IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F' NEW DLEHI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI N.K. CHOUDHRY, JUDICIAL MEMBER

ITA No. 7322/Del/2018
Assessment Year: 2015-16

Addl. CIT, Range-7, New Delhi.	VersuS	M/s. Power Link Transmission Ltd., 10th Floor, DLF Tower-A, District Centre, Jasola, New Delhi. **PAN: AABCT7775M**
(Appellant)		(Respondent)

Appellant by : Sh. Vishal Kalra, Ld. Adv.
Ms. Sumisha, Ld. CA
Respondent by : Sh. Vinod Kumar, Ld. CIT-DR

Date of hearing: 04.01.2023
Date of order : 16.01.2023

ORDER

PER N.K. CHOUDHRY, J.M.

This appeal has been preferred by the Revenue Department against the order dated 30.08.2018, impugned herein, passed by the learned Commissioner of Income-tax (Appeals)-38, Delhi (in short "Ld. Commissioner"), u/s. 250(6) of the Income-tax Act, 1961 (in short 'the Act') for the assessment year 2015-16.

2. In the instant case, the Assessee, being a joint venture of Tata Power Company Limited and Power Grid Corporation of India Ltd., set up to construct, operate and maintain 1,116 kilometres of five 400 KV double circuit transmission lines and one 220 KV double circuit transmission line from Siliguri (in West Bengal) via Bihar to Mandola (in Uttar Pradesh) under the "build-Own-Operate-Transfer" ("BOOT") basis.

2.1 The Assessee by filing its return of income on dated 30.11.2015 for the year under consideration declared a total income of Rs.15,39,83,940/- and book profit of Rs.1,18,71,55,441/- and paid taxes on book profits under the provisions of section 115JB of the Act.

2.2 The case of the Assessee was selected for scrutiny, resultantly the AO issued the statutory notices and ultimately made the addition of Rs.4,76,95,802/- on account of disallowance of interest u/s. 36(1)(iii) of the Act by holding as under :

> *"Besides this, there are a large number of other case laws in which the different Courts in the country have held that the funds attributable to interest payments must be utilized for the purpose of business. From the details submitted by the assessee company and discussion as above, it is held that the assessee company used substantial amount of funds as investments, a purpose other than that of its business. Therefore, the proportionate amount of interest paid on account of funds utilized as investments is considered an expense not eligible to be allowed within the*

provisions of section 36(1)(iii) of the Income Tax Act, 1961, and is disallowed being interest cost incurred for the purpose other than the purpose of business by the assessee company.

Therefore, a total disallowance under section 36(1)(iii) of the Income Tax Act, 1961 is made and added back in the income of the assessee company for the assessment year 2015-16 being considered as excessive interest payment by the company on account of funds not utilized for the purpose of business.

[Addition:- Rs.4,76,95,802/-]

3. The Assessee, being aggrieved, challenged the said addition/disallowance made by the Assessing Officer, before the ld. Commissioner, who by impugned order, deleted the said addition/disallowance.

4. The Revenue Department, being aggrieved, has preferred this appeal which is under consideration before us.

5. Heard the parties and perused the material available on record. We observe that identical additions/disallowances u/s. 36(1)(iii) of the Act, have also been made, in the assessment orders passed for the A.Yrs. 2010-11 and 2012-13 as well, which were deleted by the then ld. Commissioners *vide orders dated 09.04.2014 and 20.01.2016 passed in appeals no. 98/2012-13 and 857/CIT-7(A)/2014-15 for the AYs 2010-11 and AY 2012-13 respectively,* and the Ld. Commissioner in this case by following the said orders passed

by its predecessor, deleted the addition/disallowance under challenge by concluding as under:

> ***4.2*** *I have carefully considered the facts of the case, the assessment order and the submissions made on behalf of the appellant. I find that an identical issue has been decided by my predecessor in favour of the appellant for AY 2012-13 vide order dated 20.01.2016 appeal no. 857/CIT-7(A)/2014-15 in which he has relied on a decision of his predecessor in favour of the appellant for AY 2010-11 vide order dated 09.04.2014 in appeal no. 98/2012-13 where the CIT(Appeals) had held as under:-*
>
> > *"6. Ground No. 2 is in respect of disallowance under section 36 (1)(iii).*
> >
> > *6.1. The AO held that the appellant company used substantial amount of funds which were borrowed as investments, which was not the business of the company. Therefore, the AO disallowed proportionate interest paid on account of funds utilized as investments stating that it was for non business purposes.*
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> > *6.2. The appellant on the other hand stated that the loans borrowed and the utilization of funds was purely for business purposes. A part of the loans was utilized for investment in debt oriented funds. These funds were the appellant's own funds. The balance funds were used for investment in banks. The appellant stated that it had entered into a loan agreement with the lenders of capital. As per the agreement, the appellant was compulsorily to keep a deposit in the bank and not withdraw it.*
> >
> > *6.3. The appellant has quoted the case of the Hon'ble Supreme Court in Madhav Prasad Jatia vs. CIT, AIR 1979 SC 1291: 118 ITR 200, 208.*
> >
> > *6.4. The judgment of Bombay High Court in the case of CIT v Reliance Utility & Power Ltd. as well as Woolcombers of India Ltd. and of the apex court in the case of East India Pharmaceuticals Ltd. has held that if there are funds available with the appellant then the presumption would arise that investment would be out of interest free funds generated or available with the company, if the interest free funds were sufficient to meet the investment. The judgment of S A Builders Ltd. v CIT held that what is relevant is whether the amount was advanced as a measure of commercial expediency. The judgment of the Hon'ble Delhi High Court in the case of CIT v Dalmia Cement Ltd. has held that it should be established that there was nexus between the expenditure and purpose of the business.*
> >
> > *6.5. As per section 36(l)(iii) the clause envisages the fulfillment of three conditions before interest can be allowed as a deduction:*
> >
> > *(1) There should a borrowing;*
> >
> > *(2) Capital must have been borrowed for business purposes; and*
> >
> > *(3) Interest should have been paid or payable in respect thereof*

6.6. Borrowal implies a consensual act: The word 'borrow' has not been defined in the statute and, therefore, its dictionary meaning has to be looked up. The meaning of the word 'borrow' as given in the Shorter Oxford Dictionary is to take (a thing) on security given for its safe return. Since borrowing implies a consensual act by a debtor receiving money from a creditor, it would not cover a case of any and every liability. Borrowing money and payment or interest is a mere commercial transaction. Where the appellant, a public limited company, carrying on the business in manufacture of sugar, owning about 2000 acres of land on which it grew sugarcane, borrowed a certain sum which was credited to the agricultural section of the appellant, it was held that the interest payable on the borrowings credited to the agricultural section was an admissible deduction. The borrowing must be a genuine borrowing and not a bogus one. The borrowing may be on a permanent footing such as by way of debenture loan or a spasmodic one such as from year to year, or for short term such as by way of overdrafts from banks, or loans from time to time.

6.7. The amount should be borrowed for the purposes of the business. The moneys should be borrowed by the appellant for purposes of the appellant's business. Further, the expression 'for the purpose of the business' may take into account not only the day to day running of a business but several other matters. A borrowing diverted from business would cease to be a borrowing for purpose of business, so that the interest proportionate to such diverted funds is liable for disallowance. In order to be allowable as expenses, it should be in respect of business which was carried on by the appellant and the profits of Which are computed and assessed, and should be incurred after the business is set up. Where the expenses were in connection with or related to a business which was yet to commence, the decision of the Tribunal in disallowing the deduction claimed by the appellant was correct. Interest on money borrowed for investment in a joint venture company could be treated as one borrowed for appellant's business and therefore deductible. Where an appellant borrows money for expansion of its existing business, the interest paid thereon is allowable.

6.8 In state of Madras vs. Coelho (GJ), the Supreme Court has held that, in ordinary commercial practice, payment of interest is taken as a revenue expenditure. The money borrowed must be for the purposes of the appellant's business or profession that is carried on during the year of account.

6.9. In respect of interest paid, deduction permissible under this clause is in respect of interest as distinguished from other kinds of compensation. Interest is a permissible deduction under this clause only if it has been 'paid'. It need not have been actually paid in cash. It may have been paid by way of adjustment in accounts by any equivalent mode when the accounts are maintained on the mercantile basis. Interest on borrowed capital is allowable under this clause.

6.10. The issue whether borrowed capital had been actually used for business is one relating to facts and does not give rise to a question of law. Even if it were a question of law, it may not give rise to a substantial question of law where the appellant agrees to pay interest on loan originally treated as interest free. The inference that borrowing is for non-business purposes on the particular facts of the case may be a question of fact. But it may give rise to a question of law where the inference does not follow the facts of the case.

6.11. It is quite apparent that the appellant is not incurring any such expenditure which is not a business expenditure. All expenditure has been incurred for the purpose of business. The appellant had borrowed funds which was for business purposes and was paying interest on these funds. ***In view thereof the addition of Rs.6,45,21,521/- is deleted. The ground of appeal is ruled in favour of the appellant."***

4.5 *Since the facts of the case are similar in the present appeal, following the above decision,* ***disallowance of Rs. 4,76,95,802/- u/s 36(1)(iii) of the IT Act 1961, made by the assessing officer is deleted*** *and grounds of appeal 2 and 3 are allowed."*

*(**Highlighted by us**)*

5.1 We further observe that the Hon'ble Tribunal also came across with similar additions made by the Assessing Officer in Assessee's own cases for A.Ys. 2012-13, 2013-14 and 2014-15 and deleted by the ld. Commissioner. The Hon'ble Coordinate Benches of the Tribunal affirmed the deletion of the similar additions by passing orders dated 08.02.2019 for A.Y. 2012-13 (ITA No. 1809/Del/2016) and 02.03.2021 for A.Y. 2013-14 and 2014-15 (ITA Nos. 5965/Del/2017 and 5966/Del/2017 respectively).

5.2 Further, the Hon'ble Delhi High Court vide its judgment dated 18.04.2022 in ITA No. 87/2022 and ITA No. 90/2022 affirmed the orders passed by the Tribunal in Assessee's own cases for the A.Yrs. 2013-14 and 2014-15, whereby the Tribunal affirmed the deletion of the similar additions by the then ld. CIT(A). The relevant part of the judgment passed by the Hon'ble High Court is reproduced herein below:

2. Learned counsel for the Appellant-Revenue states that the ITAT has erred in deleting the addition of Rs.5,64,73,054/- made by the Assessing Officer under Section 36(1)(iii) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') on account of disallowance of interest expenditure. He states that the ITAT has failed to appreciate that the assessing company had used the borrowed funds for non-business purposes. He states that the Company earned interest income at an average rate of 7.6% while on loans the assessee company paid interest at an average rate of 12.1%. He contends that liability on account of interest could have been reduced by 4.5%, in case the amount kept as FDRs had been utilised in making early repayment of the loans. He emphasises that the assessee company is neither into the business of investment nor in securities. Therefore, according to him, the Assessing Officer had correctly invoked Section 36(1)(iii) of the Act and disallowed the proportionate interest expenditure which was not utilized for business purposes.

3. Learned counsel for the Appellant further states that the ITAT has

dismissed the appeals on basis of the Assessee's own case for the Assessment Years 2007-08, 2010-11 & 2012-13. He submits that it is a settled principle that in matters pertaining to tax there is no issue of res judicata because each year's assessment is final only for that particular financial/assessment year and does not govern later years.

4. A perusal of the paper book reveals that the issue in dispute in both the present appeals is covered by the decisions passed by co-ordinate Benches of the ITAT in ITA No.1809/Del/2016 for the Assessment Year 2012-13 dated 8th February, 2019 and in ITA No.3869 & 3870/Del/2014 dated 21st December, 2018 for the Assessment Years 2007-08 and 2010-11 respectively. In fact, the Tribunal while dealing with previous assessment years in the assessee's own case has held that due to contractual restrictions and liquidation damages/pre-payment charges, it was neither prudent for the assessee to divert any part of borrowed funds for non-business purposes nor was it prudent to make pre-payment of loan even if the assessee had its own interest free funds.

5. It is an admitted position that the facts and circumstances in the present appeals (for the Assessment Years 2013-14 and 2014-15) are similar to the facts and circumstances for the Assessment Years 2007-08, 2010-11 and 2012-13 to which the aforesaid orders dated 21st December, 2018 and 08 February, 2019 pertain. It is pertinent to mention that no appeal has been filed under Section 260A of the Act till date challenging the orders dated 21st December, 2018 and 08th February, 2019.

6. Undoubtedly, the principles of res-judicata and estoppel are not applicable in taxation matters. However; it has been held that a departure from a finding during the past years would result in a contradictory finding. ***(See: Commissioner of Income Tax vs. Sridev Enterprises (1991) 192 ITR 165).*** *In fact, in Commissioner of Income Tax vs Excel Industries Ltd (2014) 13 SCC 457, the Court had observed that it was not appropriate to allow reconsideration of an issue for a subsequent assessment year if the same "fundamental aspect" permeates in different assessment years.*

7. The Supreme Court in ***Principal Commissioner of Income Tax, New Delhi vs. Maruti Suzuki India Ltd. [2019] 107 taxmann.com 375 (SC)*** *has emphasized the importance of promoting the 'principle of consistency and certainty' in tax matters. The Apex Court has held "There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011-12 must, in our view be adopted in respect of the in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable."*

8. Consequently, this Court is of the view that all similar matters should receive similar treatment except where factual differences require a different treatment so that there is assurance of consideration in the present appeals and the same are dismissed."

5.3 Considering the peculiar facts and circumstances, as the similar addition/disallowance as involved in this case, travelled upto Hon'ble High Court and the Hon'ble High Court did not approve the same, hence, the decision for deletion of the same do not require any interference. Consequently the appeal filed by the Revenue Department is un-sustainable and liable to be set aside.

6. In the result, the appeal filed by the Revenue Department stands dismissed.

Order pronounced in the open court on 16.01.2023.

Sd/-	Sd/-
(SHAMIM YAHYA)	**(N.K. CHOUDHRY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

*aks/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Assistant Registrar
ITAT New Delhi

Draft dictated	06.01.2023
Draft placed before author	06.01.2023
Approved Draft comes to the Sr.PS/PS	
Order si gned and pronounced on	
Date of uploading on the website	
File sent to the Bench Clerk	
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	