IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B' : NEW DELHI)

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
and
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

(THROUGH VIDEO CONFERENCE)

ITA Nos.6431 & 6432/Del./2019
(ASSESSMENT YEARS : 2014-15 & 2015-16)

ACIT, Circle 7 (1), New Delhi.	vs.	M/s. DLF Utilities Ltd., 9th Floor, DLF Centre, Sansad Marg, Connaught Place, New Delhi – 110 001. **(PAN : AACCN3199A)**
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Satyajeet Goel, CA
REVENUE BY : Ms. Yagya Saini Kakkar, CIT DR

Date of Hearing : 10.03.2022
Date of Order : 11.04.2022

O R D E R

PER AMIT SHUKLA, JM :

The aforesaid appeals have been filed by the Revenue against the separate impugned orders dated 19.01.2017 & 18.01.2018, passed by the ld. CIT (A)-3, New Delhi for the quantum of assessment passed u/s 143(3) of the Income-tax Act, 1961 (for short 'the Act') for the assessment years 2014-15 & 2015-16 respectively.

2. The Revenue has challenged the disallowance of interest expenditure under section 36(1)(iii) of the Act of Rs.6,53,18,819/- & Rs.14,31,97,207/- for the AYs 2014-15 & 2015-16 respectively. Another issue which has been raised by the Department in its grounds of appeal is with regard to disallowance made u/s 14A read with Rule 8D amounting to Rs.37,91,688/- & Rs.39,35,258/- for the AYs 2014-15 & 2015-16 respectively.

3. Since facts and issues involved are common, therefore, same was heard together and are being disposed off by this consolidated order.

4. Before us, ld. counsel for the assessee submitted that both the issues are covered in favour of the assessee by the order of the Tribunal for the AYs 2011-12, 2012-13 & 2013-14 and order of Hon'ble High Court in the case of assessee wherein similar disallowance made u/s 36(1)(iii) on same set of facts in the Revenue's appeal against the deletion of said disallowance has been confirmed by the Hon'ble High Court. Thus, issue of disallowance made u/s 36(1)(iii) is squarely covered in favour of the assessee.

5. Further, insofar as disallowance u/s 14A is concerned, the same is also covered by the decision of the Tribunal in AY 2013-14 on similar facts and reasoning as are present in the present appeals.

6. The facts, in brief for AY 2014-15, are that the appellant has taken secured and unsecured loan aggregating to Rs.1847.20 crores on which interest of Rs.195.10 crores was paid. The assessee has given utilisation of loan for business purpose and also has shown interest free loan and advances to related entities. Before the AO, the assessee submitted that these were purely business advances given to M/s. DLF Ltd. and following explanation was given :-

> *"With regards to query related to explanation towards as to whether interest has been charged on advance paid to M/s. DLF Limited amounting to Rs.1,17,53,416/- for purchase of land and plots, it is submitted that the said amount of advances were paid to M/s DLF Limited in earlier years by various companies which have since been amalgamated with the assessee company w.e.f. 01/04/1999. No interest was chargeable on the advances, since same were business advances. It is reiterated that the assessee company has not charged the interest because it have been given on account of Commercial Expediency, therefore, no notional interest can be charged on such business advances. It is pertinent to mention that this issue has already' been decided by the learned CIT(A)-3, New Delhi in favour of the Assessee Company in the Assessment Years - 2009-10 to 2011-12. A copy of the appellate order for the A.Y. 2011-12 is enclosed herewith at Annexure-1."*

7. The case of the AO is that, apart from M/s. DLF Ltd., the assessee had used borrowed funds for investments, capital work-in-progress and other loans/advances. As per AO, "*Assessee should have adjusted the advances given to M/s. DLF Ltd. for purchase of plots and land with the loan taken from M/s. DLF Ltd."* On this premise, he

proceeded to make proportionate disallowance of interest of Rs.6,53,18,819/-.

8. Before the ld. CIT (A), the assessee had filed very detailed submissions which have been noted in Para 6.2 of his appellate order from pages 2 to 6, wherein the assessee had explained that, *firstly*, this issue has been decided in favour of the assessee by Ld. CIT (A) exactly on similar observation and finding made by the AO from AYs 2009-10 to 2013-14. *Secondly*, this issue had already been decided by the Tribunal in favour of the assessee for AY 2011-12; and *lastly*, it was pointed out that assessee had availability of total interest free funds as surplus funds for more than Rs.246.34 crores, whereas the average of loans and advances/investments given as interest free advances has been computed by the AO to the tune of Rs.66.54 crores. Apart from that, it was duly demonstrated that all the advances were part of business activities and commercial expediency and the same was given wholly and exclusively for the purpose of business which were investment in properties and investment in partnership firm. Ld. CIT (A) on perusal of facts had given a categorical finding that assessee had sufficient interest free funds in the form of capital and reserves & surplus, which are much more than the interest free

advances/investments and also following the ITAT decision in assessee's own case deleted the addition by observing as under :-

> *"6.4 On perusal of the above decision of the Hon'ble ITAT, it is observed that it been held that if the appellant has sufficient interest free funds to meet the Capital expenditure/CWIP and to make investments, no disallowance u/s 36(1)(iii) of the Act can be made. In view of this, a reasonable presumption can be made that investments have been made out of the appellant's own funds. Reliance in this regard is placed on the decision of Bombay High Court in the case of Reliance Utilities 313 ITR 340 and of Delhi High Court in the case of Eicher Goodearth in ITA NO. 54/2000. It is also observed that the issue has been decided in favour of the appellant in the case of the appellant itself for AY 2011-12 by Hon'ble ITAT Delhi in ITA No. 1998/Del/2016. Respectfully following the decisions referred above and the decision of Hon'ble ITAT in the appellant's own case for AY 2011-12, the addition made by the AO is deleted and the ground of appeal is allowed."*

9. Regarding addition of Rs.37,91,688/- made by the AO u/s 14A, AO noted that assessee had made various investments for which it has earned income u/s 10(34). However, the AO though after incorporating entire submissions of the assessee specifically the fact that the assessee had not earned any dividend income during the year has mechanically proceeded to make disallowance u/s 14A read with Rule 8D. Ld. CIT (A) following the decision of **Hon'ble Delhi High Court in the case of Joint Investments Pvt. Ltd. in ITA 117/2015 and Chem Invest Ltd. vs. CIT 378 ITR 333** has deleted the said addition.

10. On the other hand, ld. DR for the Revenue submitted that principles of *res judicata* are not applicable in the income-tax

proceedings. She pointed out even the ld. CIT (A) had not examined the factual matrix in the light of the finding of the AO that there was nothing on record to show business expediency, therefore, she cited several judgments which, on perusal of the same, are purely distinguishable on facts. She has also filed her written submissions on this issue, which has been filed for the AY 2015-16 will also apply for both the years are as under :-

> *"I) On issue of 36(1)(iii) - Ws dated 8-3-2022 and further that -*
>
> *Reliance on AOs order - as regards resjudicata and distinguishing feature with reference to orders cited wrt sec36(1)(iii) aspect in ITA 2209/D/2016 dt 19.6.2018 of Hon'ble Delhi HC which states that-*
>
> *"3. The AO disallowed the amount of Rs.2.75 crore under Section 36(1)(iii) of the Act. The assessee's appeal was accepted by the CIT. The Appellate Commissioner relied upon the decision of this Court in Commissioner of Income Tax vs. Dalmia Cement (Bharat) Ltd. [253 ITR 377 (DL)). The CIT(A) holds as follows: "In the present case, the loan and advances have been given on account of "Commercial expediency" and no notional interest can be charged on such advances given for the purpose of business. The Delhi High court in the case of CIT Vs. Dalmia Cement (Bharat) Ltd. reported in 253 ITR 377 held that "once it is business, revenue cannot justifiable claim to put itself in the armchair of the businessman and assume the role to decide how much is reasonable expenditure having regarding to the circumstances of the case, No businessman can be compelled to maximize its profits. The authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. We have to see the transfer of the borrowed funds to the sister concern from the point of view of commercial expediency and not form the point of view whether the amount was advances for earning the profit?....."*
>
> *4. The ITAT, to whom the Revenue appealed, affirmed the decision of the CIT(A).*
>
> *5. The grounds of commercial expedience are now well established in tax jurisprudence. The position of*

the CIT(A) and its affirmation by the ITAT are essentially based upon a fact appreciation that the assessee forewent interest. As to whether there was an element of sacrifice and if so, for what purpose, is not for the Court to consider, given that the loans obtained by the assessee were for its business purposes.

6. There is nothing on record to dispel/undermine the findings of the lower Appellate Authorities that commercial expedience dictated the nature of the transactions. 7. No question of law arises."

Distinguishing feature in AY 15-16 wrt 36(1)(iii) --as already stated in WS -I dated 8-3-2022 the CIT(A) as ipso facto just reproduced the contentions of assessee which is non speaking order virtually and against settle principles of jurisprudence without examining any factual aspect raising a legal question of being erroneous in law as much as ingredients of section 36{1}{iii) have not been examined perse by CIT(A) leading to palpable error in law & on facts both in given legal matrix ... As such the Decision of Delhi HC in ITA no 39/2019 would not be applicable in view of facts stated in WS dated 8-3-2022 which may very kindly be appreciated and which shall not act as resjudicata in view of following decision -

[2018] 92 taxmann.com 101 (Delhi)HIGH COURT OF DELHI Rakesh Kumar Gupta v. Commissioner of Income-tax-XIII" .... 6. It is apparent from the above factual narrative that the Revenue authorities - including the CIT(A) and the ITA T carried out a detailed analysis of the transactions in question including the volume of holding, duration of holding and the dividend earned and other essential details. The lower authorities-including the AO considered the cumulative effect of these factors and also all the relevant authorities, starting from the judgment of the Supreme Court in Raja Bahadur Visheshwara Singh v. CII' [1961] 41 ITR 685. In this background the assessee's assertion that the previous year's assessment- which had accepted the reporting of the transaction which he claims to be identical, is unpersuasive. The previous year's assessment order (for AY 2008-09) in fact did not lead any discussion on this aspect and appear to have merely accepted the assessee's contention. Those cannot by any stretch of imagination be conclusive. At any rate in such cases, one cannot apply the principle of resjudicata or estoppel.(emphasis supplied)

7. For these reasons, the Court is of the opinion that no substantial question of law arises. What is urged related to pure appreciation of facts. The appeal is therefore dismissed. All the pending applications also stand disposed of.. .. "(unquote)

[2012] 23 taxmann.com 265 (Delhi)Krishak Bharati Cooperative Ltd. v. Deputy Commissioner of Income-tax" ... 15. It is now necessary to take up the submission that the Tribunal erred in departing from the "consistency" rule. This is based on the fact that for the period of about 15 years, the income tax authorities had accepted the assessee's submissions and permitted annual amortization of the initial lease consideration, as advance rent. The assessee here relied on the "consistency" rule enunciated in Radhasoami Satsang (supra). The Supreme Court observed, in that case that:*

> *" ... where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.*
>
> *19. On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter-and if there was not change it was in support of the assesses-we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-Tax in the earlier proceedings, a different and contradictory stand should have been taken."*

This Court notices that there cannot be a wide application of the rule of consistency. In Radhasomi Satsang's case (supra) itself, the Supreme Court acknowledged that there is no res judicata, as regards assessment orders, and assessments for one year may not bind the officer for the next year. This is consistent with the view of the Supreme Court that "there is no such thing as res judicata in income-tax matters" Raja Bahadur Visheshwara Singh v. CIT AIR 1961 SC 1062. Similarly, erroneous or mistaken views cannot fetter the authorities into repeating them, by application of a rule such as estoppel, for the reason that being an equitable principle, it has to yield to the mandate of law. A deeper reflection would show that blind adherence to the rule of consistency would lead to anomalous results, for the reason that it would engender the unequal application of laws, and direct the tax authorities to adopt varied interpretations, to suit individual assesses, subjective to their convenience, - a result at once debilitating and destructive of the rule of law. A previous Division Bench of this Court, in Rohitasava Chand v. CfT 120081 306 ITR 242/171 Taxman 147 had held that the rule of consistency cannot be of inflexible application.

16. In view of the above reasons, this court is of opinion that the reasoning and conclusions of the Tribunal do not call for interference. The question of law framed is answered accordingly, against the

appellant, and in favour of the revenue. The appeals are dismissed, with no order as to costs. (unquote)(emphasis supplied).

[2011] 198 Taxman 443 (Delhi) HIGH COURT OF DELHI AII India J.D. Educational Society vs. Director General of Income-tax (Exemptions):, Delhi" ... 13. Further, we are in agreement with Ms. Prem Lata Bansal, learned counsel for the respondent that the principle of res judicata is not applicable to the facts of the present case. We believe that not finding any discrepancy or inconsistency in earlier years while granting exemption under section 12A and registration under section 80G of the Act would not automatically entitle the petitioner-society to have approval under section 10(23C) in subsequent years. In income-tax matters, each assessment year is an independent year and the principle of res judicata, in general is not applicable. We may refer with profit the decision of the Supreme Court in Municipal Corpn. of City of Thane v. Vidyut Metallics Ltd. 1200718 SCC 688 wherein it has been held as under:-

"18. So far as the proposition of law is concerned, it is well settled and needs no further discussion. In taxation matters, the strict rule of res judicata as envisaged by section II of the Code of Civil Procedure, 1908 has no application. As a general rule, each year's assessment is final only for that year and does not govern later years, because it determines the tax for a particular period. It is, therefore, open to the Revenue/ Taxing Authority to consider the position of the assessee every year for the purpose of determining and computing the liability to pay tax or octroi on that basis in subsequent years. A decision taken by the authorities in the previous year would not estop or operate as res judicata for subsequent year (videMaharana Mills (P.) LId. v. ITO; Raja Bahadur Visheshwara Singh v. CIT; Instalment Supply (P.) Ltd. v. Union of India; New Jehangir Vakil Mills Co. Ltd. v. CIT; Amalgamated Coalfields LId. v. Janapada Sabha; Devilal Modi v. STO; Udayan Chinubhai v. CIT; M.M. Ipoh v. CIT; Kapurchand Shrimal v. Tax Recovery Officer; CITv. Durga Prasad More; Radhasoami Satsang v. CIT; Society of Medical Officers of Health v. Hope; Broken Hill Proprietary Co. LId. v. Broken Hill Municipal Council; Turner on ResJudicata, 2nd Edn., Para 219, p. 193). [Emphasis supplied]."(emphasis supplied)

II) ON ISSUE OF 14A - In addition to contentions made in WS dated 8-3-2022 , the decision in ITA no.415/De1/2017 is distinguishable as in that matter relating to a different assessee (DLF Home developers) addition was deleted by CIT(A) stating that AO has not recorded procedural dissatisfaction which is not the case in AY 15-16 as dissatisfaction is recorded in para 4.1, 4.2 of assessment order for AY15-16 rw Indiabulls decision of Delhi HC(76 taxmann.com 268) and

as such the decision in ITA 4155/de1/2017 of assessee is inapplicable besides the fact that factual matrix of funds position is also different as depicted by assessing officer in assessment order rendering resjudicata inapplicable perse read with aforestated decisions ..

(b) Further decision in ITA 2567/D/2016(GOAno4 of Revenue appeal) and ITA 2209/D/2016(GOA no l of assessee appeal) in a different case of DLF Home Developers is also not applicable as nowhere has it been demonstrated by day to day investment as regards flow of available funds into investment made and is a blanket contention of assessee unsupported by any cogent evidence and is a mere (gross /net funds) mathematical exercise perse as even during Assessment stage assessee has merely elucidated the legal principles without satisfying and proving factual matrix of investments flowing from available funds and the exclusion of secured loans /unsecured loans of Rs.13033650000 and Rs.9328646757 respectively as depicted at para 3.11 of assessment order ....

The CIT(A) has not examined the factual matrix and has merely relied upon Takshika c (satisfaction aspect) which has to be now read with 76 taxmann.com 268 India Bulls case of binding Delhi HC and may very kindly be appropriately considered ."

11. We have heard the rival submissions and also perused the relevant facts and material on record as well as the impugned orders. First of all, from the bare perusal of the assessment order the reasoning which has been given by AO for making the disallowance as appearing in para 3.2 of the assessment order reads as under :-

"3.2 The plea of the assessee has been examined. Apart from DLF Ltd., the assessee has used borrowed funds for investments, capital work in progress and other loans and advances. Further, the assessee should have adjusted the advance given to DLF Ltd. for purchase of plots and land with the loan taken from DLF Ltd. In order to analyze the claim of the assessee it is essential to go through the provisions of section 36(1)(iii)."

12. Thereafter, AO has discussed the relevant provisions of section 36(1)(iii) and case laws. Nowhere, he has rebutted that the payment of loans and advances were not for the purpose of business or are not in the nature of business advances. What AO is suggesting that the assessee should have first adjusted the advances given to DLF Ltd. for the purchase of plots and land with the loan taken from DLF Ltd. Solely on this reason AO made the proportionate admissible deduction of interest and worked out the disallowance of interest expenditure. Ld. CIT (A) has categorically found that it is not in dispute that the assessee had huge interest free surplus funds and no disallowance u/s 36(1)(iii) can be made. We find that, this proposition that, if assessee has sufficient interest free funds, then no disallowance can be made if the sufficient interest free funds exceeds advances given, has been upheld by the decision of Tribunal in assessee's own case after taking note of judgements of Hon'ble jurisdictional High Court and Hon'ble Bombay High Court. Not only that, this precise issue was involved before the Tribunal in all the assessment years right from AYs 2011-12 to 2013-14, copy of which has been filed before us. In AY 2011-12, **Hon'ble Delhi High Court in ITA No.39/2019 vide order and judgment dated 18.01.2019** has upheld the contention that these advances were purely for the purpose of business and, therefore,

commercial expediency has been well established in this case and therefore, disallowance has rightly been deleted.

13. Now, this issue stands covered on the reasoning that, *firstly*, these advances were business advances and is covered under commercial expediency; and *secondly*, if the assessee had huge interest free funds which far exceeds the advances given, therefore, no deduction u/s 36(1)(iii) can be made. Here, in this case, on both the count, we hold that no disallowance can be made as these loans and advances were purely business advances which are not being rebutted by the AO except for making the disallowance on conjectures and hypothesis and what the businessman do first; and *secondly,* if assessee had surplus interest free funds then it can be presumed that the borrowed funds which have been utilized for some other business purpose, proportionate disallowance could be made. Accordingly, this ground raised by the Revenue is dismissed.

14. Insofar as disallowance u/s 14A is concerned it is an admitted fact that in AY 2014-15, no exempt income has been accrued to the assessee, therefore, no disallowance u/s 14A can be made.

15. Similar issues and facts are permeating in AY 2015-16 also wherein similar observation were made in para 3.2 is as under :-

> *"3.2 The plea of the assessee has been examined. Apart from DLF Ltd., the assessee has used borrowed funds for investments, capital work in progress and other loans and advances. Further, the assessee should have adjusted the advance given to DLF Ltd. for purchase of plots and land with the loan taken from DLF Ltd. In order to analyze the claim of the assessee it is essential to go through the provisions of section 36(1)(iii)."*

and then in para 3.5 as under :-

> *"3.5 Section 36(1)(iii) of the I.T. Act refer to "the amount of the interest paid in respect of capital borrowed for the purposes of business or profession". It is implicit in this provision that the capital so borrowed should not only be invested in the business, but that the amount borrowed should continue to remain in the business. This provision cannot be construed as enable an assessee to burden the business with interest even while taking the amount initially borrowed for the business, but subsequently taken out of the business by diverting it as interest free loans or loans on lower rate of interest."*

16. Ld. CIT (A) has given same reasoning which has been reproduced in para 5.3 of his order. Thus, there is no material change either on the facts or no new material has brought on record so as to divert from findings of earlier years, therefore, following the binding precedence in the earlier assessment years which are applicable in the nature of *mutatis mutandis* on this issue, the ground raised by the Revenue is dismissed.

15. Similar disallowance u/s 14A is made. It is an admitted fact that here, the assessee has received exempt dividend income of Rs 6,31,308/-, out of which the assessee had made suo moto disallowance of Rs.5,45,245/-. Ld. CIT (A) restricted the disallowance

to the extent of exempt income, therefore, we do not find any reason to interfere in such a finding in the light of the judgment of Hon'ble Delhi High Court in the case of Joint Investments Pvt. Ltd. and Cheminvest Ltd. (supra), therefore, this ground is dismissed.

16. In the result, both the appeals filed by the Revenue are dismissed.

Order was pronounced on 11th day of April, 2022.

Sd/-	**sd/-**
(DR. B.R.R. KUMAR)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 11.04.2022
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Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A)-XXV, New Delhi.
5.CIT(ITAT), New Delhi.

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