

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 758/Mum/2022 (A.Y. 2016-17)
ITA No. 759/Mum/2022 (A.Y. 2017-18)

Keva Construction Pvt. Ltd.
C/o. SH Kelkar and Company Ltd.
LBS Marg, Mulund West,
Mumbai-400080
PAN: AAFCK0631B

..... Appellant

Vs.

ACIT-15(2)(1),
Aayakar Bhavan, M.K. Road,
New Marine Lines,
Mumbai-400020

..... Respondent

Appellant by : Sh. Saurabh Bhat, C.A.
Respondent by : Sh. Tejinder Pal Singh, Sr. DR
Date of hearing : 13/07/2022
Date of pronouncement : 10/10/2022

ORDER

PER GAGAN GOYAL, A.M:

These appeals by the assessee are directed against the orders of National Faceless Appeal Centre, Delhi [hereinafter referred to as ('NFAC')] dated 29-03.2022 for the Assessment Years (AY) 2016-17 & 2017-18 respectively. The assessee has raised similar grounds of appeal in both the AYs. Firstly, we are

taking ITA No. 758/Mum/2022 for A.Y. 2016-17 as lead case. The assessee has raised the following grounds of appeal:

"1. The learned Commissioner of Income-tax (Appeals) National Faceless Appeal Centre, New Delhi [CITA], erred on facts and in circumstances of the case and in law, in confirming the disallowance of Rs. 63,00,000-00 u/s. 36(1Xiii) of the Income-tax Act, 1961 [the Act'] out of total interest expenditure incurred by the appellant.

2. The CITA failed to appreciate that the appellant had sufficient free funds and that the advances were given out of own funds, therefore, no disallowance u/s. 36(1)(iii) of the Act was called for:

3. The appellant prays to your Honours to delete the disallowance made.

4. The above grounds of appeal are without prejudice to one another, and the appellant craves leave to add, alter, amend, delete or modify any of the above grounds of appeal."

2. Brief facts of the case are that the assessee had filed return of income declaring loss of Rs. 2,34,74,111/-. The case was selected for complete scrutiny under the CASS. The assessee company is engaged in the business of investment segment and carries on investment in shares securities and other portfolio investments directly or through portfolio management scheme. The company is also involved in development and redevelopment of properties, lands and structures.

3. During the year under consideration company has taken loans from banks and others amounting to Rs. 57,19,29,788/- and also had debt free own funds to the extent of Rs. 51,43,66,364/-. During the year under consideration assessee had claimed interest of Rs. 6, 68, 43,105/-. During the FY 2015-16 assessee had given interest free loans and advances to three parties amounting to Rs. 6.06 cr. because of these interest free loans and advances AO issued a show cause to the

assessee that why the proportionate interest on these interest free loans and advances should not be disallowed u/s 36(1)(iii).

4. In response to the show cause assessee submitted its reply and stated that these interest free loans and advances were made out of assessee's own fund. He further stated that the amounts advanced interest free are business advances towards purchase of property. As and when the deals will be materialized these advances will be utilized towards the same. Further on purchase of such properties the income arising there from will be offered to tax.

5. To substantiate its legal argument assessee-company relied on the decisions of

- a) S.A. Builders Ltd Vs CIT (2007) 288 ITR-1 (SC.)
- b) CIT Vs Dalmia Cement (Bharat) Ltd (2002) 254 ITR 377(Del).
- c) Jurisdictional High court in the case of CIT Vs Reliance Utilities and Power Ltd (2009) 313 ITR 340 (Bom).
- d) East India Pharmaceutical Works Ltd. Vs. CIT 224 ITR 627 (SC.) [1997]
- e) Wool Combers of India Ltd. [1981] 7 Taxman 188 (Cal)

6. As far as factual argument of advancing the loans interest free for the purchase of property no evidence in any form has been provided by the assessee before and Ld. CIT (A).

7. AO was not agreed with the legal arguments of the assessee and as mentioned supra assessee furnished any evidence before the AO and Ld. CIT (A) to substantiate its factual contention.

8. We have carefully gone through the order of the AO, Order of the Ld. CIT (A) and considered the legal arguments taken by the assessee. There are two question arises before us while deciding this appeal.

- i) As assessee has not substantiated its factual contention but still advanced interest free loans and claiming full deduction of interest expenses incurred, can that be allowed?
- ii) Even if it is assumed that interest free loans and advances given not for the purposes of business but the same were provided out of own funds, in that situation can assessee claim whole interest expenditure?

9. We have gone through the various case laws relied upon by the assessee , particularly the decision of Hon'ble Supreme Court of India in East India Pharmaceutical Works Ltd. and Hon'ble Jurisdictional High court in the case of CIT Vs. Reliance Utilities and Power Ltd. (2009) 313 ITR 340(Bom). The relevant observations are as under:-

[1997] 91 Taxman 185 (SC) East India Pharmaceutical Works Ltd. v. CIT

Assessee paid interest on overdraft amount which had been raised by it to pay income-tax - High Court disallowed assessee's claim for deduction of interest holding that amount paid as income-tax was not a business expenditure - On appeal before Supreme Court assessee raised a new contention to effect that assessee having deposited entire profits in overdraft account and amount thus deposited in overdraft account being much more than income-tax liability and tax paid, it should have been presumed that in essence and true character taxes were paid out of profits of relevant year and not out of overdraft account for running of business and, consequently, interest paid by assessee on overdraft account relatable to payment of income-tax should be allowed as an admissible deduction

[2007] 158 Taxman 74 (SC) S.A. Builders Ltd. v. CIT (Appeals), Chandigarh

We agree with the view taken by the Delhi High Court in CIT v. Dalmia Cement (Bharat) Ltd. [2002] 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits.

[2009] 178 Taxman 135 (Bombay) CIT v. Reliance Utilities & Power Ltd.

Section 36(1)(iii) of the Income-tax Act, 1961 - Interest on borrowed capital - Assessee-company was engaged in business of generation of power - It had made investments in its sister concern from January, 2000 to March, 2000 - Assessing Officer was of view that sum of Rs. 213 crores was invested out of assessee's own funds and Rs. 147 crores was invested out of borrowed funds - Accordingly, Assessing Officer disallowed a part of interest claimed - On appeal, assessee-company contended that it had interest-free funds worth Rs. 398 crores comprising of share capital, reserves and surplus and depreciation reserves and, thus, entire investment had been made in sister concern out of interest-free funds - Commissioner (Appeals) accepted assessee's contention and directed Assessing Officer to allow entire amount of interest under section 36(1)(iii) - Tribunal upheld order of Commissioner (Appeals) - On instant appeal, it was seen that Commissioner (Appeals) as also Tribunal had recorded a clear finding that assessee had interest-free funds of its own which had been generated in course of year commencing from 1-4-1999 - Further, in terms of balance-sheet there was an availability of Rs. 398.19 crores including Rs. 180 crores of share capital - Whether if there are funds available, both, interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of interest-free funds generated or available with company, provided said funds are sufficient to meet investments - Held, yes - Whether since, in instant case, said presumption was clearly established in view of findings recorded by Commissioner (Appeals) and Tribunal, impugned order passed by said authorities was to be affirmed - Held, yes

[1981] 7 Taxman 188 (Cal) Wool combers of India Ltd. v. Commissioner of Income-tax

Section 40(a)(ii) of the Income-tax Act, 1961—Payments not deductible—In the case of any assessee—Assessee-Company had a bank account for all its financial transactions—In relevant accounting year it had profits of Rs. 27 lakhs which it deposited in said account—It, however, paid its advance tax of about Rs. 18 lakhs by taking overdraft from said account since account showed a debit balance at relevant time—Whether it could be said that advance tax was paid out of profits and not out of overdraft—Held, on facts, yes—Whether interest on overdraft taken to pay advance tax could be disallowed—Held, on facts, no

Facts

The assessee's previous year for the assessment year 1970-71 ended 31-12-1969. It enjoyed overdraft facilities from a bank and its account showed a debit balance of Rs. 1, 39,412 on 12-12-1969. The assessee paid advance tax of Rs. 18, 05,000 on 15-12-1969 which increased the overdraft as on 31-12-1969. The ITO, holding that the payment of advance tax could not be treated as business expenses, disallowed the proportionate interest amounting to Rs. 6,769 payable by the assessee to the bank. On appeal to the AAC, the assessee, inter alia, argued (i)that the said bank account was continuously operated for all financial transactions in which were embedded the income earnings of the assessee; (ii)that its profits for the accounting year in question, prior to payment of taxes, amounted to Rs. 27 lakhs and that almost the entire profit had gone into the said bank account by 15-12-1969; (iii)that its income was always higher than the tax payments made during the year; and (iv) that, therefore, the advance tax was paid out of business profits and not out of the overdraft account. The AAC held that although the profits of the business were embedded in the combined financial transactions, yet at the time of payment of advance tax, the assessee had no adequate cash surplus and had resorted to the overdraft specifically for this purpose. The AAC, therefore, sustained the ITO's order. On second appeal, the Tribunal upheld the AAC's order, rejecting the assessee's plea that taxes had been paid out of business profits and the overdraft had been utilised for the purpose of the business.

On reference:

Held

Having regard to the facts of the case, it appeared that the assessee's profits, which were deposited in the overdraft account, were sufficient to meet the advance tax liability. It should, therefore, be presumed that in essence and in their true character, the taxes were paid out of the profits of the year and not out of the overdraft account from the running of the business. The impugned interest

was, therefore, not relatable to the payment of advance tax and hence could not be disallowed in computation of the assessee's business income.

10. Moreover other than the legal ratio in favour of assessee, we found that the AO in his order has not done one to one matching of the entries related to interest free loans provided vis-a vis availability of funds (whether own fund used or interest bearing funds used) while passing the assessment order AO neither countered the legal submissions of the assessee nor the activity of one to one matching as mentioned supra was done.

11. With the given facts order of the AO is failed to establish its credibility while disallowing claim of the assessee. The said order will be called as passed under the conjunctions, surmises, and presumptions. Any order of AO when called to be passed under the conjunctions, surmises and presumptions can't be sustained and harm the interest of the assessee.

12. In view of the above order passed by the AO and Ld. CIT (A) is declared to be bad in law. It is further directed to allow the claim of the assessee u/s 36(1)(iii) amounting to Rs 63 lakhs.

13. In the result, appeal filed by the assessee is fully allowed.

ITA No. 759/Mum/2022 (A.Y. 2017-18)

14. The facts and the issue involved in this appeal also are similar to ITA No. 758/Mum/2022 (A.Y. 2016-17). Our decision for this appeal is also mutatis mutandis applicable. In view of the above order passed by the AO and Ld. CIT (A)

is declared to be bad in law. It is further directed to allow the claim of the assessee u/s 36(1)(iii) amounting to Rs. 63 lakhs.

15. In the result, appeal filed by the assessee is fully allowed.

Order pronounced in the open court on 10th day of October 2022.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai, दिनांक / Dated: 10/10/2022

SK, Sr.PS

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy. /Asstt. Registrar)
ITAT, Mumbai