-.*

2. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the addition of Rs.4,72,6437- as interest income.*

3. *The learned CIT(A) has erred both in law and on the facts of the case fn confirming the disallowance of Rs.1,44,500/- u/s.40(a)(ia) r.w.s.!94C of the Act.*

4. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of interest expense of Rs.44,18,949/- u/s.36(l)(iii) of the Act.*

5. *Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.*

6. *The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in levying interest u/s.234A/B/C of the Act.*

7. *The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in initiating penalty u/s.271(l)(c) of the Act.*

8. *The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.*

3. The interconnected issue raised by the assessee in ground No. 1 and 2 is that learned CIT (A) erred in confirming the disallowance of interest expenses of ₹ 4,72,860/- and further adding the interest income of ₹ 4,72,643/- on the financial transactions carried out with the sister concern.

4. The facts in brief are that the assessee in the present case is a partnership firm and engaged in the business of construction of residential and commercial buildings. The assessee in the year under consideration has claimed interest expenses for ₹ 4,72,860/- on the money borrowed from the sister concern. It was submitted by the assessee that its sister concern namely M/s Anjani Enterprise has shown corresponding income of interest for ₹ 4,72,860/- in its books of accounts.

4.1 However, the AO was not satisfied with the contention of the assessee on the reasoning that the assessee in the initial period has advanced money to the

sister concern and in the later period, it has borrowed money from the sister concern. Thus, as per the AO the assessee was also supposed to charge the interest on the money advanced by it to the sister concern along with the payment of interest on the money borrowed by it by it from the sister concern. The AO based on the financial transaction for advancing loan to the sister concern and borrowing from the sister concern computed interest receivable at ₹ 5,23,718/- and interest payable at ₹ 51,075/- only. Thus, as per the AO the assessee should have received the interest income of ₹ 4,72,643/- (₹5,23,718.00 minus 51,075.00) instead of interest payment of ₹ 4,72,860/- which was claimed as an expense in the profit and loss account. Thus the AO disallowed the interest expenses of ₹4,72,860/- and made the addition of ₹4,72,643/- aggregating to the addition of ₹ 9,45,503/- to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to the learned CIT (A) who confirmed the addition made by the AO by observing as under:

> *The AO noted that he appellant had debited Rs. 4,72,860/- on account | of interest paid to Anjani Enterprises while actually the appellant had received interest from Anjani Enterprises. Hence, the AO disallowed Rs. 4,72,860/- and added the same. During appeal proceedings, the appellant did not make any submission on this issue as can be seen from para 5.2 above. During hearing of the appeal, the authored representative of that appellant submitted that-' he is not pressing this ground. Accordingly, addition of Rs. 4,72,860/- is confirmed. This ground of appeal is dismissed.*

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> *In fact, the firm has paid and debited interest expenses instead of interest income receivable from that firm" but no further submission were made on this account. The A.R. of the appellant during hearing of appeal submitted that he is not; pressing this ground. In any case, the appellant has not contested with' corroborative evidence finding of the AO that instead of paying interest to Anjani Enterprises, the appellant has received interest of Rs. 4,72,643/-. Accordingly, addition of Rs. 4,72,643/- is upheld. This ground of appeal is rejected.*
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> *It is seen that during assessment proceedings, the AO noted that the appellant had made payment of Rs. 72,000/- and Rs. 72,500/- to Ishwarbhai and Parmeshwarbhai respectively for colour work. The AO further noted that j no TDS was deducted on these amounts which was deductible'u/s 194C of the | Act. Thus, the AO after giving the appellant an opportunity to explain and not finding explanation of the appellant satisfactory, disallowed Rs. 1,44,500/-u/s 40(a)(ia) of the Act and added the same to the income of the appellant. During appeal proceedings, the appellant did not make any submissions on this issue. Accordingly, it is held that the AO was justified in disallowing Rs. 1,44,500/- u/s 40(a)(Ia) of the Act. This ground of appeal is rejected.*

6. Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before us.

7. The learned AR before us filed a paper book running from pages 1 to 98 and contended that assessee has made concession before the learned CIT (A) not to press this ground of appeal inadvertently and under the wrong advice. This concession is not binding upon the assessee. As such the assessee before the higher forum can contest the addition made by the authorities below despite the fact that the same was not pressed before the ld. CIT-A. The learned AR in support of his contention relied on the following judgments:

- *Department of Elementary Education vs. Pramod Kumar Sahoo-(2019) 10SCC 674;*
- *Central Council for Research in Ayurveda vs. D.K. Santha-kumari-(2001) 5 SCC60;*
- *DCIT vs. KS Suresh – 319 ITR 1(Mad.);*
- *Krishna B. Agarwal Vs. ITO – ITA 2176/Ahd/2012;*

8. On the other hand the learned DR vehemently opposed to accept the contention of the learned AR of the assessee. The learned DR vehemently supported the order of the authorities below.

9. We have heard the rival contentions of both the parties and perused the materials available on record. The question arises before us for adjudication whether the assessee can raise the ground of appeal which was not pressed before the learned CIT (A). Generally, it is not expected from the assessee to raise the issue before the higher forum when the same was not pressed before the lower authorities. However, there are certain exceptions to it. If the learned counsel for the assessee under wrong appreciation of facts and the law has not pressed the issue before the lower authorities, the same can be raised before the higher forum. It is for the reason that the assessee should not be deprived of the benefit for which it is entitled under the provisions of law merely on wrong appreciation of facts/law. All the facts relating to the issue are arising from the order of the AO and there is no need to refer to any fresh document to decide the issue on hand. Therefore in the interest of justice and fair play, we have no hesitation in admitting the ground

raised by the assessee as discussed above though the same was not pressed before the learned CIT (A) by the assessee.

9.1 As there is no finding by the learned CIT (A) qua the dispute on hand, therefore we are inclined to set aside the same to the file of the learned CIT (A) for fresh adjudication as per the provisions of law. Hence, the ground raised by the assessee is allowed for statistical purposes.

10. The 2nd issue raised by the assessee in ground No. 3 is that the learned CIT (A) erred in confirming the disallowance made by the AO for ₹ 1,44,500 on account of non-deduction of TDS under the provisions of section 194C read with section 40(a)(ia) of the Act.

11. The assessee in the year under consideration has incurred an expense of ₹ 1,44,500/- towards the colouring work but no TDS was deducted thereon under the provisions of section 194C of the Act. Therefore the same was disallowed by the AO and added to the total income of the assessee.

12. Aggrieved assessee preferred an appeal to the learned CIT (A) who confirmed the order of the AO by observing as under:

13. Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before us.

14. The learned AR before us contended that there was an amendment by the Finance Act (No.2) 2014 under the provisions of section 40(a)(ia) of the Act which restricted the disallowance to 30% only of the expenses in respect of which TDS was not deducted. Such amendment was held to be retrospective in the following orders:

Muradul Haque vs. ITO –184 ITD 58 (Del.);

Electronic Instrumentation & Control Pvt. Ltd. vs. ITO-ITA3055 & 3056/Ahd/2013(Annexure "A")

14.1 In view of the above, the learned AR requested to restrict the disallowance of the impugned expenses to the tune of 30% only. The learned AR alternatively contended that the matter can be set aside to the AO to verify whether the recipient had paid the taxes on the amount received from the assessee. If that be so, there cannot be any disallowance under the provisions of section 40(a)(ia) of the Act.

15. On the other hand the learned DR vehemently supported the order of the authorities below.

16. We have heard the rival contentions of both the parties and perused the materials available on record. In the present case, the expense claimed by the assessee for colouring work was disallowed by the AO on account of non-deduction of TDS. The disallowance made by the AO was also subsequently confirmed by the learned CIT (A). Now, there are two issues which require consideration and the adjudication. The 1st issue is whether the disallowance of the expense should be restricted to 30% by virtue of the proviso to section 40(a)(ia) of the Act which was brought the statute by the Finance Act (No. 2) 2014. Admittedly, as per the proviso to section 40(a)(ia) of the Act, the disallowance has to be restricted to the tune of 30% in respect of the expenses on which TDS has not been deducted by the assessee. Such amendment was retrospective as held by the Delhi Tribunal in the case of Muradul Haque vs. ITO reported in 184 ITD 58 wherein it was held as under:

> *We find that Finance (No.2) Act has made amendment to section 40(a)(ia) of the Act w.e.f. 1-4-2015. Various benches of the Tribunals including the Delhi Benches of the Tribunal, have held the amendment made by Finance (No 2) Act to be curative in nature. We further finds the coordinate bench of the Tribunal in the case of R.H. International (supra) has held that disallowance u/s. 40(a)(ia) of the Act be restricted to 30% of the expenses paid as against 100% because amended provision is curative in nature and the provisions should be applied retrospectively.*

16.1 Likewise, the Ahmedabad tribunal in the case of Electronic Instrumentation & Control Pvt. Ltd. vs. ITO in ITA No. 3055 and 3056/AHD/2013 has held that the

proviso added to the provisions of section 40(a)(ia) of the Act by the Finance Act (No. 2) 2014 is applicable retrospectively. Thus, in view of the above provisions, the 100% of the expenses incurred by the assessee without incurring the TDS cannot be disallowed. Rather disallowance shall be restricted to the tune of 30% only. Accordingly, we direct the AO to restrict the disallowance to the tune of 30% of the total expenses incurred by the assessee.

16.2 In the alternate contention, the learned AR at the time of hearing before us has submitted that the payees have already included the amount received from the assessee in the financial statements and paid the due taxes thereon. Accordingly, there cannot be any disallowance by virtue of the 2nd proviso to section 40(a)(ia) of the Act. For this purpose, the matter can be referred back to the AO for the necessary verification.

16.3 Undoubtedly, the primary onus lies upon the assessee to deduct the TDS under chapter XVIII-B of the Act. In case, the assessee fails to deduct the TDS, then the assessee is not eligible for deduction of the corresponding expenditure. However, the lawmakers have given relief to certain assessee by inserting the 2nd proviso to section 40(a)(ia) of the Act which reads as under:

> ***Provided further*** *that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.*

16.4 It is also important to refer the provisions of section 201 of the Act which reads as under:

> *[**Provided** that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—*
>
> *(i) has furnished his return of income under section 139;*
>
> *(ii) has taken into account such sum for computing income in such return of income; and*
>
> *(iii) has paid the tax due on the income declared by him in such return of income,*

> *and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed[68]:*

16.5 From the preceding discussion is transpired that Payers defaulting in deducting TDS from payments to resident payees not to be deemed as Assessee in Default if no loss to revenue results due to short deduction/non-deduction-i.e.

> (A) Payee has included the impugned amount, on which tax was not deducted/short deducted, in his return of income filed under section 139 and pays taxes due on returned income and
>
> (B) Payer produces a certificate in prescribed form from a CA to the effect that the payee has included the income in return and paid taxes thereof.

16.6 The CBDT has prescribed Form No. 26A for CA certificate to be obtained and furnished by payer evidencing compliance by payee. From the above discussion, it is transpired that the assessee can be granted immunity from disallowances of expenses on account of non/short deduction of Taxes provided that the assessee furnishes the certificate in the prescribed form. Thus the onus is upon the assessee. However, we find that assessee has not furnished the necessary certificate in form 26A prescribed by the CBDT. Now at the time of hearing before us, the learned AR has also not furnished any certificate in form 26A prescribed by CBDT. Now the issue arises, can the matter be set aside to the file of the AO for collecting the necessary evidences from the respective payees to ensure that such payees have paid the taxes on the amount received from the assessee?

16.7 In this regard we note it is the duty of assessee to deduct appropriate tax from the amount paid/payable to any party i.e. payee if such amount falls under the preview of provision of chapter XVII (B) of the Act i.e. deduction at source. Further, the provision of section 40(a)(ia) of the Act provides that if assessee failed to deduct or failed to deduct appropriate tax on amount paid on which it was liable

to deduct tax then such amount will not be allowed as business expenses. However the legislator provided relaxation to the assessee by inserting the 2nd proviso to section 40(a)(ia) on account of failure to deduct if it fulfil the condition prescribed under proviso to section 201(1) of the Act i.e. furnishing a certificate from accountant in from 26A. To our understanding the duty cast on the assessee cannot be transferred to revenue. If such burden transferred to revenue then the importance of provision of tax deduction at source will be of no relevance. Therefore the alternate contention of the assessee is dismissed. Hence the ground of appeal of the assessee is partly allowed.

17. The last issue raised by the assessee is that the learned CIT (A) erred in confirming the disallowance of interest expenses for Rs. 44,18,949/- under the provisions of section 36(1)(iii) of the Act.

18. The assessee in the year under consideration has shown turnover of ₹ 1,96,27,100/- only which was inclusive of sale of open plot of land and residential units of a project namely 'Shivdhara Site'. The assessee during the assessment proceedings claimed that there was interest expenses of Rs. 48,91,809/- which was incurred with respect to its project namely 'Shivdhara Site' and shown as part of the closing WIP as on the balance sheet date. As per the assessee the entire amount of loan shown by it was utilized for its projects namely 'Shivdhara Site' and therefore interest paid on such loan was shown in the closing work-in-progress.

18.1 However, the AO assumed that the assessee has borrowed fund of Rs. 4.07 crores taking the interest rate at 12% for the full year. As per the version of the assessee, the entire amount of loan has been used for the projects namely 'Shivdhara Site'. But on perusal of the account for the projects namely 'Shivdhara Site', it was found that assessee has shown sales of ₹51.24 lakhs, construction cost of ₹19.46 Lacs and purchase expenses of ₹41.85 lakhs with respect to its project namely 'Shivdhara Site'. Thus, the AO was of the view that the entire amount of

borrowed fund approximately 5 crores was not utilized for the project namely 'Shivdhara Site'. Accordingly, it was not possible to claim such huge amount of interest expenses of Rs. 48,91,809.00 towards such project namely 'Shivdhara Site'. Likewise, the contention of the assessee that no interest expense has been debited in the profit and loss account was not correct. It is for the reason that indeed the assessee has increased the closing WIP by the amount of interest expense but the same will become the opening WIP for the subsequent year and the assessee will claim the deduction of the same in the succeeding years.

18.2 The AO further found that the assessee has carried out financial transactions approximately for ₹ 5.70 crores with its sister concern namely M/s Anajni Enterprise, having no commercial dealings. Thus, he was of the view that the borrowed fund has been diverted to extend the benefit to the sister concern. Accordingly, the AO concluded that the interest expense has not been incurred for the purpose of business as provided under section 36(1)(iii) of the Act and disallowed the interest expenses of Rs. 44,18,949.00 (48,91,809 minus 4,72,860.00 the amount already added) by adding to the total income of the assessee.

19. Aggrieved assessee preferred an appeal to the learned CIT (A)

20. The assessee before the learned CIT (A) submitted that it has shown closing WIP of its project namely namely 'Shivdhara Site' as on 31 March 2014 at ₹ 2.85 crores which was funded out of own capital and borrowed fund of ₹ 1.50 crores and 1.30 crores respectively. Out of the total interest expenses of Rs. 48,91,809.00 a sum of ₹ 37,99,950.00 was included in the valuation of closing stock. The borrowed fund as such has not been utilized for any other purpose as alleged by the AO. The learned CIT (A) after considering the submission of the assessee observed that the assessee has not given the necessary details about the parties from whom it has taken loan and to whom it has paid the interest. Likewise, there was no detail

available to justify the purpose of the loan taken from different parties. The learned CIT (A) disregarded the contention of the assessee by observing as under:

> *During the appeal proceedings, though the appellant made long narrative submissions on this issue, but it failed to refute the contentions of the AO and establish that funds on which interest was paid were used for business purpose. A perusal of the submissions-appellant as reproduced in para 7.2 above, shows that there is no clarity in the same. The appellant has made long descriptive submission which lacks the quantitative details which could have explained its claim. It says that it has included interest in Opening Stock and in Closing Stock as cost but clear picture does not emerge. It has not given details of parties from whom loans were taken and to whom interest of Rs. 48,91,8097- was paid. Nor has it given details of work7purpose for which these loans were used. In fact, it must be said that there is no clarity in the submission of "the appellant. In such scenario and in the absence of complete details, it is difficult to accept contention of the appellant. Case laws relied on by the appellant are not relevant as these are distinguished on facts. Accordingly, it is held that the AD was justified in making addition of Rs. 48,91,809/-. Accordingly the addition of Rs. 48,91,809/- is upheld. This ground of appeal is rejected.*

21. Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before us.

22. The learned AR for us submitted that the entire interest bearing loan was utilized exclusively for the purpose of its construction activities without diverting the same to the sister concern. There was opening debit balance of Rs. 33,29,438.00 in the books of the assessee. Likewise, the assessee has received a sum of ₹ 5,82,71,860.00 and repaid a sum of ₹ 5,40,69,286.00 during the year under consideration leaving a credit balance of ₹ 8,73,136.00 at the end of the financial year. Thus, as such the assessee has received more fund from the sister concern than advancing the same to the sister concern. Thus the question of diversion of fund does not arise.

23. Alternatively, the assessee submitted that maximum amount outstanding from the sister concern as on 11 May 2013 was of ₹ 1,47,78,435.00 against the capital of the assessee at ₹ 1,49,56,320.00. Accordingly it can be said that the amount of loan has been given to the sister concern out of its own fund.

23.1 Without prejudice to the above, the assessee also contended that amount of interest expenses of ₹ 37,99,950.00 has already been included in the closing WIP. Thus to this extent, the amount of interest has been nullified. Thus, the addition to this extent, if sustained it shall tantamount double addition which is unwarranted under the provisions of law.

24. On the other hand the learned DR vehemently supported the order of the authorities below.

25. We have heard the rival contentions of both the parties and perused the materials available on record. At the threshold, we note that the AO has made reverse working for calculating the amount of loan obtained by the assessee presuming the rate of interest at 12 percent for the full year. As per this working, the amount of loan works out at ₹4.07 crores whereas on perusal of the balance sheet of the assessee as on 31 March 2014 the amount of unsecured loan stands at ₹1,29,69,616.00 only. Therefore, we are not convinced with the finding of the authorities below that the assessee has utilized the borrowed fund to the tune of Rs. 4.03 crores approximately against the closing work in progress shown by the assessee at Rs. 2.85 crores. It was contended by the assessee before the learned CIT (A) that closing WIP has been funded by the own fund as well as by the borrowed fund. This contention has nowhere been doubted by the learned CIT (A). Thus, it is transpired that the assessee has utilized the unsecured loan to the tune of ₹1.30 gross approximately in the closing WIP. Thus, it appears that the fund has not been diverted for non-commercial activities as alleged by the authorities below. We have also perused the financial transactions carried out by the assessee with its sister concern and find that it is the running account where the assessee has accepted as well as advanced loan to the sister concern. The maximum outstanding debit balance in the account of the sister concern was ₹ 1,47,78,435.00 as on 11 May 2013 against the capital of the assessee at ₹ 1,49,56,320.00 at the end of the balance sheet date. Here we note that the assessee should have compared the

maximum amount of loan given as on 11-5-2013 with the capital of the assessee as on that date. But the assessee has not done so. However we have found the opening capital account of the firm as on 1 April 2013, as evident from the balance sheet as on 31 March 2013 placed on page 18 of the paper book that it stands at ₹ 1,02,08,479.00 only which is less than the maximum amount of advance shown by the assessee. Be that as it may be, we note that the AO has already taken care of the adjustments of the amount of loan given and taken from the sister concern and suitable adjustments have already been made. Therefore, we are not inclined to make any reference to consider the financial transactions carried out by the assessee with the sister concern for making the disallowance of the interest expenses claimed by the assessee with respect to its project.

25.1 We also find force in the contention of the learned AR that the assessee in the year under consideration has not claimed any deduction of the interest to the extent of ₹ 37,99,950.00 being shown as part of the closing WIP. Indeed, in the later years, this closing WIP shall become the opening WIP and again the same will be allowed as deduction in the subsequent year which will result in the reduction of the profit of the assessee of the subsequent years. Once, an amount of interest has already been suffered to tax, if the addition is sustained, then the same amount should not be treated as opening WIP. In doing so, it would lead to the double taxation which is not warranted under the provisions of law. On this count as well as, the addition to the extent of ₹37, 99950 is liable to be deleted.

25.2 It is also pertinent to note that all the details about the interest expenses, financial statements, written submissions of the assessee were available before the learned CIT (A) and no defect of whatsoever was pointed out by him therein. The learned CIT (A) has just dismissed the claim of the assessee by observing that the assessee failed to furnish the necessary details. To our understanding, this kind of approach of the learned CIT (A) is unwarranted for confirming the addition made by the AO after ignoring the necessary details which were available on record.

25.3 In view of the above and after considering the facts in totality, we set aside the finding of the learned CIT (A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

26. In the result, the appeal filed by the assessee is **partly allowed for the statistical purposes.**

Order pronounced in the Court on 03/01/2022 at Ahmedabad.

Sd/-	Sd/-
(SUCHITRA KAMBLE,)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 03/01/2022
Manish