IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “C”: NEW DELHI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 6738/DEL/2017
[Assessment Year: 2012-13

M/s Guardian Nutrition & Health Supplements Pvt. Ltd., A-258, Phase-I, Okhla Industrial Area, New Delhi-110020. PAN:AACCG2848K	Vs	DCIT, Circle 10(2), New Delhi.
APPELLANT		**RESPONDENT**
Assessee represented by	**None**	
Department represented by	**Sh. Anuj Garg, Sr. DR**	
Date of hearing	**21.11.2022**	
Date of pronouncement	**21.11.2022**	

O R D E R

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax(Appeals)-18, New Delhi, dated 20.06.2017, pertaining to the assessment year 2012-13. The assessee has raised following grounds of appeal:

> *“1) That in the facts and circumstances of the case, the CIT(A) erred in sustaining addition to the extent of Rs. 51,67,163/- made by A.O. as disallowance of interest, bank charges etc incurred by assessee company.*
>
> *2) That the appellant craves leave to add, alter, amend or drop any of the above grounds at the time of hearing.*”

2. The only effective ground is against the addition of Rs. 51,67,163/-. Facts giving rise to the present appeal are that in this case the assessee filed its return of income

declaring loss of Rs. 2,36,88,181/- on 28.09.2012. The case was selected for scrutiny assessment and the assessment u/s 143(3) of the Income-tax Act, 1961 (in short “the Act”) was framed vide order dated 31.03.2012. The Assessing Officer while framing the assessment noticed that the assessee had made payment of royalty amounting to Rs. 64,30,604/-, which was 1.5 times of the royalty expenses. The assessee company failed to deduct tax. Therefore, the Assessing officer made disallowance u/s 40(a)(i) of the Act amounting to Rs. 32,15,303/-. Further, the Assessing officer noticed that the assessee company had advanced a sum of Rs. 8,15,000/- to its related company Guardian Nutrition & Health Pvt. Ltd., but did not charge interest on such advance. The assessee company, however, claimed finance cost of Rs. 60,84,876/-. The Assessing officer, therefore, made disallowance u/s 36(1)(iii) of Rs. 60,84,876/- and assessed total loss at Rs. 1,43,88,000/- against the returned loss of Rs. 2,36,88,181/-.

3. Aggrieved against this the assessee preferred appeal before the learned CIT(Appeals), who partly allowed the appeal. The learned CIT(Appeals) while deciding the appeal restricted the disallowance to the extent of Rs. 51,67,163/-. Aggrieved against this the assessee is in appeal before this Tribunal.

4. At the time of hearing, no one attended the proceedings on behalf of the assessee. It is seen from the record that no one has been attending on behalf of the assessee. Therefore, the appeal is taken up for hearing in the absence of the assessee and is being decided on the basis of material available on record.

5. Apropos to the ground raised by the assessee learned DR vehemently supported the orders of the authorities below and submitted that there is no infirmity into the order

of the learned CIT(Appeals) as the learned CIT(Appeals) has also followed the finding of his predecessor in respect of the assessment year 2011-12.

6. We have heard learned DR, perused the material on record and gone through the orders of the authorities below. The learned CIT(Appeals) has decided the issue in para 5.2.3 of his order by observing as under:

> *"5.2.3 I have carefully considered the matter. A perusal of the assessment order and the contentions of the AR shows that the background of the disallowance and the arguments are same as for AY 11-12 except the following factual difference.*
>
> *(1) The details of advance and the source of funds are explained the same way as in AY 11-12.(PB-26)*
>
> *(2) The financial expenses of (Sch 24) Rs.60,84,876 includes Rs.3,50,504 on car loan and Rs.5,67,209 on bank charge and commission. Interest on cash credit comes to Rs.5i,67,i63/-(3) The amount due from Guardian Life Care P Ltd has increased from Rs.22,13,30,415/- to Rs.25,65,22,030/-(See Sch 19) The details of increase are not given. But it appears that the amount has not been repaid.*
>
> *(3) There are no details given of the construction of building. It appears that there is no improvement in the situation as prevailing in AY 2011-12.*
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> *5.2.3.1 Thus there is nothing new to make me depart from my findings for AY 2011-12 since the interest is not shown to be due to any other reason than the continuing loan making the debit balance in the cash credit account of IDBI Bank continue during this period, causing the interest charge. Incidentally, the cash credit account details for this year is also not furnished.*
>
> *5.2.3.2 In short, the AR has nothing new to say except repeating the same arguments as in AY 11-12.*
>
> *5.2.3.3 In the circumstances, I would again hold it against the assessee following my observations and conclusions for AY 11-12, which reads as follows.*
>
>> *5.2.3 With the facts thus set out in their proper perspective, the legal precedents provide useful guidance for me to decide the matter as under.*
>>
>> *(a) It is well settled that the burden of proof in such type of claim of allowance u/s 36(1)(iii) is on assessee. The Burden of proof in making a claim of deduction has been well delineated by Hon'ble Orissa HC in the*

case of IMFA Ltd. vs. CIT (1992) 193 iTR 344 (Ori.) where they held:

Section 36(1)(iii) of the Act provides that, in computing the income chargeable under the head "Profits and gains of business or profession", a deduction shall be allowed of the amount of interest paid in respect of capital borrowed for the purpose of business or profession. What is "borrowed money" has been construed by courts in England and by the Supreme Court in a number of cases. In Port of London Authority v. IRC [1922] 2 KB 599 (CA), Lord Stemdale M.R. observed that, in order that there be borrowed money, there must be a borrower and a lender. A similar view was expressed in CIT v. Bazpur Co-operative Sugar Factory Ltd. [1989] 1 77 ITR 469 (SC). The essence of interest is that it is a payment which becomes due because the creditor has not had his money at his disposal. It may be regarded either as representing the profit he might have made if he had used his own money, or conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation (see Westminster Bank Ltd. v. Riches [1947] 28 TC 159 (HL)).

The determinative question in a case of this nature is the source from which the assessee makes investments or advances. Where an assessee seeks to deduct certain items from his business profits, the onus of proving the same falls on him. The burden of proving a claim to an allowance or deduction is on an assessee. (See CIT v. Calcutta Agency Ltd. [1951] 19 ITR 1 91 (SC)).

If the assessee makes a claim to deduction in terms of section 36 of the Act for the purpose of computation of income referred to in section 28 of the Act, he has to place materials in support of his claim of entitlement to the deduction.

Section 36(1)(iii) relates to the amount of interest paid on capital borrowed for the purposes of the business, profession or vocation. The assessee has to satisfy the assessing authority that he is entitled to obtain deduction in accordance with the taxing statute. The burden is on the assessee to prove that a particular class of income is exempt from taxation. (See H.E.H. Nizam's Religious Endowment Trust v. CIT [1966] 59 ITR 582 (SC).

It was held in Nizam's case [1966] 59 ITR 582 (SC), that the burden is on the Revenue authorities to show that the income is liable to tax under the statute; but the onus of showing that a particular class of income is exempt from taxation lies on the assessee.

To earn the exemption, the assessee has to establish that his case clearly

and squarely falls within the ambit of the exempting provisions of the Act. The principles equally apply in cases of deductions claimed.

Therefore, the assessee was required to show that the amounts invested in or advanced to the subsidiary company came out of the assessee's own funds. The- Tribunal, with reference to the factual aspects, came to hold that the money utilised was from the borrowed funds. This essentially is an inference from factual aspects.

(b) The conditions for allowing any claim of deduction u/ s 36(l)iii) has been outlined in Marolia & Sons vs CIT [1981] 129 ITR 475 (Allahabad) (Also see Hotel Roopa vs CIT [2015] 57 taxmann.com 331 (Karnataka)) in the following manner:

It would be found from section 36(l)(iii) that three conditions must be established by an assessee for getting the benefit under the aforesaid clause:

(1) interest should have been payable,

(2) there should be a borrowing, and

(3) Capital must have been borrowed or taken for business purposes.

If the capital borrowed is not utilised for the purposes of the business, the assessee will not be entitled to deduction under this clause. In case, after having borrowed the capital for business purposes, the firm gives the same to its partners for their personal use or utilisation, the firm would not be entitled to claim deduction on the amount diverted for utilisation for other purposes or by other persons. It is settled that an assessee-firm cannot be entitled to claim deduction under clause (iii) of sub-section (1) of section 36 on the amount which is not used for the purposes of business but is given to the partners for their personal use.

(c) The Apex Court, in the case of S.A. Builders Ltd. v. CIT (Appeals) [2007/ 288 ITR 1/158 Taxman 74 also had an occasion to consider the provisions of Section 36(l)(iii). In that case, after a detailed examination of the provisions, the Supreme Court held that when a claim for deduction under Section 36(1)(hi) is made, the authorities should enquire as to whether the interest free loan was given as a measure of commercial expediency and on facts if it is so found, deduction should be allowed. The court also explained that the expression "commercial expediency" is an expression of wide import and includes such expenditure that a prudent businessman incurs for the purpose of business and that such expenditure

may not have been incurred under any legal obligation. After explaining what is commercial/business expediency, they observed in the said judgment as under :

"To consider whether one should allow deduction under s. 36(1 Kiii) of interest paid by the assessee on amounts borrowed by it for advancing to a sister concern, the authorities and the Courts should examine the purpose for which the assessee advanced the money and what the sister concern did with the money. That the borrowed amount is not utilized by the assessee in its own business but had been advanced as interest-free loan to its sister concern is not relevant. What is relevant is whether the amount was advanced as a measure of commercial expediency and not from the point of view whether the amount was advanced for earning profits.

(d) Thus where the assessee fails to prove that the loan advanced is not for business purpose or commercial expediency, interest attributable to that portion would call for disallowance.

This judicial view is well settled in a plethora of judgments and few of these are:

CIT vs H.R. Sugar Factory (P.) Ltd. [1990] 53 Taxman 63 (ALL), Milapchand R. Shah vs CIT [1965] 58 ITR 525 (Mad.), Akarshan Builders vs ITO [2015] 60 taxmann.com 138 (Karnataka) , Crescent Organics (P.) Ltd. vs DCIT 2014] 49 taxmann.com 128 (Bombay HC), C. R. Auluck and Sons (P.) Ltd. vs CIT [2014] 49 taxmann.com 21 (Punjab & Haryana), CIT vs Avery Cycle Inds Ltd. [2015] 56 taxmann.com 459 (Punjab & Haryana), CIT vs Subrata Roy [2013] 38 taxmann.com 324 (Allahabad), CIT vs Subrata Roy [2013] 38 taxmann.com 324 (Allahabad).

(e) This is all the more so when there is a finding that the loans were extended out of borrowed funds and not out of any credit balance available with the assessee-firm at that time.

One may refer to the judgment of jurisdictional HC in Punjab Stainless Steel Inds. Vs CIT 324 ITR 396(Del HC), where they held,

In the instant case, there was absolutely no finding recorded by the Tribunal that the interest free advances were made by the assessee to sister concern for its business purposes. There was no such finding by the Tribunal even with respect to the advances extended in the previous years. It was not the case of the assessee that it had so much surplus cash available with it at the time of extending those advances that the same could have been extended by it out of those surplus funds available to it. In

fact, the payments made to sister concern from cash credit account indicated to the contrary and showed that advances made during the financial year relevant to the assessment year 2001-02, were extended out of borrowed funds and not out of any credit balance available with the assessee-firm at that time. [Para 13]

(f) Two related aspects while considering the disallowance are that (i) notional addition for non charge of interest has been disapproved in cases like Shivnandan Buildcon (P.) Ltd. [2015] 60 taxmann.com 347 (Delhi) and Guwahati High Court, in Highways Construction Co. (P.) Ltd. v. CIT [1993] 199 ITR 702, (relied on by the AR) on the reasoning that any provision of the Income-Tax Act empowering the income-tax authorities to include in the income on notional basis, interest which was not due or not collected. (NB:In our case, the issue of course is not interest that is not allowable u/s 36(l)(iii) when interest bearing advances have been extended as interest free/ less interest bearing loan to third parties.)

(ii) There are several decisions like Reliance Utilities & Power Ltd. [2009] 313 ITR 340/1 78 Taxman 135 (Bom.), Hotel Savera [1999] 239 ITR 795/102 Taxman 247 (Mad), Tin Box Co. [2003] 260 ITR 637/[2004] 135 Taxman 145 (Delhi)) in support of the conclusion that when the assessee possesses mixed funds which include its own funds in sufficient quantity, a presumption that its own funds were utilized for the advances is to be drawn.

(g) However, it is also well accepted a view that while computing disallowance the availability of non interest bearing fund and capital reserve etc ought to be considered. The logic is well brought out in some of the judgments as discussed here below.

(i) CIT vs Vijay Solvex Ltd [2015] 59 taxmann.com 294 (Rajasthan)

9. It may be that the assessee on account of business expediency advanced money to sister concerns or other concerns at a lower rate of interest or did not charge interest that by itself does not prove that the assessee diverted interest-bearing loans to the said firms.

(ii) CIT vs Amod Stamping (P.) Ltd [2014] 45 taxmann.com 427 (Gujarat) :

In the case of Reliance Utilities & Power Ltd. (supra), the Bombay High Court has held that 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 the interest free funds generated or available

with the company, if the interest free funds were sufficient to meet the investments and, therefore, interest was deductible.

(iii) CIT vs Kajal Exports [2014] 49 taxmann.com 21 7 (Gujarat)

The Tribunal has rightly held that Rs. 97.26 lakhs interest-free advance were made whereas the assessee had interest-free fund to the tune of Rs. 95.80 lakhs available with it and, therefore, only for the remaining sum of Rs. 1.46 lakhs, it had confirmed the disallowance of the interest. [Paras 10 and 11]

(iv) Allahabad High Court in the case of CIT v. Radico Khaitan Ltd. [2005] 274 ITR 354/142 Taxman 681

The assessee company had sufficient fund other than the borrowed money for giving the amount in question as loan to its sister concern, which finding had not been specifically challenged in the present appeal. The conditions of s. 36(l)(iii) of the Act had been complied with and, therefore, the assessee company was entitled to full allowance of the 'amount of interest paid by it on borrowed capital.

(v) Hutchison Essar Telecom Ltd. vs JCIT [2013] 33 taxmann.com 642 (Delhi - Trib.)

There was no need to establish the nexus when it was proved that the assessee had its own funds which were much more than advances/investments made by assessee to its sister concern. Therefore, the disallowance deserved to be deleted.

(vi) Venus Records & Tapes (P.) Ltd. [2013] 33 taxmann.com 49 (Mumbai - Trib.)

Whether since assessee had its own funds in shape of share capital and share application money which was sufficient to meet amount advanced by it as interest free to its associate concerns, deduction claimed on interest paid on borrowed capital was to be allowed.

(h) Even as argued by the AR of appellant, the basis of disallowance may be restricted to the loans for the instant year only, if the interest on earlier loans have already been allowed in previous years. In CIT vs Sri Dev: 192 ITR 165(Kar) (Also Escorts Ltd. [2007] 104 ITD 427 (DELHI) ; Punjab Wool Combers Ltd. [2004] 1 SOT 114 (CHD.), G.R. Agencies 1 SOT 635(Luck))), it was held that if interest is allowed as being for business purpose, a different stand could not be taken by the Department in

subsequent year on the same loan. In that case, there was certain opening balance of advances made to partners during earlier years. No interest was charged from Partners of assessee who were given loan , however, assessee borrowed funds from third parties and claimed deduction of interest paid on such borrowings. It was held that since no addition had been made in earlier years, opening debit balance of partners could not be considered during year in question and enquiry had to be limited to increase in current year only.

5.2.4 I find that the AO has relied on the decision of Abhishek Industries of HC of Punjab & Haryana [2006] 156 Taxman 257 (Punjab & Haryana). The following portions of the judgment is pertinent to see.

As far as the issue of establishment of nexus of the funds borrowed vis-a-vis the funds diverted towards sister concern on interest free basis was concerned, the stand of the assessee that the onus of proving the nexus of funds available with the assessee with the funds advanced to the sister concerns without interest was on the revenue was not correct. Section 36(l)(iii) provides for deductions of interest on the loans raised for business purposes. Once the assessee claims any such deduction in the books of account, the onus will be on the assessee to satisfy the Assessing Officer that whatever loans were raised by the assessee, the same were used for business purposes. If in the process of examination of genuineness of such a deduction, it transpires that the assessee had advanced certain funds to sister concerns or any other person without any interest, there would be very heavy onus on the assessee to be discharged before the Assessing Officer to the effect that in spite of pending term loans and working capital loans on which the assessee is incurring liability to pay interest, still there was justification to advance loans to sister concerns for non-business purposes without any interest and, accordingly, the assessee should be allowed deduction of interest being paid on the loans raised by it to that extent. Even the plea of nexus of loans raised by the assessee with the funds advanced to the sister concerns on interest free basis might be pleaded to be out of sale proceeds or share capital or different account could not be accepted. [Para 14]
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If the plea of the assessee was accepted that the interest free advances made to the sister concerns for non-business purposes was out of its own funds in the form of capital introduced in business, that again would show a camouflage by the assessee as at the time of raising of loan, the assessee would show the figures of capital introduced by it as a margin for loans being raised and after the loans were raised, when substantial amount was diverted to sister concerns for non-business purposes without interest, a plea was sought to be raised that the amount advanced was out of its capital, which in fact stood exhausted in setting up of the

unit. Such a plea may be acceptable at a stage when no loans had been raised by the assessee at the time of disbursement of funds. This would depend on facts of each case. [Para 16]

5.2.5 However, the same (P & H) HC in a later desison and in the wake of subsequent decisions of SC in S A Builders and Munjal Sales, has held as under, after considering this decision of Abhishek Industries:

> *4. On the other hand, counsel for the assessee while referring to the decision of the Supreme Court in A. Builders Ltd v. CIT (Appeals) [2007] 288 ITR H and Munjal Sales Corpn. v. CIT [2008] 298 ITR 298[3] (SC), submitted that once a finding of fact has been recorded by the Tribunal to the effect that the interest-free loan given to the sister concern was for a business consideration, then in that situation merely on the basis of the observations made in Abhishek Industries Ltd.'s case (supra), the order of the Tribunal in deleting the disallowance of interest on the ground that there is no nexus between the borrowings and interest-free advances made to sister concern, cannot be quashed.*
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> *5. After hearing the counsel for the parties, we do not find any substance in the arguments raised by the counsel for the revenue.* As *per section 36(l)(iii) of the Act, the amount of interest paid in respect of capital borrowed for the purposes of the business or profession has to be allowed as a deduction in computing the income under section 28 of the Act. Once a finding of fact has been recorded that the interest paid in respect of the advances was for business consideration, then the deduction has to be allowed to the assessee while computing the income. Merely because the interest-free loan has been advanced to the sister concerns, no such inference can be drawn that the said advances were not for any business connection or purpose. The Supreme Court in S.A. Builders Ltd's case (supra) has held that when the assessee borrowed the fund from the bank and lent some of it to its sister concerns as an interest-free loan, then the real test to allow the interest as deduction under section 36(l)(iii) of the Act is whether this was done for commercial expediency or not. Similar view has been taken by the Supreme Court in Munjal Sales Corpn. 's case (supra).*

5.2.6 Similarly in a later judgment, it was held in CIT vs Southern Bottlers (P.) Ltd [2013] 35 taxmann.com 412 (Punjab & Haryana) after considering all these decisions, that:

The commercial expediency cannot be mere availing of interest free loan from one and giving interest free loan to another. The assessee in order to prove commercial expediency has to prove that it was a prudent act of a reasonable

person in the trade to avail interest free loan and to advance interest free loan to some other persons. The assessee cannot be intermediatory for availing and granting interest free loan. Since such question has not been examined, we deem it appropriate to set aside the orders of the Commissioner of Income Tax (Appeals) and that of the Tribunal and direct the Commissioner of Income Tax (Appeals) to examine the said question and decide the appeal on merits in accordance with law.

5.2.7 Similarly in C.R. Auluck and Sons (P.) ltd. [2014] 49 taxmann.com 21 (Punjab & Haryana), the HC in a sense agreeing with the views of the authorities that the 'commercial expediency' for the purposes of examining the applicability of the ratio of the decision of S.A. Builders ltd. (supra), has to be seen with the reference to the loan giver and not the loan receiver, upheld the decision with the following remarks,

> *8. The Tribunal, while dismissing the appeal of the assessee, had also concluded that there was no commercial expediency and the interest-free borrowed funds had been advanced for non-business purposes and had accordingly disallowed interest amounting to Rs. 14,82,695 being interest attributable to the interest-free advances made by the assessee to its sister concern out of interest- bearing borrowed funds.*
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> *xxx*
>
> *10. Referring to the judgments relied upon by learned counsel for the assessee in Malayalam Plantation Ltd (supra) and S. A. Builders Ltd 's cases (supra), the legal proposition enunciated therein is well recognised but in view of the finding concurrently recorded by the Assessing Officer, the Commissioner of Income-tax (Appeals) and the Tribunal that commercial expediency was not involved in the transaction, the same do not help the assessee.*

5.2.8 Explaining further the concept of business expediency, the same HC of P & H in yet another decision in Bright Enterprises (P) Ltd vs CIT [2015] 61 taxmann.com 73 (Punjab & Haryana) explained,

> *17. The Assessing Officer's view that the advance* was not *for business purposes as the appellant had no business dealings with the sister company is erroneous. Commercial expediency in advancing loans does not arise only on account of there being transactions directly between the holding company and the subsidiary company or between the group companies inter se. The two companies may even be in a different line of business. It would make no difference. It would still be commercially expedient for one group company to advance amounts to another group company, if, for instance, as a result thereof the former benefits. In the present case, as we*

> *have already demonstrated, there would be a direct benefit on account of the advance made by the appellant to its sister company if the same improves the financial health of the sister company and makes it a viable enterprise. We hasten to add that it is not necessary that the advance results in a positive tangible benefit. So long as the amount is advanced with that view in mind or with any other commercially expedient view in mind that is sufficient.*

5.2.9 A distillation of all the above judgments reveal that the following broad postulates can be culled out and laid down in this matter:

(a) If the assessee claims any deduction on account of interest paid on borrowed funds or claims any other deduction, then the initial burden is upon the assessee to show that borrowed funds were utilized for business purposes and thus the assessee is required to substantiate its claim;

(b) If the assessee discharges the primary onus, then for disallowing its claim, the burden shifts to department which is required to establish the nexus between the borrowed funds and funds advanced free of interest or funds invested for non-business purposes, for example funds invested in shares and

(c) If despite directions of the department, the assessee fails to furnish any material to substantiate its claim for deduction, then adverse inference can be drawn against the assessee.

(d) If the assessee has borrowed funds and also interest free deposits and profits etc., and keeps the same in the mixed or common account, then no presumption can be drawn that the interest free advances or investments made by the assessee were only out of borrowed funds. On the other hand, if entire profits are deposited by the assessee into the over-draft account and if such profits, surplus or reserves etc., are found to be far in excess then the amount invested in shares and bonds, the presumption has to be drawn that the investments in shares and bonds etc., were not out of borrowed funds but from such profits and surplus etc., unless contrary is established.

(e) Facts of each case and each assessment year and the relevant accounts of the assessee are to be thoroughly examined for allowing or disallowing the claim for deduction and no general presumption can be drawn in absence of specific findings recorded by the authorities.

5.2.10 However, while the law laid down by the courts leads to the principles to be followed, the matter is essentially factual. Indeed the Hon'ble Delhi HC has said in the cases of Elmer Havell Electrics vs. CIT 277 ITR 549 9Del.) and Tin box Co. 260 ITR 637 9Del.) has said that;

Whether there existed any commercial expediency for the assessee to transfer the said amount to one of its sister concerns or not was primarily a question of fact. The contention that the funds were advanced from self-generated funds of the assessee and that there was a need for that purpose, was again a question of fact.

5.2.11 When the facts of our case are analysed on the anvil of principles enunciated in these decisions, I find that the appellant has not spelt out why the funds were diverted in the first place. Or what was the business expediency involved in extending the interest free loan. The only plea taken is that the loan has been given out of FDRs en-cashed and therefore no disallowance could be made. However, what is of importance is what was it used for in the hands of the recipient and whether there is any business expediency involved therein as far as the assessee is concerned. In fact a case close to ours has been decided by the Hon'ble Delhi HC in Punjab Stainless Steel Inds.vs CIT [2011 j 196 Taxman 404 (Delhi) :

> *7. A perusal of the assessment order would show that the assessee did not claim before him, that the advances to M/s. Kesho Ram Industries were actuated by way of commercial expediency. The contention before the Assessing Officer was that the interest free advances to M/s. Kesho Ram Industries were made out of interest free funds available with the assessee firm. No case of commercial expediency was set up before him. From a perusal of the order passed by the CIT(A), we find that the plea of commercial expediency was not set up before him as well. The assessee firm did not claim before him that the advances to M/s. Kesho Ram Industries were in the business interest of the assessee firm and were a measure of commercial expediency. The plea of commercial expediency in advancing the loan was set up for the first time before the Income-tax Appellate Tribunal. The assessee, however, failed to make out a case of commercial expediency before the Tribunal. During the course of arguments before us the assessee did not try to make out a case of commercial expediency in extending interest free advances to M/s. Kesho Ram Industries. The assessee did not tell the Tribunal as to what business interest of the assessee firm was sought to be achieved by making interest free advances to M/s. Kesho Ram Industries and in what manner that interest was served. The assessee was required not only to claim commercial expediency but also to establish it from the material available to the Assessing Officer. It has not even made such an attempt.*
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> *8. In Elmer Havell Electrics v. CIT [2005] 277 ITR 509 (Delhi) the assessee had borrowed funds while giving interest free loan to its sister concern. The Tribunal held that there was no commercial expediency in*

extending the interest free loan to the sister concern. It was held by this Court that whether there existed any commercial expediency for the assessee to transfer amount in question to one of its sister concerns and whether the funds were advanced from self-generated funds of the assessee and there was a need for that purpose, were questions of fact and the Tribunal was the final fact-finding authority in this regard.

5.2.12 Explaining the concept of business expediency and the applicability of sec 36(l)(iii), the Hon'ble HC held against the assessee in this manner:

11. In view of the provisions contained in section 36(l)(iii) of Income-tax Act, the interest paid by the assessee in respect of capital borrowed for the purpose of business or profession is to be allowed as a deduction. Hence, the question to be considered in a case such as the one before us is as to whether the interest-free advance was made by the assessee for commercial expediency or not. If the advances were not made by the assessee for a business purpose of the assessee firm, interest paid by the assessee on that part of the borrowed capital which is commensurate with the amount of the interest free advances extended by it cannot be said to have been paid for the purpose of its business.

12. The commercial expediency, in our view, would include such purpose as is expected by the assessee to advance its business interest and may include measures taken for preservation, protection or advancement of its business interests. The business interest of the assessee has to be distinguished from the personal interest of its directors or partners, as the case may be. In other words. *there has to be a nexus between the advancing of funds and business interest of the assessee firm. The appropriate test in such a case would be as to whether a reasonable person stepping into the shoes of the directors/partners of the assessee firm and working solely in the interest of the assessee firm/company*. *would have extended such interest-free advances. Some business objective should be sought to have been achieved by extending such interest free advance when the assessee firm/ company itself is borrowing funds for running its business.*

It may not be relevant as to whether the advances have been extended out of the borrowed funds or out of mixed funds which included borrowed funds. The test to be applied in such cases is not the source of the funds but the purpose for which the advances were extended.

13. The learned counsel for the appellant has referred to the decision of the Supreme Court in Murijal Sales Corporation v. CIT [2008] 298 ITR 298. In that case it was held by the Tribunal that the assessee had given

interest free loan in the assessment year 1992-93, out of its own funds and not from interest beating loan taken by the firm from the third party and, consequently, the assessee was entitled to claim deduction under section 36(l)(iii) of the Act. It was observed by the Supreme Court that the Tribunal had held that the loans were given for business purposes. It was further observed that similarly for the assessment year 1 993-94, the Tribunal had taken the view that the loans given, to the sister concern of the assessee were for business purposes. The loans given by the assessee in August/September, 1991 to its sister concern were wiped out in the assessment year 1997-98. The Court was of the view that once the Tribunal had found that the loans were advanced for business purposes and the interest paid by the assessee did not exceed 18 per cent per annum, the assessee was entitled to deduction under section 36(l)(iii) read with section 40(b)(iv) of the Act. As *regards a small interest free loan of Rs.5 lakhs extended by the assessee during the assessment year 1995-96, the Court was of the view that since the opening balance as on 1st April, 1994 was Rs.1.91 crores whereas loan given to the sister concern was a small amount of Rs.5 lakhs, profits earned by the assessee during the relevant year were sufficient to cover the loan of Rs.5 lakhs. The assessee before the Supreme Court succeeded on the peculiar facts of the case before the Court. However, in the present case, there is absolutely no finding recorded by the Tribunal that the interest-free advances were made by the assessee to M/s. Kesho Ram Industries for its business purposes. There is no such finding by the Tribunal even with respect to the advances extended in the previous years. It is not the case of the appellant before us that it had so much surplus cash available with it at the time of extending these advances that the same could have been extended by it out of those surplus funds available to it. In fact, the payments made to M/s. Kesho Ram Industries from CC 40 account indicate to the contrary and show that advances made during the financial year relevant to the assessment year 2001-02, were extended out of borrowed funds and not out of any credit balance available with the assessee firm at that time. Therefore, this judgment is of no help to the appellant.*

14. The learned counsel for the appellant has also referred to CIT v. Tin Box Co. [2003] 260 ITR 637 (Delhi). We find that in the case of Tin Box Company (supra) the capital of the firm and interest-free unsecured loans available with the appellant far exceeded the amount advanced to the sister concern in all the years under appeal. The question as to whether the loans to the sister concern were extended for commercial expediency or not was neither raised nor examined in that case. Considering the decision of Supreme Court in S.A. Builders Ltd.'s case (supra), what is relevant in such a case is as to whether the loan was extended for any commercial

expediency or not and, therefore, it would be immaterial whether the assessee firm had interest-free funds available to it or not.

15. The learned counsel for the appellant has also lastly referred to CIT v. Sridev Enterprises [1991] 192 ITR 165 (Kar). In the case before the Karnataka High Court, it was found that in past years the assessee's claims for deduction were allowed in respect of the sums advanced during those years and a departure from that finding in respect of the amount advanced during the previous year would result in a contradictory finding and it would not be equitable to permit the Revenue to take a different stand in respect of the amounts which were subject-matter of the previous year. We find that no such argument was advanced by the appellant before the Income-tax Appellate Tribunal. We, therefore, do not deem it appropriate to allow the argument to be raised in an appeal under section 260A of Income-tax Act, particularly when the advances made by the assessee firm do not stand the test of commercial expediency laid down by the Supreme Court in the case of S.A. Builders Ltd. (supra).

(b) Thus notably in this case, the contention before the Assessing Officer or CIT(A) was that the interest free advances to its sister concern were made out of interest free funds available with the assessee firm. No case of commercial expediency was set up before him. The issue of commercial expediency was brought for the first time before the ITAT but could not be substantiated. It was clearly held by the HC that the assessee was required not only to claim commercial expediency but also to establish it from the material available to the Assessing Officer. It had not even made such an attempt.

5.2.13 Our facts are similar. The appellant while unsuccessfully explaining the nature of source (which is the cash credit account in any case) has not made out any case for business expediency. Hence its case has to fail.

5.2.14 On facts also the appellant has no ground to succeed. I have examined the cash credit account submitted by the appellant as follows.

Date	Particulars	Debit	Remarks
06.07.10	Being fund transferred to ICICI Bank GLPL through RTGS dated 06.07.10	75,00,000	Encashment of FDR with ICICI Bank funds of Rs. 88,00,000/- transferred to IDBI bank on 06.07.2010 and then advanced Rs. 75,00,000/- to Guardian Lifecare Pvt. Ltd. (GLPL)
06.08.10	Ch no. 019365, issued to Guardian Lifecare Pvt. Ltd. (GLPL)	15,00,000	Encashment of FDR with ICICI Bank on 06.08.10 and amount of Rs. 15,00,000/- advances to GLPL

06.08.10	Being RTGS issued to GLPL dated 06.08.10	50,00,000	Out of encashment of FDR with ICICI Bank & transferred to IDBI Bank i) Rs. 40,00,000/- on 04.08.10 ii) Rs. 30,00,000 on 05.08.10 A sum of Rs. 50,00,000/- advanced to GLPL on 06.08.10
12.11.10	Amount paid to GLPL ICICI Bank through RTGS dated 12.11.10	1,50,00,000	Out of encashment of FDR on 10.11.2010 with ICICI Bank (Rs.1,00,00,000/-) and transferred to IDBI bank alongwith Op. Balance amount (Rs.1,00,00,000/-) advanced to GLPL
06.12.10	Ch no. 021548, issued to Guardian Lifecare Pvt. Ltd. (GLPL)	85,00,000	Out of encashment of FDR on 06.12.10 with ICICI Bank & advanced to GLPL on 07.12.10
06.01.11	Ch no. 021648, issued to Guardian Lifecare Pvt. Ltd. (GLPL)	85,00,000	Out of encashment of FDR on 05.1.11 with ICICI Bank & advanced to GLPL on 07.1.11
05.02.11	Ch no. 026707 issued to Guardian Lifecare Pvt. Ltd. (GLPL)	85,00,000	Out of encashment of FDR on 05.2.11 with ICICI Bank & advanced to GLPL on 05.2.11 Rs. 85,00,000
05.03.11	Ch no. 026723 issued to Guardian Lifecare Pvt. Ltd. (GLPL)	85,00,000	Out of encashment of FDR on 05.3.11 with ICICI Bank & advanced to GLPL on 05.3.11 Rs. 85,00,000
31.03.11	Ch no. 026707 issued to Guardian Lifecare Pvt. Ltd. (GLPL)	85,00,000	Out of encashment of FDR on 31.3.11 with ICICI Bank & advanced to GLPL on 31.3.11 Rs. 85,00,000
31.03.11	Ch no. 026707 issued to Guardian Lifecare Pvt. Ltd. (GLPL)	1,70,00,000	Out of encashment of FDR on 31.3.11 with ICICI Bank & advanced to GLPL on 31.3.11 Rs. 1,70,00,000

(ii) We can see some transactions. On 12/11/10 an amount of Rs. 1.15 cr has been advanced to the sister concern claimed to be out of credit of FDR maturity of Rs. 1 cr on 10/11/10. The facts depicted in the CC account belies this. Let us see the transactions as depicted therein.

Date	Description	Date	Ch no. etc.	Amount (Rs) Dr	Amount (Rs) Cr	Balance
8/11/2010						1,40,89,762 Dr
10/11/2010	At Surjapur RTGS/ICI Guardian Nutrition and	10.11.2010			1,00,00,000	40,89,762Dr

	health Ch 10314038265					
11/11/2010	At CCU-Delhi/ MScontracter	11/11/2010	6438	4,95,000/-		45,84,762 Dr.
12/11/2010	At CCU/ Delhi/Sanyog	12.11.2010	6419	2193		45,86,955 Dr
12/11/2010	At CCU/ Delhi/Lucknow Medical Agency	12.11.2010	6418	21088		46,08,043 Dr.
12/11/2010	At CCU/Delhi/ The Medimorm	12/11/2010	6420	86047		46,94,090 Dr
12/11/2010	At CCU/Delhi/ Kapb ro Agency	12/11/2010	6417	17370		47,11,460/-
13/11/2010	At CCU/Delhi/ Kapbro Agency	13.11.2010	6391	704		47,12,164 Dr
15/11/2010	At CCU/Delhi/ SBMarket Zone	15.11.2010	6432	1680		47,64,285Dr
15/11/2010	At CCU-Raj Zone serial	15/11/2010	6431	1,39,435		49,03,720 Dr
15/11/2010	At Surjapur RTGS/IBKLH10319004480/ Guardian Water Resources Pvt. Health	15/11/2010		1,25,00,00,000		1,74,03,720 Dr
15/11/2010	At Surjapur RTGS/IBKLH10319004503/ Guardian lifecare Pvt. health	15/11/2010		1,15,00,00		2,89,12,017Dr

Thus the debit balance on 15.11.2010 shows that Rs. 1 crore wa already utilized for payment of Rs. 1.25 crore to Guardian Water Resources and not available for loan to Guardian Lifecare Ltd.

5.2.15 I find that Guardian Lifecare Ltd is the holding company. The financial expenses of (Sch 19) Rs.34,81,668 includes Rs.l,98,694 on car loan and Rs.5,32,238 on bank charge and commission. Interest on cash credit comes to Rs.27,50,736/-. The details of interest charged on IDBI Bank CC Account has also been furnished. It was explained that (see submission on 5/6/17) the money was taken from maturity of FDR(No proper evidence produced not the complete ICICI bank a/c copy) then transferred to IDBI account and from there to associate concerns. However, the complete link has not been explained with corresponding documents.

5.2.16 It was further explained that the money was capital advance for the purpose of construction of a building to be shared jointly. Land was acquired but the building could not be constructed till 31.3.11.

(b) A copy of Resolution of the appellant company dated 16/6/2010 has been filed and this, inter alia, reads as under:

Guardian Lifecare Private Ltd. is an owner of the property situated at Plot No. 52,

Sector-34, Gurgaon and willing to construct it corporate office. They will provide the space 12,500 sqft build up area in the said property for 15 years without any monthly rent, security and maintenance charges to Guardian Nutrition and Health Supplements Private Limited.

(c) Thus the land was already in place by the time further funds was pumped in and no improvement has been made thereafter because of delay in approval. The correspondence for the construction or approval has not been furnished. The fund mainly is for construction of their corporate office with a promise that 12,500 sft of rent-free area would be provided to the appellant for 15 years .But during the year, the advance has been used for the benefit of the payee company, while loss of interest of FDR and the interest payment on CC account has been incurred by the appellant. Further from the analysis above, the continuing debit balance in the current account before and after the advance shows that the corresponding interest is attributable to this loan and it is not out of FDR per se, whose credit has not been able to wipeout the debit balance in the first place.

Further I find that there are other discrepancies as well . For example on 7/6/2010 an amount of Rs.l cr has been paid to the payee company. This raises doubt as to how before the resolution dated 16/6/2010, the amount was advanced. There is also interim credits received from Guardian Life care e.g.26/ 7/2010 Rs. 20 lakh. Similarly on 6/ 8/ 2010, payment of Rs. 50 lakh made to Guardian Life care is paid back on different dates 10/8/2010, 13/08/2010, 17/8/10 and 18/8/10. The complete picture in the form of inter transactions has not been submitted. The balance sheet also shows that the amount receivable from Guardian Life care is shown at Rs. 24,04,90,620 (Sch 12) . Thus in absence of the complete information, the least that can be said is that the appellant has not been able to prove the business expediency.

In the aforesaid premises, the contentions have to fail. However, the interest on cash credit being Rs. 27,50,736/-, the disallowance is limited to that extent.

5.2.17 The ground is partly allowed."

7. The assessee has not furnished any evidence to rebut the finding on facts arrived by the learned CIT(Appeals). Therefore, we do not see any reason to disturb the finding of the learned Cit(Appeals), same is hereby upheld. The ground raised by the assessee is dismissed.

4. Appeal of the assessee is dismissed.

Order pronounced in open court during the course of hearing on 21st November, 2022.

Sd/-	**Sd/-**
(NARENDRA KUMAR BILLAIYA)	**(KUL BHARAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MP

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI