IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" "C" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.954/Bang/2022
Assessment Year: 2018-19

M/s. RMZ Hotels Private Limited The Millenia Level 1 & 14, No.1 & 2 Murphy Road Ulsoor Bangalore 560 008. **PAN NO : AADCR3654H**	**Vs.**	NFAC Delhi
APPELLANT		**RESPONDENT**

Appellant by	:	Shri V. Srinivasan, A.R.
Respondent by	:	Shri Ganesh R. Ghale, Standing Counsel for Department.

Date of Hearing	:	08.02.2023
Date of Pronouncement	:	22.02.2023

O R D E R

This appeal by assessee is directed against order of CIT(A) dated 27.4.2022 for the assessment year 2018-19. The assessee has raised following grounds of appeal:-

"1. *The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.*

2. The learned CIT[A] is not justified in upholding the disallowance made U/s 36[1][iii] of the Act of Rs. 99,02,829/- being the interest paid on capital borrowed and used for purposes of business under the facts and in the circumstances of the appellant's case.

3. The learned CIT[A] is not justified in upholding the disallowance of Rs.7,10,500/-

being the expenses incurred on legal and professional charges debited in P & L Account under the facts and in the circumstances of the appellant's case.

4. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies itself liable to be charged to interest u/s. 234-B of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.

5. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs."

2. At the outset the ld. D.R. objected that the addition in this case is Rs.1,06,13,329/- and as such this cannot be heard by SMC. In my opinion, this plea of the ld. D.R. is misplaced. At this point, it is appropriate to go through the provisions of section 255(3) of the Act which reads as under:-

*"**Section 255(3):***

The President or any other member of the Appellate Tribunal authorized in this behalf by the Central Government may, sitting singly, dispose of any case which has been allotted to the Bench of which he is a member and which pertains to an assessee whose total income as computed by the [Assessing] Officer in the case does not exceed fifty lakh rupees."

2.1 A plain reading of above provisions of section 255(3) as extracted above in the case of a Single Member Bench of the Income Tax Appellate Tribunal can hear all those appeals where total income determined by AO does not exceed Rs.50 lakhs. The aforesaid phraseology does not suggest that the figure of Rs.50 lakhs mentioned in the section should be understood in the algebraical sense of either being a plus figure or minus figure. The clause "total income…. does not exceed Rs.50 lakhs" leaves a clear impression on the mind that Rs.50 lakhs is a positive figure and the total income should not exceed the above positive figure. Ofcourse, for

the purpose of assessment, income includes loss, but I am at this stage concerned with the interpretation of the phraseology used in sub-section (3) of section 255 of the Act, and not with the dispute as to whether for the purpose of assessment total income would include loss. That it will, is beyond dispute but the question for determination here is as to what is the impression left on the mind by the use of the clause "total income as computed by the Assessing Officer …… does not exceed Rs.50 lakhs for determining the jurisdiction of Senior Member bench. My answer is that the above clause clearly suggests a positive figure of Rs.50 lakhs. It may be noted here that the criterion adopted for determining the jurisdiction of Single Member Bench is not the quantum of addition but the quantum of assessed addition. In the present case, the assessee returned loss of (-)Rs.1,05,73,207/-. The AO made addition of Rs.1,06,13,329/- (disallowance of interest at Rs.99,02,829/- and disallowance of expenses at Rs.7,10,500/-) and finally he determined the income of (+) Rs.40,120/-. Thus, assessed income in this case is only Rs.40,120/- and as such jurisdiction in this case will definitely be of SMC. It is therefore, I have to look into only assessed income as stipulated in sub-section (3) of section 255 of the Act, therefore, the argument of ld. D.R. in this case is devoid of merit. Accordingly, this primary objection of ld. D.R. is dismissed. For this purpose, order of this coordinate bench of Tribunal in the case of Cawnpore Textiles Ltd. reported in 34 ITD 495 of Allahabad bench, wherein the Tribunal has taken a similar view on this issue.

2.2 It is also pointed by ld. D.R. that there was a delay of 93 days in filing the appeal.

2.3 The ld. A.R. filed a condonation petition for delay as follows:-

AFFIDAVIT FOR CONDONATION OF DELAY IN FILING THE APPEAL

I, **DEEPAK MANOHARLAL CHHABRIA,** son of late Sri Manoharlal Chhabria, aged about 53 years, residing at RMZ Latitude Residences, Apt No-A-1204,Tower A, Bellary Road, Hebbal, Bangalore - 560092, Senior Managing Director of the above appellant, do hereby solemnly affirm and say on oath as under:-

1. That being aggrieved by the order u/s. 143[3] rws 143[3A] & 143[3B]of the Act dated 23/02/2021 passed by the learned A.O. for the aforesaid assessment year, we had instituted an appeal before the learned Commissioner of Income-tax [Appeals]-11, BANGALORE.

2. That, the learned Commissioner of Income-tax [Appeals] disposed off the appeal instituted by us in ITA No. CIT[A]-11/BNG/10429/2017-2018 by order dated 27/04/2022, which was deemed to be received on **27/04/2022**itself and the appeal against the said appellate order ought to have been filed before the Hon'ble **ITAT on or before 26/06/2022.**

3. That, the appeal against the said appellate order came to be instituted before the Hon'ble Income-tax Appellate Tribunal, Bangalore Bench, Bangalore on **26/09/2022** and there is a delay of **93 days** in filing the appeal. The reasons for the delay in filing the appeal are explained hereinafter.

4. That, soon after the receipt of the above appellate order dated 27/04/2022, we had placed the same in the hands of Sri V S Narayanan, our group Managing Director [Risk and Compliance], who was taking care of all income tax related matters for the entire group.

5. That, Sri V S Narayanan informed us that the aforesaid order has to be forwarded to Sri Ashok Raghavan, Chartered Accountant to seek further advice in the matter and we were under the impression that he would forward the papers to Sri Ashok Raghavan and the needful would be done by him as he was handling all the income tax matters earlier.

NOTARY
B. CHITRA
BANGALORE METROPOLITAN AREA
Reg. No. 10153
GOVT. OF INDIA

For RMZ Hotels Private Limited

Senior managing **Director**

6. That, Sri V S Narayanan, who was handling all the income tax related matters had actually desired that we should henceforth start handling the income tax matters of our company and owing to the confusion / misconception in communication between us, the appeal could not be filed within the due date as we were under the impression that he would have attended to the matter and he was under the impression that we would have attended to the filing of the appeal.

7. That, recently, when we were going through our income tax files during the tax audit of the group companies, we approached Sri V S Narayanan to get a copy of the appeal filed for our records and it is only then that it was discovered that no appeal was filed against the aforesaid appellate order and thereupon, we took immediate steps to file the present appeal before the Hon'ble ITAT.

8. That, there was a **delay of 93 days** in filing the appeal before the Hon'ble Income-tax Appellate Tribunal, Bangalore Bench, BANGALORE, which occurred on account of the aforesaid circumstances beyond our control and therefore, the delay is neither intentional, willful nor deliberate and occasioned by sufficient cause.

9. That, it is, therefore, prayed that the delay in filing the appeal may kindly be condoned and the appeal may kindly be admitted and disposed off on merits for the advancement of substantial cause of Justice.

WHATEVER STATED ABOVE IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Dated this the 26Th Day of SEPTEMBER, 2022; at BENGALURU

For RMZ Hotels Private Limite

Senior Managing Director

DEPONENT

NOTARY
B. CHITRA
BANGALORE METROPOLITAN AREA
Reg. No. 10453
GOVT. OF INDIA

No. Of Corrections: Nil.

SWORN TO BEFORE

SWORN TO BEFORE ME

B. CHITRA, B.A.L., LL.B.
ADVOCATE & NOTARY PUBLIC
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Gerappa Reddy Layout, Banaswadi Road
BANGALORE - 560 033

2.4 Further, the ld. A.R. also filed supporting affidavit from V.S. Narayanan as follows:-

AFFIDAVIT

I, **V.S NARAYANAN**, son of SriLate A.V.Venkatraman, aged about60 years, residing at SLNS NarashimaKrupa,Flat No T1,No-155, 9th Cross, 8th Main Road, Malleshwaram,Bangalore - 560003, do herebysolemnly affirm and state on oath as under:-

1. That, I am the group Managing Director [Risk and Compliance] of M/s. RMZ group and I am acquainted with the facts of the case and competent to swear to the contents of this affidavit.

2. That being aggrieved by the order u/s. 143[3] rws 143[3A] & 143[3B] of the Act dated 23/02/2021 passed by the learned A.O. for the aforesaid assessment year, M/s. **RMZ HOTELS PRIVATE LIMITED,** one of our group companies, had instituted an appeal before the learned Commissioner of Income-tax [Appeals] - 11, BANGALORE.

3. That, the learned Commissioner of Income-tax [Appeals] disposed off the appeal instituted by the appellant in ITA No. CIT[A]-11/BNG/10429/2017-2018 by order dated 27/04/2022, which was deemed to be received **on 27/04/2022** and upon receipt of the said order, Sri **DEEPAK MANOHARLAL CHHABRIA**, Senior Managing Director of M/s. **RMZ HOTELS PRIVATE LIMITED,** had approached me to seek further action to be taken since I was handling the income tax matter of the entire group.

4. That, I had advised Sri **DEEPAK MANOHARLAL CHHABRIA** to meet Sri Ashok Raghavan, Chartered Accountant and seek further advice in the matter of filing a second appeal against the said appellate order before the Hon'ble Income-tax Appellate Tribunal, Bangalore Bench, Bangalore.

5. That, however, Sri **DEEPAK MANOHARLAL CHHABRIA** misunderstood my advice and was under the bonafide belief that I would take up the matter with Sri Ashok Raghavan, as I was doing previously and therefore, no action was taken by M/s. **RMZ**

NOTARY B. CHITRA BANGALORE METROPOLITAN AREA Reg. No. 10153 GOVT. OF INDIA

HOTELS PRIVATE LIMITED to file the appeal before the Hon'ble ITAT before the due date.

6. That, recently, Sri **DEEPAK MANOHARLAL CHHABRIA** asked me for the records of the appeal filed, when the tax audit of M/s. **RMZ HOTELS PRIVATE LIMITED** was going on, and I was surprised that he asked me since I had informed him to co-ordinate with Sri Ashok Raghavan and file the appeal before the Hon'ble ITAT.

7. That, I was keen that the responsible person of each of the group companies must henceforth handle all the income tax matters by themselves without reference to me since I was planning to retire shortly and I wanted them to be aware of the further proceedings in each of the cases.

8_. That, this affidavit is being executed by me at the request of the above appellant to be produced before the Hon'ble ITAT to explain the circumstances under which there was a delay in filing the appeal by M/s.**RMZ HOTELS PRIVATE LIMITED**.

WHATEVER STATED ABOVE IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIF.

DATED THIS THE 26th DAY OF SEPTEMBER, 2022; AT BANGALORE

NOTARY
B. CHITRA
BANGALORE METROPOLITAN AREA
Reg. No. 10153
GOVT. OF INDIA

No. Of Corrections:Nil.

DEPONENT

SWORN TO BEFORE ME

SWORN TO BEFORE ME

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2.5 Thus, the contention of the ld. A.R. is that due to mis-communication between Shri Deepak Manoharlal Chhabria, Senior Managing Director of the assessee company and between V.S. Narayanan, Group Managing Director, it was resulted in delay of 93 days in filing appeal before this Tribunal.

2.6 The ld. D.R. strongly opposed the admission of appeal before this Tribunal and relied on the order of the Tribunal in the case of Dr. Raveendra M. Madraki in ITA No.670/Bang/2019 dated 10.2.2022, wherein held as under:

"6. We have heard both the parties and gone through the petition filed by the assessee, his affidavit and also the confirmation letter filed by Advocate, Mr. Prakash R. Badiger. The assessee explained the delay of 310 days on the reason that on the advise of his CA, he handed over the appeal papers to Prakash R. Badiger, Advocate, Dharwad who failed to take necessary steps to file appeal before this Tribunal and thereafter he engaged M/s. K.R. Prasad, Advocates, Bangalore to file appeal. The assessee also furnished a confirmation letter from Mr. Prakash R. Badiger, Advocate, Bangalore stating that due to eagerness or immaturity, he accepted the income tax brief, but not able to deliver and there was a delay from his end.

7. However, the assessee has not produced any evidence of his CA, Mr. Sharanagouda Patil who advised assessee to contact Mr. Badiger, Advocate. Further, there is no evidence to suggest about the date of handing over the documents to Advocate and it is not mentioned what are the papers given to Mr. Badiger for preparation of filing of appeal and what is the advise given to the assessee during this 310 days. There is no material to suggest to suggest the professional charges so as take up filing of appeal before the Tribunal. The assessee has failed to bring anymaterial on record to prove his bonafide attempt in filing the appeal. The assessee merely furnished one letter from Mr. Badiger, Advocate for seeking condonation of delay in filing the appeal along with affidavit. Except these, the assessee has not brought out any other material to prove his bonafide attempts to file the appeal. In our opinion, the assessee has not acted with due diligence in prosecuting the appeal. On the other hand, the assessee was negligent in his attitude in taking steps to file the appeal. In the absence of any evidence to prove the bonafides of the assessee, except the self-serving documents, the inordinate delay of 310 days in filing the appeal before the Tribunal cannot be condoned. There are 3 persons involved in this case viz., the assessee, his CA Shri Sharanagouda Patil and Shri Prakash R. Badiger, Advocate, who are required to explain the delay. They are not illiterate and they very well know the law. Ignorance of law is no excuse. We may refer to the judgment of the Hon'ble Supreme Court in the case of The Swadeshi Cotton Mills Co. Ltd. v. The Govt. of UP & Ors. (1975) 4 SCC 378 wherein it was held as follows:-

> *"..... But we are in agreement with the High Court on the other two grounds. As mentioned earlier, the impugned assessments were made in 1949. The writ petition was filed in 1956. The explanation*

given by the petitioner for this long delay is that he did not know the correct legal position and he came to know about the same after the decision of the Allahabad High Court in the Commissioner of Sales Tax, U.P. Vs. Modi Food Products Ltd. Every individual is deemed to know the law of the land. He courts merely interpret the law and do not make law. Ignorance of law is not an excuse for not taking appropriate steps within limitation. Therefore the argument that the appellant did not know the true legal position is not one that can be accepted in law. ...."

8. Further, in the present case, there is no denial on the part of the assessee about the service of the order on the assessee and after receipt of the order of the CIT(Appeals), to whom the assessee wants to entrust the work of filing appeal before the Tribunal is his own concern and this explanation does not constitute sufficient ground to condone the delay. Therefore we find no merit in the application for condonation of delay. Accordingly, we are of the considered view that the assessee has failed to make out a sufficient and reasonable cause for condonation of delay and reject the petition for condonation of delay. Being so, we refrain from going into other grounds of appeal on merits."

2.7 The ld. D.R. also relied on the order of the Hon'ble Supreme Court Civil Appeal No.7696/2022 dated 16.12.2021 wherein held as under:

"7. Perused the records and considered the submissions of the learned counsel for the appellant/plaintiff. From perusal of the cause-title in the memorandum of appeal, it is clear that plaintiff is aged about 60 years, but in fact in the affidavit filed by the plaintiff nowhere mentioned the age of the plaintiff. Further, in support of his contention, the plaintiff has not produced any medical records.

8. Thus, there is inordinate delay on the part of the appellant in approaching this Court. The appellant has not explained the delay satisfactorily. Thus, doctrine of delay and laches should not be lightly brushed aside. The Court should bear in mind that while exercising jurisdiction, it has the duty to protect the right of the citizen, but simultaneously it has to keep itself alive to the primary principle that when an aggrieved person without reason approaches the Court at their own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. It may be noted that delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant - a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. A Court is not

expected to give indulgence to such indolent persons - who compete with 'Kumbhakarna' or for that matter 'Rip Van Winkle'. Thus, there is delay in filing the appeal. Such inordinate delay of 1172 days in filing second appeal does not deserve any indulgence. Hence, on the ground delay and laches, the appeal is liable to be dismissed at the very threshold. The Hon'ble Apex Court in the case of Chennai Metropolitan Water Supply and Sewerage Board and others vs. T.T.Murali Babu reported in 2014(4) SCC 108, declined to condone the delay of four years in approaching the Court. The Hon'ble Apex Court in the case of Majji Sannemma @ Sanyasirao vs. Reddy Sridevi & Ors., in Civil Appeal No.7696/2021 disposed of on 16.12.2021 relying on the judgment of the said Court in the case of Basavaraj and another vs. Special Land Acquisition Officer reported in (2013)14 SCC 81 has observed as under:

"The expression "sufficient cause" cannot be liberally interpreted if negligence, inaction or lack of bona fides is attributed to the party."

It is further observed that, "Even though limitation may harshly affect the rights of a party but it has to be applied with all its rigour when prescribed by statute."

It is further observed that,-

"In case a party has acted with negligence, lack of bonaf ides or there is inaction then there cannot be any justified ground for condoning the delay even by imposing conditions."

It is observed that, "Each application for condonation of delay has to be decided within the framework laid down by this Court".

It is further observed that, "If Courts start condoning delay where no sufficient cause is made out by imposing conditions then that would amount to violation of statutory principles and showing utter disregard to the legislature."

9. The Hon'ble Apex Court has declined to condone the delay of 1011 days in preferring the second appeal. Further, the Hon'ble Apex Court in the case of Lingeswaran Etc. vs. Thirunagalingam in Special Leave to Appeal (C) Nos.2054-2055/2022 disposed of on 25.02.2022, held that when it is found that the delay is not properly explained, the application to condone the delay is required to be dismissed. The Hon'ble Apex Court declined to condone the delay of 465 days.

10. Considering the law declared by the Hon'ble Apex Court in the above cases, the plaintiff has not made out sufficient cause to condone the delay of 1172 days in filing the appeal. Accordingly, I.A.No.1/2019 filed seeking condonation of delay is dismissed. Consequently, the appeal is dismissed."

3. I heard the rival submissions and perused the materials available on record. In the present case, there was a delay of 93 days

in filing appeal before this Tribunal. The assessee supports the delay of 93 days by way of condonation petitions explaining the reason that it was due to miscommunication between Senior Managing Director Mr. Deepal Manoharlal Chhabria and Mr. V.S. Narayanan, Group Managing Director of the assessee company. Thus, the averments was supported by the affidavit by Deepak Manoharlal Chhabria, Senior Managing Director and also affidavit by V.S. Narayanan, Group Managing Director. Mr. V.S. Narayanan, Senior Managing Director instructed Mr. Deepak Manoharlal Chhabria, Senior Managing Director to contact Shri Ashok Raghawan, Chartered Accountant and take advice by him so as to file the second appeal before this Tribunal. However, Shri Deepak Manoharlal Chhabria misunderstood his instructions and he was of the bonafide belief that Mr. V.S. Narayanan would take up the matter with Mr. Ashok Raghawan as he was doing earlier. This was came to knowledge of Mr. V.S. Narayanan when Mr. Deepak Manoharlal Chhabria asked him for the records of the appeal filed when the tax audit of assessee company was going on and then both of them came to know that there was no appeal filed against the impugned CIT(A)'s order before this Tribunal, thereafter, they took steps to file the present appeal and accordingly, the appeal was filed before this Tribunal on 26.9.2022 which was resulted in delay of 93 days in filing appeal before this Tribunal. Now we have to see whether the assessee's failure to file appeal in time before this Tribunal is there sufficient cause for condoning the delay. Hon'ble Madras High Court consider an issue in the case of Srinivas Charitable Trust Vs. DCIT (280 ITR 357) (Mad) and held that mixing of papers with other papers are sufficient because for not filing appeal in time. The Madras High Court further observed that the expression "sufficient cause" should

be interpreted to advance substantial justice. Therefore, advancement of substantial justice is the prime factor while considering the reason for condoning the delay.

3.1 There is a technical defect in the appeals since the appeals were not filed within the period of limitation. The assessee filed an affidavit stating that the appeals were not filed because of the improper service of notice by the Department. The Revenue has not filed any counter-affidavit to deny the allegation made by the assessee. While considering a delay in filing the appeal, the Apex Court in the case of Collector, Land Acquisition v. Mst. Katiji and Ors. (167 ITR 471) laid down six principles. For the purpose of convenience, the principles laid down by the Apex Court are reproduced hereunder:

> (1) Ordinarily, a litigant does not stand to benefit by lodging an appeal late.
>
> (2) Refusing to condone delay can result in a meritorious matter being thrown at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.
>
> (3) 'Every day's delay must be explained' does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational, commonsense and pragmatic manner.

(4) When substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

(5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

(6) It must be grasped that the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

3.2 When substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right for injustice being done because of non deliberate delay. Moreover, no counter-affidavit was filed by the Revenue denying the reasons advanced by the assessee. It is not the case of the Revenue that the appeal was filed deliberately with delay. Therefore, I have to prefer substantial justice rather than technicality in deciding the issue. As observed by Apex Court, if the application of the assessee for condoning the delay is rejected, it would amount to legalise injustice on technical ground when the Tribunal is capable of removing injustice and to do justice. Therefore, this Tribunal is bound to remove the injustice by condoning the delay on technicalities. If the delay is

not condoned, it would amount to legalising an illegal order which would result in unjust enrichment on the part of the State by retaining the tax relatable thereto. Under the scheme of Constitution, the Government cannot retain even a single pie of the individual citizen as tax, when it is not authorised by an authority of law. Therefore, if I refuse to condone the delay, that would amount to legalise an illegal and unconstitutional order passed by the lower authority. Therefore, in my opinion, by preferring the substantial justice, the delay of 93 days has to be condoned.

3.3 The next question may arise whether delay was excessive or inordinate. There is no question of any excessive or inordinate when the reason stated by the assessee was a reasonable cause for not filing the appeal. I have to see the cause for the delay. When there was a reasonable cause, the period of delay may not be relevant factor. In fact, the Madras High Court in the case of CIT vs. K.S.P. Shanmugavel Nadai and Ors. (153 ITR 596) considered the condonation of delay and held that there was sufficient and reasonable cause on the part of the assessee for not filing the appeal within the period of limitation. Accordingly, the Madras High Court condoned nearly 21 years of delay in filing the appeal. When compared to 21 years, 93 days cannot be considered to be inordinate or excessive. Furthermore, the Chennai Tribunal by majority opinion in the case of People Education and Economic Development Society (PEEDS) v. ITO (100 ITD 87) (Chennai) (TM) condoned more than six hundred days delay. It is pertinent to mention herein that the view taken by the present author in that case was overruled by the Third Member.

3.4 I also place reliance on the decision of this Tribunal in the case of Midas Polymer Compounds (P.) Ltd vs. Asstt. CIT in ITA No. 288/Coch/2017 dated 25/06/2018 wherein this Tribunal condoned the delay of 2819 days. Insofar as the reliance on the decision of the Tribunal in the case of Midas Polymer Compounds (P) Ltd. cited supra is concerned, I am of the view that the Tribunal condoned the delay on the part of the assessee in filing the appeals by observing that the Chartered Accountant who was handling the matter failed to take proper steps to file the appeals and the Chartered Accountant filed affidavit stating that the appeals for AYs. 1999-2000 to 2004-05 in respect of the group concern and appeals for the AYs. 2005-06, 2007-08 and 2008-09 of the assessee were filed and represented by the Chartered Accountant at Cochin and he was under the impression that the appeal for the AY 2006-2007 was also filed by that Chartered Accountant in Cochin. It was also stated that the issue in all these appeals were covered in favour of the assessee by the order of the High Court of Kerala for the assessment years 2005-06 to 2008-09. The non-filing of the appeal was noted only when the Assessing Officer had enquired about the status of the case and payment of tax in the last week of May, 2017. The assessee was under the impression that the Chartered Accountant had already made arrangements for filing the appeal and as so many appeals were pending before the ITAT, he was under the impression that the appeal for this year also was filed. It was submitted that the non-filing of the appeal was due to an inadvertent omission on his part in handing over the file to the AR at Cochin. Hence, it was prayed that the delay of 2819 days in filing the appeal may be condoned. As such, the Tribunal condoned the above delay of 2819 days.

3.5 The Madras High Court in the case of Sreenivas Charitable Trust (supra) held that no hard and fast rule can be laid down in the matter of condonation of delay and the Court should adopt a pragmatic approach and the Court should exercise their discretion on the facts of each case keeping in mind that in construing the expression "sufficient cause" the principle of advancing substantial justice is of prime importance and the expression "sufficient cause" should receive a liberal construction. Therefore, this Judgment of the Madras High Court (supra) clearly says that in order to advance substantial justice which is of prime importance, the expression "sufficient cause" should receive a liberal construction. In this case, the issue on merit regarding granting of deduction u/s. 80IB was covered in favour of the assessee by the Judgment of the Madras High Court. Therefore, for the purpose of advancing substantial justice which is of prime importance in the administration of justice, the expression "sufficient cause" should receive a liberal construction. In my opinion, this Judgment of the Madras High Court is also squarely applicable to the facts of this case. A similar view was taken by the Madras High Court in the case of Venkatadri Traders Ltd. v. CIT (2001) 168 CTR (Mad) 81 : (2001) 118 Taxman 622 (Mad).

3.6 The Mumbai Bench of this Tribunal in the case of Bajaj Hindusthan Ltd. v. Jt. CIT (AT) (277 ITR 1) has condoned the delay of 180 days when the appeal was filed after the pronouncement of the Judgment of the Apex Court. Furthermore, the Revenue has not filed any counter-affidavit opposing the application of the assessee for condonation of delay. The Apex Court in the case of Mrs. Sandhya Rani Sarkar vs. Smt. Sudha Rani Debi (AIR 1978 SC 537) held that non-filing of affidavit in opposition to an application

for condonation of delay may be a sufficient cause for condonation of delay. In this case, the Revenue has not filed any counter-affidavit opposing the application of the assessee, therefore, as held by the Apex Court, there is sufficient cause for condonation of delay. The Supreme Court observed that when the delay was of short duration, a liberal view should be taken. "It does not mean that when the delay was for longer period, the delay should not be condoned even though there was sufficient cause. The Apex Court did not say that longer period of delay should not be condoned. Condonation of delay is the discretion of the Court/Tribunal. Therefore, it would depend upon the facts of each case. In our opinion, when there is sufficient cause for not filing the appeal within the period of limitation, the delay has to be condoned irrespective of the duration/period. In this case, the non-filing of an affidavit by the Revenue for opposing the condonation of delay itself is sufficient for condoning the delay in filing the appeals before the CIT(A).

3.7 In case the delay was not condoned, it would amount to legalise an illegal and unconstitutional order. The power given to the Tribunal is not to legalise an injustice on technical ground but to do substantial justice by removing the injustice. The Parliament conferred power on this Tribunal with the intention that this Tribunal would deliver justice rather than legalise injustice on technicalities. Therefore, when this Tribunal was empowered and capable of removing injustice, in my opinion, the delay in filing the appeals before the CIT(A) has to be condoned and the appeals of the assessee have to be admitted and disposed of on merit.

3.8 In view of the above, I condone the delay in filing the appeal before the CIT(A) and remit the issue to the file of the ld. CIT(A) to decide the issue on the merit of the additions made by the Assessing Officer. Since the assessment order was passed ex parte u/s. 144 of the Act, the CIT(A), if required, may call for the remand report from the Assessing Officer and confront the same to the assessee before deciding the appeal. I also make it clear that if the ld. CIT(A) or the Assessing Officer relied on any statement of the third parties so as to frame the impugned assessments on an earlier occasion, the same is to be confronted to the assessee and if the assessee requires any cross examination of the parties concerned, the same is to be provided.

3.9 Being so, I am of the opinion that there is reasonable cause in filing the appeal before me by delay of 93 days and I condone the above delay and admit the appeal for adjudication.

4. The first ground for our consideration is with regard to the disallowance of Rs.99,02,829/-, which is claimed by assessee as an interest payment. The assessee in the year under consideration advanced a sum of Rs.41 crores towards purchase of shares. The AO questioned the sources of Rs.41 crores paid as advance towards purchase of shares. The assessee stated that assessee had taken loan from M/s. Millenia Realtors Pvt. Ltd., Ulsoor, Bengaluru. The assessee also stated that assessee has paid an interest of that inter-corporate loan at Rs.99,02,829/- which is charged to P&L account. The said amount has been given towards purchase of shares and shares has not been allotted in the assessment year under consideration and it has been allotted in the next financial year 2018-

19 relevant to assessment year 2019-20. According to the AO, the shares has not been allotted in the assessment year under consideration and the amount paid as an advance to acquire shares to M/s. Akarshak Infrastructure Pvt. Ltd. (AIPL) for the period of pre-acquisition during the assessment year under consideration. As such, the said interest payment on the loan borrowed from M/s. Millenia Realtors Pvt. Ltd. cannot be allowed as a deduction u/s 36(1)(iii) of the Income-tax Act,1961 ['the Act' for short]. Against this assessee went in appeal before ld. CIT(A), who has confirmed the order of AO.

5. The ld. A.R. submitted that the assessee acquired 2,49,99,999 shares out of 2,50,00,000 shares of M/s. Akarshak Infrastructure Private Limited on 22/01/2019 from the Promoters of the Company with the balance of l(One) share held by a nominee of the assessee. In effect M/s. Akarshak Infrastructure Private Limited became the wholly owned Subsidiary of M/s RMZ Hotels Private Limited on the date of acquisition of shares. The said shareholding is reflected in the Financials of M/s. Akarshak Infrastructure Private Limited for the year ended 31/03/2019. The assessee had advanced a sum of Rs. 41 Crores towards the purchase of the subject shares in M/s. Akarshak Infrastructure Private Limited as explained above in the F.Y 2017-18. The assessee submitted that the amount advanced to the promoters of M/s. Akarshak Infrastructure Private Limited was to acquire the shares held by then in M/s. Akarshak Infrastructure Private Limited in order to make M/s. Akarshak Infrastructure Private Limited its Wholly

Owned Subsidiary. As the said Company was in the same line of business as of the assessee, the amount advanced to its Wholly Owned Subsidiary was made out of commercial expediency and for expansion of its business and not for the extension of its business. Further M/s Akarshak Infrastructure Private Limited merged with the assessee M/s RMZ Hotels Private Limited on 01/03/2021 vide merger order dated 05/02/2021, there by supporting the view of the assessee that the amounts advanced for acquisition of shares was purely out of business expediency. Consequently, the ld. A.R. submitted that the case laws submitted by the assessee in its reply dated 21/02/2021 and those referred to in the Grounds of Appeal are clearly applicable in the assessee's case. The ld. A.R. submitted that the analogy adopted by the learned Assessing Officer in rejecting the assessee's contention by holding that the case laws cited by him are not applicable as the assessee had not yet become the holding company of M/s. Akarshak Infrastructure Private Limited in F.Y 2017-18 but became the holding company only in the F.Y 2018-19, is devoid of merit as the principles laid down in the decisions cited by the assessee are squarely applicable in the assessee's case.

5.1 The ld. A.R. submitted that the averments of the learned Assessing Officer in the order that the interest paid on loan to acquire shares of the promoters of M/s. Akarshak Infrastructure Private Limited is the pre-acquisition cost and should therefore be added to the cost of shares is incorrect for the following reasons:

a. It is to be noted that as per the principles laid out in "Indian Accounting Standard-23 (Accounting Standard - 16 (AS-16)) - Borrowing Cost", only the interest incurred on borrowings which are used for an asset that necessarily takes a substantial period of time to get ready for its, intended use or sale i.e., a qualifying asset is to be capitalized. In this regard the definition of "Qualifying Assets" in Ind AS-23 (AS-16) Borrowing Cost is defined as "A qualifying asset is an asset that necessarily takes a substantial period of time to get ready for its intended use or sale". From a perusal of the aforesaid definition of "Qualifying Asset", the investment in shares of subsidiaries cannot be termed as a "qualifying asset" as they do not fall within the definition of the term qualifying asset as above, and consequently the interest incurred on borrowing for the purpose of investment in subsidiaries which is not a qualifying asset has to be taken as period cost and can be claimed as revenue expenditure in the year in which it is incurred.

b. Further, the definition of "Qualifying Asset" under the Income Computation and Disclosures Standard IX relating to Borrowing cost is as under:

"Qualifying asset" as defined under ICDS IX:

(i) land, building, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets;

(iii) inventories that require a period of twelve months or more to bring them to a saleable condition.

c. On a reading of the definition of Qualifying Asset both under Indian Accounting Standard - 23 (AS-16) and under the "Income Computation and Disclosure Standard-IX", it is clear that acquiring shares is not a Qualifying Asset either under Indian Accounting Standard -23 (AS-16) and under Income Computation and Disclosure Standard-IX. Consequently, the interest paid on loans taken to acquire shares is to be treated as a period cost and consequently as a deductible expense for preparations of the financials as mandated under section 133 of Companies Act, 2013, Similarly, the interest paid on loans borrowed for acquiring shares is a deductible expense for computation of the income under the head "Profits and Gains of Business or Profession" as per the provisions of section 36(i)(iii) of the Income Tax Act, 1961 read with Income Computation and Disclosure Standard-IX.

d. It is to be noted that Central Board of Direct Taxes (CBDT) as notified Income Computation and Disclosure Standard to be adopted by the assesses

vide Notification No. S.O. 892(E) dated 31/03/2015, to compute income chargeable under the head "Profits and (Jains of Business or Profession". Further vide Notification No. S.O. 3079(E) dated 31/09/2016 the CBDT has mandated that all assesses following mercantile system of accounting for the purpose of computation of income chargeable to Income Tax under the head Profits and Gains of Business or Profession have to be mandatorily followed, the ICDS already notified by exercising its power under section 145(2) of The Income Tax Act, 1961,In effect, in order to comply with the method of accounting mandated under section 145(2), the assessee has to follow the principles laid down in the 1GDS.

5.2 Further, the ld. A.R. submitted that in case of the assessee, as it is a company, it has to mandatorily follow Accounting Standard for preparations of its accounts under the Companies Act, 2013 and follow the ICDS for computation of its income and the same has been correctly followed by the assessee by claiming the interest on loan for acquisition of shares as a period cost for preparation of its financial statement under the Companies Act, 2013 and for claiming the same as deductible expense for computation of income under Profits and Gains of Business or Profession as per the Income Computation and Disclosure Standards.

5.3 The ld. A.R. submitted to consider these written submissions along with the Grounds of Appeal and the Statement of Facts.

5.4 The ld. A.R. for the assessee relied on the following judgements:

(i) Decision of Hon'ble High Court of Gujarat in the case of B. Nanji and Co. reported in 425 ITR 286, wherein held as under:-

"Sub-section (i)(iii) of section 36 of the Income-tax Act, 1961, has three words or phrases that are important for the purpose of understanding the provision, viz., (a) interest, (b) capital borrowed and (c) for the purpose of business or profession. Thus, for the allowance of a claim for deduction of interest under section 36(1)(iii) of the Act, the following three conditions are necessary : (I) the money, that is capital, must have been borrowed by the assesses, *(ii) it must have been borrowed for the purpose of business and (in) the assessee must have paid interest on the borrowed amount, i. e., shown the sum as an item of expenditure. Interest paid on capital borrowed for the purpose of business is to be allowed as* a *deduction in computing taxable income. The expression "for purposes of business or profession" occurring in section 36(1)(iii) of the Act is wider in scope than the expression ^For the purpose of earning income, profits or gains". Accordingly, expenditure voluntarily incurred and meeting the "commercial expediency" test is to be allowed as* a *deduction. It is immaterial if a third party also benefits by the expenditure. The expression 'commercial expediency" is again of wide import and once it is established that there was a connection and nexus between the interest paid claimed as expenditure and the business of the* assesses *the purpose of business* need not be the bus/ness *of the* assessee, for *the deduction under section 36(1)(iii) to be allowed. Further, the Revenue cannot occupy the armchair of a businessman to decide whether the expenditure was reasonable.*

A perusal of section 57(iii) would indicate that in order to grant deduction of interest paid by the assessee, it would be necessary to determine the dominant purpose for which the expenditure was incurred, meaning thereby that if the expenditure incurred is not to earn the income, the expenditure would not be allowable. What section 57(iii) requires is that the expenditure must be laid out or expended wholly and exclusively for the purpose of making of earning income. Section 57(iii) does not require that this purpose must be fulfilled in order to qualify the expenditure for deduction. It does not say that the expenditure shall deductible only if any income is made or earned. Where the borrowings are made for the purchase of shares, a question that would often arise is whether the interest paid should be allowed as deduction under section 36(1)(iii) or under section 57(iii). Income by way of dividends on shares,

whether held on investment portfolio or as stock-in-trade, is pacifically assessable, under section 56(2)(i), as "Income from other sources". Although the shares are held on the investment portfolio as an integral part of the business, the interest on such borrowings is allowable under section 36(1)(iii). Thus, the qualifying factor to ascertain whether the borrowings for purchasing shares is an integral part of the business of the assessee. The interest can be allowed under section 36(1)(iii) only if assessee proves that it was paid in respect of capital borrowed for the purpose of business..

The assessee was in the business of real estate. With the intention to expand the business of real estate, it created a housing arm. The purpose of creating such a housing finance company within the group was to make funds readily available when required. With this object the assessee and B, its associate, borrowed funds and subscribed the share capital of I. The interest paid on the borrowed capital by the assessee came to be disallowed by the Assessing Officer. The Commissioner (Appeals) took the view that the interest could not be allowed to the assessee under section 36(1)(iii) of the Act, but under section 57(iii). The Tribunal disallowed interest under both, i.e., section 36(1)(iii) and section 57(iii). On appeal:

Held, that the assessee had borrowed the capital to purchase shares in I so as to have effective control of I in order to expand its real estate business. Thus, the investment in shares was nothing but expansion of business of the assessee. Therefore, all the conditions necessary for deduction under section 36()(iii) were prima facie satisfied by the assessee. The dominant purpose of the assessee to borrow the capital was to acquire the shares to have effective control over I so as to expand the business of the assessee. In that view of the matter, the Commissioner (Appeals) was not justified in granting deduction of interest paid by the assessee under section 57(iii) of the Act. The assessee was entitled to deduction of interest paid on capital borrowed for investment in the shares of I for the purpose of expansion for its business under section 36(1)(iii)."

(ii) Decision of Bangalore Bench of Tribunal in the case of M/s. Maxim India Integrated Circuit Design Pvt. Ltd. in IT(TP)A No.411/Bang/2016 dated 5.1.2021, wherein held as under:

"We have considered the rival submissions. We find that this is not in dispute, that the borrowed funds; were used for the purposes of acquiring a land to be used for constructing assessee's office premises and this is also not in dispute that construction could not take place because of some dispute in the title of the said land. Under these facts, the AO invoked the provisions of proviso to section 36(i)(iii) which says that if the funds are borrowed for acquiring an asset for extension of existing business, then interest is not allowable till the date on which such asset was first put to use. The objection of the assessee is this that in the present case, the land was not

acquired for extension of business but it was acquired for expansion of business and therefore, this proviso is not applicable. In this regard, para no. 18 of the Tribunal order rendered in the case of AT & T Global Network Services (India) Pvt. Ltd. Vs. DCIT (supra) is relevant and hence, the same is reproduced hereinbelow from page no. 690 of the paper book.

> *"18. Undisputedly assessee is engaged in telecommunication business. It has commenced its business operation on April 07, 2007. The present situation deals with the case where in the assessee has purchased capital goods for its existing telecommunication business. The question that arises for IT(TP)A No.4ii/Bang/2Oi6 Maxim India Integrated Circuit Design Pvt. Ltd., Bangalore consideration here is that whether the proviso to Section 36(i)(iii) which disallows the interest paid on acquisition of an asset for extension of existing business is applicable to the present case or not. In the present case, whether the assets were acquired for extension of business or not. The word -extension has not been defined in the Income-tax Act, 1961 and one has to resort to the popular meaning of the term. The dictionary meaning of the word extend is a part that is added to something to enlarge or prolong it, addition, add-on, adjunct, addendum, augmentation, supplement, appendage, appendix; annexe, supplementary etc. The assessee submitted that the assets have been acquired only in connection with its existing telecommunication business, In our view, there is a very thin line of demarcation between the term expansion and extension, which can be differentiated basis the facts and evidences brought on record. Neither the Ld AO or the Ld DRP has brought any evidence on facts to suggest that there was an extension of business during the year under consideration and the Interest paid should he disallowed u/s 36(i)(iii) of the Act.*

Further, the assessee also distinguished the decisions relied upon by the lower authorities on facts of the present case. While arriving at the above finding we also draw support from the decision of Hon'ble Supreme Court in the case of DCIT vs. Gujarat Alkalies & Chemicals Ltd. ['2008] 2991'i'R 85 {SC) cited by the Ld. AR wherein it was held that extension' implies starting of a new business activity. Keeping in view the above said meaning we are of the view that the telecom equipment purchased by the Appellant using the ECB loans was for continuation of the existing business only and not for the extension of business. Hence, the said proviso to Section 36(i)(iii) does not apply to the facts, of the present case. In the result, the ground No.3 of the appeal of the assessee is allowed"

14. From the above para reproduced from the Tribunal order, it comes out that if the borrowed funds are not used for extension of existing business, and the same are used for continuation of existing business only, then the proviso to section 36(l)(iii) of the IT Act is not applicable. In our considered opinion, purchasing of land for

construction of new office premises cannot be said to be for extension of assessee's business and hence, in our considered opinion, in the facts of present case, this Tribunal order is applicable and hence, respectfully following this Tribunal order, we hold the interest disallowance made by the AO is not justified because the funds were borrowed for continuation / expansion of existing business and not for extension of existing business and therefore, the proviso to section 36(i)(iii) is not applicable in the present case because the amendment in this proviso was made by the Finance Act, 2015 w.e.f. 01.04.2016 as per which the words "for extension of were omitted and therefore in our considered opinion, up to Assessment Year 2015-16, the proviso is applicable only in those cases where borrowed funds was used for acquisition of asset for extension of existing business. In the present case, the Assessment Year involved is Assessment Year 2009-10 and therefore, in the facts of present case, in the present year, this proviso is not applicable and hence, we delete this disallowance by respectfully following this Tribunal order rendered in the case of AT &T Global Network Services (India) Pvt. Ltd. Vs. DCIT (supra). Accordingly, ground no. 4(b) is allowed."

14-3 Following the above said decision of the co-ordinate bench rendered in assessee's own case on an identical issue, we direct the AO to delete this disallowance."

(iii) Decision of Hyderabad Bench of Tribunal in the case of M/s. ITW Signode India Ltd. reported in 110 TTJ 170, wherein held as under:

"*12. We have duly considered the rival contentions and the material on record. The facts are not in dispute. Recently, Supreme Court had the occasion to explain the meaning of the expression 'commercial expediency". It was explained that it is a term of wide import and includes such expenditure for which there may not be any legal obligation but is incurred for the purpose of the business. It referred to its earlier judgment in the case of Madhav Prasad Jatia V: CIT (1979) 10 CTR (SC) 375 : (1979) 118 ITR 200 (SC) where the borrowed amount was donated to a college with a view to commemorate the memory of the assessee's deceased husband after whom the college was to be named. It was held that if the borrowed amount was donated for some sentimental or personal reasons then it could not be said that it was for commercial expediency. In the present case, it is not the case of the Department that the ICD placed with Shaw Wallace was for some personal reasons. Inter-corporate deposits are quite common and corporate houses accommodate each other on short-term basis on grounds of commercial expediency. Today, if the assessee accommodated Shaw Wallace, tomorrow, it could be Shaw Wallace accommodating the assessee. Moreover, it is also not uncommon that at certain points of time, companies may have surplus funds awaiting fruitful deployment. Pending such deployment, they park their funds to earn interest. Earning of interest on surplus funds is also on grounds of*

commercial expediency as such income would ultimately augment the working capital of the assessee. Therefore, placing of ICDs is in the usual course of business and a company doing so need not be in money lending business. If placing of ICDs is in the normal course of business, the loss arising therefrom cannot be anything else but arising in the usual course of business. It was the judgment of the assessee that the debt due from Shaw Wallace has become irrecoverable. It was not without any reason that the assessee judged the debt to have become bad and irrecoverable. The ICD was initially for 90 days. At the end of this period, it was rolled over again for another 90 days. At the end of the second period of 90 days, Shaw Wallace issued a cheque which it could not honour. If these are not good enough reasons to consider a debt as irrecoverable, what else is required. It is further interesting to note that the interest of Rs. 21,05,278 accrued on this very ICD is also claimed as a bad debt and the AO has allowed the same. Therefore, considering the facts of the case, the claim of the assessee for deduction of Rs.1 crore is allowed."

(iv) Decision of Hon'ble Supreme Court of India in the case of M/s. S.A. Builders Ltd. reported in 158 Taxman 74, wherein held as under:

"We have considered the submission of the respective parties. The question involved in this case is only about the allowability of the interest on borrowed funds and hence we are dealing only with that question. In our opinion, the approach of the High Court as well as the authorities below on the aforesaid question was not correct.

In this connection we may refer to Section 36(1)(iii) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') which states that "the amount of the 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 tax under Section 28 of the Act.

In Madhav Prasad Jantia vs. Commissioner of Income Tax U.P. AIR 1979 SC 1291, this Court held that the expression "for the purpose of business" occurring under the provision is wider in scope than the expression "for the purpose of earning income, profits or gains", and this has been the consistent view of this Court.

In our opinion, the High Court in the impugned judgment, as well as the Tribunal and the Income Tax authorities have approached the matter from an erroneous angle. In the present case, the assessee borrowed the fund from the bank and lent some of it to its sister concern (a subsidiary) on interest free loan. The test, in our opinion, in such a case is really whether this was done as a measure of commercial expediency.

In our opinion, the decisions relating to Section 37 of the Act will also be applicable to Section 36(1)(iii) because in Section 37 also the expression used is "for the purpose of business". It has been consistently held in decisions relating to Section 37 that the expression "for the purpose of business" includes expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits thereby.

Thus in Atherton vs. British Insulated & Helsby Cables Ltd (1925)10 TC 155 (HL), it was held by the House of Lords that in order to claim a deduction, it is enough to show that the money is expended, not of necessity and with a view to direct and immediate benefit, but voluntarily and on grounds of commercial expediency and in order to indirectly to facilitate the carrying on the business. The above test in Atherton's case (supra) has been approved by this Court in several decisions e.g. Eastern Investments Ltd. vs. CIT (1951) 20 ITR 1, CIT vs. Chandulal Keshavlal & Co. (1960) 38 ITR 601 etc. In our opinion, the High Court as well as the Tribunal and other Income Tax authorities should have approached the question of allowability of interest on the borrowed funds from the above angle. In other words, the High Court and other authorities should have enquired as to whether the interest free loan was given to the sister company (which is a subsidiary of the assessee) as a measure of commercial expediency, and if it was, it should have been allowed.

The expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency.

No doubt, as held in Madhav Prasad Jantia vs. CIT (supra), if the borrowed amount was donated for some sentimental or personal reasons and not on the ground of commercial expediency, the interest thereon could not have been allowed under Section 36(1)(iii) of the Act. In Madhav Prasad's case (supra), the borrowed amount was donated to a college with a view to commemorate the memory of the assessee's deceased husband after whom the college was to be named. It was held by this Court that the interest on the borrowed fund in such a case could not be allowed, as it could not be said that it was for commercial expediency.

Thus, the ratio of Madhav Prasad Jantia's case (supra) is that the borrowed fund advanced to a third party should be for commercial expediency if it is sought to be allowed under Section 36(1)(iii) of the Act.

In the present case, neither the High Court nor the Tribunal nor other authorities have examined whether the amount advanced to the sister concern was by way of commercial expediency.

It has been repeatedly held by this Court that the expression "for the purpose of business" is wider in scope than the expression " for the purpose of earning profits" vide CIT vs. Malayalam Plantations Ltd. (1964) 53 ITR 140, CIT vs. Birla Cotton Spinning & Weaving Mills Ltd (1971) 82 ITR 166 etc. The High Court and the other authorities should have examined the purpose for which the assessee advanced the money to its sister concern, and what the sister concern did with this money, in order to decide whether it was for commercial expediency, but that has not been done.

It is true that the borrowed amount in question was not utilized by the assessee in its own business, but had been advanced as interest free loan to its sister concern. However, in our opinion, that fact is not really relevant. What is relevant is whether the assessee advanced such amount to its sister concern as a measure of commercial expediency. Learned counsel for the Revenue relied on a Bombay High Court decision in Phaltan Sugar Works Ltd. Vs. Commissioner of Wealth-Tax (1994) 208 ITR 989 in which it was held that deduction under Section 36(1)(iii) can only be allowed on the interest if the assessee borrows capital for its own business. Hence, it was held that interest on the borrowed amount could not be allowed if such amount had been advanced to a subsidiary company of the assessee. With respect, we are of the opinion that the view taken by the Bombay High Court was not correct. The correct view in our opinion was whether the amount advanced to the subsidiary or associated company or any other party was advanced as a measure of commercial expediency. We are of the opinion that the view taken by the Tribunal in Phaltan Sugar Works Ltd (supra) that the interest was deductible as the amount was advanced to the subsidiary company as a measure of commercial expediency is the correct view, and the view taken by the Bombay High Court which set aside the aforesaid decision is not correct.

Similarly, the view taken by the Bombay High Court in Phaltan Sugar Works Ltd. vs. Commissioner of Wealth-Tax (1995) 215 ITR 582 also does not appear to be correct.

We agree with the view taken by the Delhi High Court in CIT vs. Dalmia Cement (Bhart) 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.

We wish to make it clear that it is not our opinion that in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case. For instance, if the Directors of the sister concern utilize the amount advanced to it by the assessee for their personal benefit, obviously it cannot be said that such money was advanced as a measure of commercial expediency. However, money can be said to be advanced to a sister concern for commercial expediency in many other circumstances (which need not be enumerated here). However, where it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans."

(v) Decision of Hon'ble Supreme Court of India in the case of M/s. Hero Cycles Pvt. Ltd. reported in 379 ITR 347, wherein held as under:

"A perusal of the order passed by the High Court would reveal! that the High Court has not at all discussed the facts which were established on record pertaining to the interest free advance given to subsidiary company as well as loans given to its own Directors at interest at the rate of 10 per cent (para 9).

On the other hand, the High Court has simply quoted from its own judgment in the case of CIT v. Abhishek Industries Ltd.[2006] 286 ITR 1/156 Taxman 257 (Punj. & Har.). On that basis, it has held that when loans were taken from the banks at which interest was paid for the purposes of business, the interest thereon could not be claimed as business expenditure. Such an approach is clearly faulty in law and cannot be countenanced. [Para 10]

Once it is established that there is nexus between the expenditure and the purpose of 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 his profit and that the revenue 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 own view point but that of a prudent businessman. [Para 13)

In the instant case, it is manifest that the advance to subsidiary company became imperative as a expediency in view of the undertaking given to the financial institutions by the assessee to the effect that it woik4jpr-dyide additional

margin to subsidiary company to meet the working capital for meeting any cash loses. [Para 14]

Insofar as the loans to Directors were concerned, it could not be disputed by the revenue that the assesses had a credit balance in the Bank account when the said advance of Rs. 3 lakhs was given. Remarkably as observed by the Commissioner (Appeals) in his order, the company had reserve/surplus to the tune of almost 15 crores and, therefore, the assessee company could in any case, utilise those funds for giving advance to its Directors. [Para 16]

On the basis of aforesaid discussion, the present appeal is allowed, thereby setting aside the order of the High Court and restoring that of the Tribunal. [Para 17]."

(vi) The ld. A.R. relied on the judgement of Delhi High Court in the case of Tulip Star Hotels Ltd. Vs. CIT (16 taxmann.com 335) (Delhi).

6. On the other hand, the ld. D.R. submitted that during the year under consideration the assessee had advanced money to the promoters of AIPL for the purchase of their shareholding in the said company. The shares were allocated in the next financial year and as such during the year under consideration the assessee was not the owner of the shares in AIPL. As such AIPL was not its subsidiary at all during the year under consideration, as being claimed by the assessee. So this cannot be said that the assessee was making investment in its wholly owned subsidiary.

6.1 The ld. D.R. further submitted that as regards decision rendered in the cases of Tulip Star Hotels (supra), it is noted that the issue involved was the disallowance of the interest by the AO by holding that borrowed funds were used for the investment in wholly owned subsidiary. The High Court, on the facts of the said case, held that the funds were used for the purpose of the business of the said assessee as the assessee wanted to have effective control on the new hotel through a wholly owned subsidiary. The HC observed that

the assessee had subscribed to the equity of the subsidiary company and in turn the amount was used by the said company to acquire a hotel. However, in the case under consideration the facts are entirely different as no such wholly owned subsidiary of the assessee existed. There was not any fresh investment in AIPL as only the shareholding was getting transferred from the existing promoters to the assessee and as such the beneficiary was not AIPL but the promoters. Secondly, in the case under consideration the issue involved is the nature of interest expenditure i.e. whether it is capital or revenue. This issue was never there in the above referred decision of the HC. The applicability of proviso to Section 36(l)(iii) of the Act was never under examination as the decision was rendered on 18.11,2011 i.e much prior to the amended provisions of the Section 36(l)(iii) of the Act, which are relevant for the year under consideration. So as such this decision doesn't help the assessee. Without prejudice to the above, while admitting SLP against the decision of the HC in the case of Tulip Star Hotels, the Hon'ble Supreme Court observed (Additional Commissioner of Income-tax v. Tulip Star Hotels Ltd. (2012) 21 taxmann.com 97 (SC)] that the decision in the case of SA Builders (SC) needed to be reconsidered.

6.2 Further the ld. D.R. submitted that as regardsd reliance of the assessee on the decision in the case of B. Nanji & Co. (supra), it is observed that in the said case the High Court had decided the issue in the favour of the assessee on the basis of the then existing provisions of section 36(1)(iii) of the Act, which were relevant for AY 1996-97 and AY 1997-98. Since the said provisions have already been amended, this decision doesn't help. The reliance of the assessee on the decisions in the cases of ITW Signode India Ltd. (supra) and decision of Delhi Tribunal in the case of AT&T Global Network Servics (India) Pvt. Ltd. in ITA No.489/Del/2021 and SA No.75/Del/2021 dated 24.8.2021 is also misplaced as the facts involved

are nowhere akin to the case of the assessee and no such ratio, as being argued by the assessee, was laid down in the said cases also. The reliance of the assessee on the decision in the case of Maxim India Integrated Circuit Design Pvt. Ltd. (supra) is also misplaced as the said decision doesn't support its arguments. The said decision is in relation to the AY 2011-12 and the Tribunal had decided the issue in the favour of the assessee on the basis of the then existing provisions of Section 36(1)(iii) of the Act, which were relevant for AY 2011-12. The proviso to Section 36(l)(iii) of the Act has already been amended by the Finance Act, 2015 w.e.f. 01.04.2016. Vide the said amendment the words *'for extension of existing business or profession'* were omitted. As such w.e.f. AY 2016-17 the proviso became applicable irrespective of the fact whether the capital was borrowed for expansion of the business or extension of the business. So the distinction, which the assessee has tried to bring, is no longer relevant. In fact, this aspect has duly been discussed by the ITAT in para 14 of its order in the case of Maxim India Integrated Circuit Design Pvt. Ltd. (supra) and as per the ratio of the same, up to AY 2015-16 if the capital was borrowed for extension of business, only then the proviso would become applicable and the interest on borrowed capital would not be allowed for such period but w.e.f. AY 2016-17 the interest needs to be disallowed on borrowed capital irrespective of the fact whether the capital was borrowed for expansion of the business or extension of the business.

6.3 The ld. D.R. submitted that as regards the argument of the assessee that AS-12 supports its case of treating the interest as revenue expenditure, the same is also without any weight. The said accounting standard do not deal with the borrowing cost relating to investment in purchase of shares. Further, if the provisions of the Act specifically require an amount to be treated as non-allowable expenditure, the accounting standards cannot be

given precedence over the same. The provisions of Section 36(l)(iii) read as follows:-

*"**36.** (1) The deductions provided for in the following clauses shall be allowed-in respect of the matters dealt with therein, in computing the income referred to in section 28—"(iii) the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession:*

Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset [***] (whether capitalised in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.——-"

6.4 The ld. D.R. stated that a bare perusal of the above referred section shows that the interest on capital borrowed for acquisition of an asset cannot be allowed prior to its usage. In the case under consideration the asset is the share. Alternatively, this can also be said that the acquisition of the share would have given the assessee a complete control over the underlying assets of AIPL. So unless those assets were put to use, the interest could not have been allowed as revenue expenditure. In the case under consideration the allotment of share was not there in the year under consideration and as such the action of the AO in disallowing the interest on capital borrowed for giving advance for acquisition of shares cannot be faulted with.

6.5 The ld. D.R. relied on the following judgements:-

(i) Decision of Chennai bench of Tribunal in the case of R. Sundararajan in ITA No.1666/Mds/2013 dated 25.6.2015, wherein held as under:

"8. Regarding disallowance of interest the ld. Authorised Representative for assessee submitted that the sundry creditors as on 31.03.2006 was at Rs.34,70,32,605/-. Out of this, an amount of Rs.24,52,61,029/- due from M/s. S.P. Apparels Limited which is a closely held company and according to the ld. Authorised Representative for assessee capital of the assessee as on 31.03.2006 was around Rs.39,73,08,548/-. In addition to this, the assessee borrowed interest free loans from his family members. As such, the amount advanced to M/s. S.P. Apparels Limited is out of interest free own funds and interest bearing funds was not at all used for the purpose of loan to M/s. S.P. Apparels Limited. Further he

relied on the judgment of the Supreme Court in the case of S.A. Builders Ltd vs. CIT (A) and another 288 ITR 1(SC) wherein held that

> *In order to decide whether interest on funds borrowed by the assessee to give an interest free loan to a sister concern(eg., a subsidiary of the assessee) should be allowed as a deduction under section 36(1)(iii) of the Income-tax Act, 1961, one has to enquire whether the loan was given by the assessee as measure of commercial expediency. The expression ''commercial expediency" is one of wide import and includes such expenditure may not have been incurred under any legal obligation, but yet it is allowable as business expenditure if it was incurred on grounds of commercial expediency. Decisions relating to sec.37 will also be applicable to section 36(1)(iii) because in section 37 also the expression used is '' for the purpose of the business". ''For the purpose of business" includes expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits thereby.*
>
> *To consider whether one should allow deduction under section 36(1)(iii) of interest paid by the assessee on amounts borrowed by it for advancing to a sister concern, the authorizes 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 assess in its own business but had been advanced as interest free loans 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.*
>
> *Once it is established that there was nexus between the expenditure and 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 armchair 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 completed to maximize his profits."*

9. On the contrary, the ld. Departmental Representative submitted that the assessee advanced an amount of Rs.24,52,61,029/- to M/s. S.P. Apparels Limited without any interest. Further, there was investment of Rs.12 crores in shares and the loan and investment are made without bringing any business advantage to the assessee. Further, he submitted that the assessee at the same time, paid interest of Rs.56,61,461/- and the Assessing Officer is justified in disallowing the interest of Rs.26,52,500/- out of the interest expenditure incurred by the assessee of Rs.56,61,461/-. He relied on the judgment of Punjab and Haryana High Court in the case of CIT vs. Abhishek Industries Ltd. 286 ITR 1, wherein held that the share capital is meant to be used for productive use in the business. If the share capital, according to the assessee, was surplus and it could part with the same to its sister concern for non-business purpose without any interest, there was no need to raise the loans to that extent and the amount of such share capital should have been utilized for the project itself. In case the assessee has not advanced loans to its sister concern on interest fee basis, even if the alleged surplus amount could not be repaid to the financial institution before the scheduled date as far as the term loan was concerned, the interest being paid by the assessee on the working capital could have certainly been saved to that extent. The borrowing of the funds by the company to that extent was not for the purpose of business and there was nothing on record to suggest that amounts were advanced to the sister concerns to advance some business object. Accordingly, the assessee was not entitled to claim deduction of the interest on the borrowings to the extent those were diverted to sister concerns or other persons without interest.

10. We have heard both the parties and perused the material on record. In the present case, admittedly the assessee has advanced a sum of Rs.24,52,61,029/- to M/s. S.P. Apparels Limited and also made investment of Rs.12 crores in shares from which the assessee has not derived any interest/dividend from these loans or from shares. At the same time, the assessee claimed an expenditure towards interest of Rs.56,61,461/-. Due to this reasoning, the Assessing Officer disallowed proportionate interest of Rs.26,52,520/-. The claim of the assessee before us is that there was enough interest free funds available with the assessee to make advance to M/s. S.P. Apparels Limited and also to make investment in shares. Further, the facts shows that the assessee has incurred interest expenditure of Rs.56,61,461/-. In our opinion, if the interest free funds are available with the assessee, it is the duty of the assessee to establish the nexus of the interest free funds to the non-income generating investment and also to show that only interest free funds were invested in non-income bearing investments and the assessee cannot expect that the Revenue has to prove that interest free funds available with the assessee was diverted in investment which yielded no returns. Section 36(1) (iii) of the Act provides for deductions of interest on the loans raised for business purposes. Once the assessee claims any such deduction in the books of accounts, 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 inspite 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. In our view, even the plea of nexus of loans raised by the assessee with the funds advanced to the sister concerns on interest free basis, may be it is pleaded to be out of sale proceeds or share capital or different account cannot be accepted.

11. The Entire money in a business entity comes in a common kitty. The monies received as share capital, as term loan, as working capital loan, as sale proceeds etc. do not have any different colour. Whatever are the receipts in the business, that have the colour of business receipts and have no separate identification. Sources has no concern whatsoever. The only thing sufficient to disallow the interest paid on the borrowing to the extent the amount is lent to sister concern without carrying any interest for non-business purposes would be that the assessee has some loans or other interest bearing debts to be repaid. In case the assessee had some surplus amount which, according to it, could not be repaid prematurely to any financial institution, still the same is either required to be circulated and utilised for the purpose of business or to be invested in a manner in which it generates income and not that it is diverted towards sister concern free of interest. This would result in not presenting true and correct picture of the accounts of the assessee as at the cost being incurred by the assessee, the sister concern would be enjoying the benefits thereof. It cannot possibly be held that the funds to the extent diverted to sister concerns or other persons free of interest were required by the assessee for the purpose of its business and loans to that extent were required to be raised. We do not subscribe to the theory of direct nexus of the funds between borrowings of the funds and diversion thereof for non-business purposes. Rather, there should be nexus of use of borrowed funds for the purpose of business to claim deduction under Section 36(1)(iii) of the Act. That being the position, there is no escape from the finding that interest being paid by the assessee to the extent the amounts are diverted to sister concern on interest free basis are to be disallowed.

12. If the plea of the assessee is 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 will show a camouflage by the assessee as at the time of raising of loan, the assessee will show the figures of capital introduced by it as a margin for loans being raised and after the loans are raised, when substantial amount is diverted to sister concerns for non-business

purposes without interest, a plea is 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.

13. Section 106 of the Indian Evidence Act or the principles analogous thereto places the burden in respect thereof upon the assessee, as the facts are within its special knowledge. However, a presumption may be raised in a given case as to why an assessee who for the purpose of running its business is required to borrow money from banks and other financial institutions would be giving loan to its subsidiary companies and that too when it pays a heavy interest to its lenders, it would claim no or little interest from its subsidiaries.

14. In the case of K. Somasundaram and Brothers v. Commissioner of Income-Tax 238 ITR 939, while dealing with a similar proposition, Madras High Court held as under (page 944):

> *The amount so lent, according to the assessee, came out of the contract earnings. The amount borrowed, according to the assessee was invested in the execution of the contracts. It is clear, therefore, that the assessee had invested the borrowed funds in the execution of the contracts, had recouped the money so invested presumably with profits as well on executing the contract. The amount realised on the execution thus, included the amount which the assessee had borrowed and invested. When the assessee decided to lend a substantial part of those funds interest-free to the relatives of the partners, it was clearly not a business purpose. The assessee clearly diverted the funds which had been borrowed, had been invested in the contract work, after the investment was recovered and was available either for the purposes of the business or by way of repayment of the loan. The assessee did neither, but chose to divert the money for non-business purposes. After such diversion, the interest paid on the capital borrowing to the extent of the amounts diverted can no longer be an item of expenditure which can be claimed for deduction as an item of business expenditure. If the amounts diverted was subsequently brought back into the business and utilised in the business, the assessee could thereafter claim the interest paid as a deduction. But so long as the diversion continues the assessee would be disentitled.*

14.1 In the case of Commissioner of Income-Tax v. M.S. Venkateswaran 222 ITR 163, the Madras High Court accepting the plea of the Revenue held as under (Page 168):

> *The facts on record would clearly go to show that the father of the assessee had definitely diverted a portion of the borrowed capital for his own purposes and not for business purposes. In such a case, it cannot be said that there can be a presumption that a part of the capital would have been diverted for non-business purposes not from the borrowed capital but from the capital contributed by the assessee. In the absence of such an element in the facts arising in the present case, we are unable to subscribe to the view of the Tribunal that the assessee is entitled to deduction under Section 36(1)(iii) with regard to the interest paid on borrowed capital, which was utilised by the assessee's father for non-business purposes.*

14.2 In the case of Commissioner of Income-tax v. P. Ganu Rao and Sons, 185 ITR 324 (Mad), interest on borrowed capital to the extent the same was utilised for non- business purposes was disallowed under Section 36(1)(viii) of the Act.

14.3 In the case of Commissioner of Income-Tax v. V.I. Baby and Co., 254 ITR 248, the Kerala High Court, while reversing the order of the Tribunal, held as under (Page 250):

> *''We are inclined to accept the argument raised by counsel for the Revenue, because the advances to the partners, their relatives and the sister concerns are not for business purposes and the assessee has not derived any benefit out of the same. Admittedly, no interest was charged on these advances. The Tribunal appears to have placed reliance on the fact that the partners and their relatives have utilised the amounts for business purposes, such as construction of a shop building etc. So long as the assessee- firm is not the beneficiary of such investments, the nature of investment or the utilisation of such advances has no relevance. So far as the assessee is concerned, it is only an interest free advance. The claim of the assessee's counsel that cash balances were available with the firm for advances to the partners, their relatives and the sister concerns does not advance the assessee's case. If cash balances are available, the borrowing itself is not for the purpose of the business. An assessee with liquidity cannot claim that it can give interest free advances to the partners and others and then borrow funds from the bank on interest for business purposes. Such borrowings will not be for business purposes, but for supplementing the cash diverted by the assessee without any benefit to it. Therefore, so long as the assessee is not the beneficiary of the*

investments made by the partners, their relatives and the sister concerns, and so long as the advances are interest free, the Assessing Officer is perfectly justified in disallowing the interest in proportion to the advances made."

14.4 We may notice that in the case of CIT v. Motor General Finance Ltd. 254 ITR 449, Delhi High Court held as under (page 460):

''From the conspectus of the decisions as noticed hereinbefore, there cannot be any doubt whatsoever that the nexus between the amount paid by way of advance to a sister concern and the fund available at the relevant time in the assessee's hands must be found out from the advances taken by the assessee. The onus to prove that it is entitled to (deduction) in this regard was on the assessee. It was to be proved that a bona fide loan had been granted in favour of a sister concern. It was, therefore, its duty to place requisite materials on record".

14.5 This aspect of the matter has also been considered in the case of CIT v. H.R. Sugar Factory Pvt. Ltd., 187 ITR 363, wherein the Allahabad High Court held (page 370):

''The court cannot shut its eyes to realities. What has actually happened is visible to the naked eye. The assessee, a private limited company closely held by three family groups, is made to lend huge amounts (up to 23 lakhs of rupees as per the compromise arrived at between the assessee and the directors/ shareholders in the civil suits referred to above) at a very low rate of interest and the entire difference of interest is being charged to the assessee. The assessee is not a finance company. It is engaged in the manufacture of sugar. No business purpose of the assessee-company is served by such lendings to its directors/ shareholders. It cannot be said that it is expedient in the interest of business or is laid out for the purpose of the business of the assessee.... May be that the company borrows large amounts for the purpose of its business every year, but that does not explain the huge advances to the directors/shareholders. Had this money been not advanced to the directors, it would have been available to the assessee for its business purposes and to that extent it may not have been necessary to borrow from the banks. We are, therefore, of the opinion that the Income-tax Officer was right in disallowing the difference of interest under Section 36(1)(iii) of the Income-tax Act and that the Tribunal's approach is not only superficial but too naïve".

14.6 In the case of Indian Metals and Ferro Alloys Ltd. v. CIT (1992) 193 ITR 344, the Orissa High Court held as under (page 349):

''... it may be pointed out that, in a hypothetical case, an assessee can earn profits only after the date of investment and advance. It cannot be said that because, in the concerned assessment year, the profit was more than the investment and advance, those came only out of the profit. The actual financial liquidity position on the relevant date has to be established by the assessee.

14.7 Yet again in CIT v. H.R. Sugar Factory Pvt. Ltd. 190 ITR 643 (All.), B.P. Jeevan Reddy C.J. (as his Lordship then was) relying upon his earlier decision in H.R. Sugar Factory Pvt. Ltd.'s case that the assessee-company was not entitled to the allowance of interest.

14.8 In Veecumsees v. CIT, 220 ITR 185 (SC) ; The Hon'ble the Supreme Court held that deduction for payment of interest on the loans raised for building a cinema theatre, which was ultimately closed, was allowable deduction as the assessee was engaged in a composite business of jewellery and cinema. The facts of the case are distinguishable with the facts of the case in hand.

14.9 In the case Commissioner of Income-Tax v. Saraya Sugar Mills (P) Ltd. , 201 ITR 181, the Allahabad High Court held that where part of the overdraft diverted to Directors and concerns in which they were substantially interested, interest in such amount to that extent was held disallowable. Similar views were expressed by Bombay High Court in Phaltan Sugar Works Ltd. v. Commissioner of Wealth Tax, and Phaltan Sugar Works Ltd. v. Commissioner of Income-Tax 215 ITR 582 (Bom).

14.10 In the case of Elmer Havell Electrics and Ors. v. Commissioner of Income-Tax and Anr. 277 ITR 549, the Delhi High Court, while rejecting the appeal of the assessee on the issue of disallowance of interest on interest free advances made to sister concern, observed that the assessee itself had taken loan with interest and had advanced funds by diversion or otherwise to its sister concern free of interest. Taking this and other findings by the Tribunal into consideration, the appeal was dismissed.

14.11 In Commissioner of Income Tax v. Sujanni Textiles (P) Ltd. , 225 ITR 560, the Madras High Court disallowed the interest on the borrowed capital to the extent the same was advanced to the Directors without interest.

14.12 In Indian Metals & Ferro Alloys Ltd. v. Commissioner of Income Tax (1992) 193 ITR 344, Orissa High Court held as under (page 348):

''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. If the assessee makes a claim to deduction in terms of Section 36 for the purpose of computation of income referred to in Section 28, he has to place materials in support of his claim of entitlement to the deduction. 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. Illustratively, it may be pointed out that, in a hypothetical case, an assessee can earn profits only after the date of investment and advance. It cannot be said that because, in the concerned assessment year, the profit was more than the investment and advance, those came only out of the profit. The actual financial liquidity position on the relevant date has to be established by the assessee".

14.13 In Regal Theatre v. Commissioner of Income Tax, 225 ITR 205, the Delhi High Court held that consideration of the issue regarding allowability of deduction under Section 36(1)(iii) of the Act is purely a question of law as it is an inference to be drawn from the facts.

15. In our opinion, if the amount is advanced from a mixed account or share capital or sale proceeds or profits etc., the same would be termed as diversion of borrowed capital and that the revenue need not require to establish nexus of the funds advanced to the sister concerns with the borrowed funds. Once it is borne out from the record that the assessee had borrowed certain funds on which liability to pay tax is being incurred and on the other hand, certain amounts had been advanced to sister concerns or others without carrying any interest and without any business purpose, the interest to the extent the advance had been made without carrying any interest is to be disallowed under Section 36(1)(iii) of the Act. Such borrowings to that extent cannot possibly be held for the purpose of business but for supplementing the cash diverted without deriving any benefit out of it. Accordingly, the assessee will not be entitled to claim deduction of the interest on the borrowings to the extent those are diverted to sister concerns or other persons without interest."

(ii) Decision of Hon'ble Supreme Court of India in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd. reported in 141 CTR 387 (SC), wherein held as under:

"The basic proposition that has to be borne in mind in this case is that it is possible for a company to have six different sources of income, each one of which will be chargeable to income tax. Profits and gains of business or profession is only one of the heads under which the company's income is liable to be assessed to tax. If a company has not commenced business, there cannot be any question of assessment of its profits and gains of business. That does not mean that until and unless the company commences its business, its income from any other source will not be taxed. If the company, even before it commences business, invests the surplus fund in its hand for purchase of land or house property and later sells it at profit, the gain made by the company will be assessable under the head 'Capital gains'. Similarly, if' a company purchases a rented house and gets rent, such rent will be assessable to tax under s. 22 as income from House property. Likewise, a company may have income from other sources. It may buy shares and get dividends. Such dividends will be taxable under s. 56. The company may also, as in this case, keep the surplus fund in short-term deposits in order to -earn interest Such interests will be chargeable under s. 56. The company has chosen not to keep its surplus capital idle, but has decided to invest it fruitfully. The fruits of such investment will clearly be of revenue nature. In other words, if the capital of a company is fruitfully utilised instead of keeping it idle the income thus generated will be of revenue nature and not accretion of capital. Whether the company raised the capital by issue of shares or debentures or by borrowing will not make any difference to this principle. If borrowed capital is used for the purpose of earning income that income will have to be taxed in accordance with law. Income is something which flows from the property. Something received in place of the property will be capital receipt. The amount of interest received by the company flows from its investments and is its income and is clearly taxable even though the interest amount is earned by utilising borrowed capital. It is true that the company will have to pay interest on the money borrowed by it. But that cannot be a ground for exemption of interest earned by the company by utilising the borrowed funds as its income. The interest earned by the assessee is clearly its income and unless it can be shown that any provision like s. 10 has exempted it from tax, it will be taxable.

The question of adjustment of interest payable by the company against the interest earned by it will depend upon the provisions of the Act. The expenditure would have been deductible as incurred for the purpose of business if the assessee's business had commenced. But that is not the case here. "The assessee may be entitled to capitalise the interest payable by it. But what the assessee cannot claim is adjustment of this expenditure against interest assessable under s. 56. Sec. 57 sets out in its cls. (i) to (iii) the expenditures which are allowable as deduction from income assessable

under s. 56. It is not the case of the assessee that the interest payable by it on term loans are allowable as deduction under s. 57. In the facts of this case the company cannot claim any relief either under s. 70 or s. 71, since its business had not started and there could not be any computation" of business' income or loss incurred by the assessee in the relevant accounting year. In such a situation the expenditure incurred by the assessee for the purpose of setting up its business cannot be allowed as deduct/on, nor can it be adjusted against any other income under any other head. No adjustment can be allowed except in accordance with the provisions of the IT Act However desirable it may be from the point of view of equity, this adjustment cannot be made unless the law specifically permits such adjustment. .

(Paras 5 to 7)

There is another aspect of this matter. The company, in this case, is at liberty to use the interest income as it likes. It is under no obligation to utilise this interest income to reduce its liability to pay interest to its creditors. It can re-invest the interest income in land or share, it can purchase securities, it can buy house property, it can also set up another line of business, it may even pay dividends out of this income to its shareholders. There is no overriding title of anybody diverting the income at source to pay the amount to the creditors of the company. It is well-settled that tax is attracted at the point when the income is earned. Taxability of income is not dependent upon its destination or the manner of its utilisation. It has to be seen whether at the point of accrual, the amount is of revenue nature. If so, the amount will have to be taxed. If a person borrows money for business purpose but utilises that money to earn interest, however temporarily, the interest so generated will be his income. This income can be utilised by the assessee whichever way he likes. He may or may not discharge his liability to pay interest with this income. Merely because it was utilised to repay the interest on the loan taken by the assessee, it did not cease to be his income. The interest earned by the assessee could have been used for many other purposes. If the assessee purchased a house or distributed dividend or paid salary of its employees with the money received as interest, will the interest amount be treated as not his income? This is not a case of diversion of income by overriding title. The assessee was entirely at liberty to deal with the interest amount as he liked. The application of the income for payment of interest could not affect its taxability in any way.—CIT vs. Seshasayee Paper & Boards Ltd. (1987) 61 CTR (Mad) 117 : (1985) 156 1TR 542 (Mad) : TC 41 R. 544 and Kedar Narain Sinoh vs. CIT (1938) 6 ITR 157 (All) : TC 32R.258 approved; CIT vs. NaQdriuna Steels Ltd. (1988) 71 CTR (AP) 118 : (1988) 171 ITR 663 (AP) : TC 41R.551, CIT vs. Electrochem Orissa Ltd. (1995) 123 CTR (On) 162 : (1995) 211 ITR 552 (Ori) and CIT vs. Maharashtra Electrosmelt ,[v] Ltg\. (1995) 124 CTR (Bom) 117 : (1995) 214 ITR 489 (Bom) : TC 41R.557 / disapproved; CIT vs. Shaw Wallace & Co. (1932) 59 IA 206~(PC) and Pondicherry -Railway Company Ltd. vs. CIT AIR 1931 PC 165 relied on.

(Paras 10 & 12)"

(iii) Decision of the Chandigarh Tribunal in the case of M/s. C.R. Auluck & Sons Pvt. Ltd. in ITA No.915/Chd/2008 dated 30.6.2010, wherein held as under:

"3. The only issue in the present appeal is against the disallowance of interest u/s 36(1)(iii) of the Act amounting to Rs. 14,82,695/- . The brief facts of the case are that on the perusal of the balance sheet, the Assessing Officer noted the assessee had made advances to its sister concern and others totaling Rs. 2,31,23,236/- . The learned AR for the assessee was asked to furnish the details of loans and advances made and whether any of the same had been given interest free to the sister concerns for non business purposes. In reply, the assessee furnished the details of loans and advances given. A sum of Rs. 1,23,65,787/- was given to M/s Luxmi Engg. Works, a sister concern of the assessee. As the assessee had paid interest at the rate of 12% on its borrowings, it was asked to explain why proportionate disallowance may not be made u/s 36(1)(iii) of the Act. In reply, it was submitted that the assessee had taken a mortgage loan of Rs. 100 lacs from the bank and the same was advanced to the sister concern M/s Luxmi Engg Works in the last week of March, 2004. Further submission was that the said firm had overdrawn its credit limits with the bank and the account was in the danger of being declared NPA (NonProductive Asset) by the bank on 31.3.2004. The assessee had also stood guarantee to the credit limits advanced by the bank to M/s Luxmi Engineering Works. Hence, in order to save the firm from being declared as NPA, and to ensure the survival of the said firm, the assessee had advanced sum of Rs. 100 lacs during the year free of interest to its sister concern. The said advance was claimed to be for commercial expediency. The Assessing Officer rejected the plea of the assessee regarding commercial expediency. He further observed that apart from the assessee, two other companies were also guarantors in the loan taken by M./s Luxmi Engineering Works from the bank and none of the said two concerns had given any loans to save their sister concern. The Assessing Officer noted that the two investment companies who had stood guarantee were not making profits and the assessee before us was making profits, hence, funds were transferred for reducing the tax liability of the profit making concern. Applying the ratio laid down by the Hon'ble Punjab & Haryana High Court in CIT Vs. Abhishek Industries [286 ITR 1 (P&H)], the Assessing Officer disallowed a sum of Rs. 14,82,695/- being 12% interest on the said advances. The Assessing Officer also held that the ratio of commercial expediency quoted by the Hon'ble Supreme Court in M/s S.A. Builders [288 ITR 1 (SC)] was not applicable in view of no business expediency. Another plea of the assessee that both the assessee and its sister concern were supplying

their goods to one concern was held by the Assessing Officer not to be a case of business expediency in relation to the assessee. The CIT(A) upheld the order of Assessing Officer on all counts and also agreed with the Assessing Officer that the commercial expediency for the purpose of examining and applicability of the ratio laid down in M/s S.A. Builders Ltd (Supra) had to be seen with reference to the loan given and not to the loan receiver. The CIT(A) thus held that in view of the ratio laid down in CIT Vs. Abhishek Industries Ltd (Supra), the disallowance of interest u/s 36(1)(iii) of the Act is upheld. The assessee is in appeal against the aforesaid order of CIT(A).

4. The learned AR for the assessee pointed out that the advances to the sister concern were made on account of commercial expediency. It was pointed out that assessee was supplying sewing machines to M/s Usha International and the sister concern was supplying fans to the said concerns. The assessee in order to save its reputation and goodwill in the market had advanced Rs. 1 Cr interest free to its sister concern. It was further pointed by the learned AR that both the concerns had raised bank loans and the assessee was a guarantor of loan advanced to M/s Luxmi. In case, the assessee was declared NPA, the creditability of the assessee also gets affected. Reliance was placed on the ratio laid down by the Hon'ble Supreme Court S.A. Builder Ltd Vs. CIT (Supra) for the proposition that no disallowance is warranted u/s 36(1) (iii) of the Act where the amounts are advanced, interest free to the sister concern for commercial expediency. Further reliance was placed on the ratio laid down in CIT Vs. Delhi Safe Deposit Company [133 ITR 756 (SC)]. Payments being made for saving business reputation and its allowability as business expenditure was the next plea of the learned AR for the assessee. The learned AR relied upon CIT Vs. Gerorgepolous [146 ITR 380 (Mad)] and Surat Electricity Co Ltd Vs. CIT [35 DTR (Ahd)(Trib) 272]. The learned AR also pointed out that the ratio laid down in CIT Vs. Abhishek Industries Ltd (supra) was not applicable as the amount was advanced for business purposes. The learned DR pointed out that both the concerns were making different products and were supplying to M/s Usha Enterprises and there was no connection between the two. The Learned DR further stated that the expenditure incurred on the loan taken and advanced interest free to the sister concern were not in the course of business and hence not allowable. The learned DR pointed that there should be nexus between the expenditure incurred and the business carried on in order to establish commercial expediency. The learned AR for the assessee in rejoinder stated that the different products supplied by the two concerns, i.e. the assessee and its sister concern would not make any differences as in S.A. Builders vs CIT (supra), the Hon'ble Supreme court has recognized that in order to establish nexus between the

expenditures and the purposes of business, the business of sister concern need not necessarily be the business of the assessee itself.

5. We have heard the rival contentions and perused the records. The issue arises in the present appeal with regard to the allowability of deduction u/s 36(1)(iii) of the Act. The assessee during the year under consideration had raised loan of Rs. 100 lacs from its banks, which was advanced interest free to the sister concern of the assessee M/s Luxmi Engineering Works. The loan was borrowed from the bank at interest cost of 12% and the same was advanced interest free to the sister concern. The plea of the assessee for making the said advance to its sister concern is that the same has been advanced for commercial expediency. The assessee and the sister concern had individually overdrawn credit limits from banks. The assessee had stood guarantee to the credit facilities availed by the sister concern. Because of non payment, the said overdraft account available by the sister concern was in danger of being declared as NPA by the bank. In order to ensure the firm not being declared as NPA, the assessee before us had made the said advances to its sister concern. The second plea of the assessee was that both the concerns were supplying its products to M/s Usha International and hence the business expediency.

6 The allowability of interest on borrowed capital wherein interest bearing funds have been advanced interest free to the sister concern was deliberated upon by the Hon'ble Supreme Court in S.A. Builders Vs. CIT (Supra). The ratio laid down by the Hon'ble Supreme Court is as under:-

> *"In order to decide whether interest on funds borrowed by the assessee to give an interest free loan to a sister concern (e.g. a subsidiary of the assessee) should be allowed as a deduction under section 36 (1)(iii) of the Income Tax Act, 1961, one has to enquire whether the loan was given by the assessee as a measure of commercial expediency."*

7. Their lordships further held that for allowing the deduction u/s 36(1)(iii) of the Act of interest paid on amounts borrowed for advancing loans to a sister concern, the authorities "should examine the purpose for which the assessee advance the money and what the

sister concern did with the money". The test of commercial expediency is to be satisfied before allowing of claim of expenditure on account of interest on borrowed capital u/s 36(1)(iii) of the Act. The Hon'ble Supreme Court further observed as under:-

> *"The expression 'commercial expediency' is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as business expenditure if it was incurred on grounds of commercial expediency."*

8. It was concluded as under:-

> *"We wish to make it clear that it is our opinion that in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case. For instance, if the directors of the sister concern utilize the amount advanced to it by the assessee for their personal benefit, obviously it cannot be said that such money was advanced as a measure of commercial expediency. However, money can be said to be advanced to a sister concern for commercial expediency in many other circumstances (which need not be enumerated here). However, where it is obvious that holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans."*

9. Coming to the facts of the present case before us, we find that the share holding of the directors in the assessee company and the partners in the sister concern M/s Luxmi Engineering Works are common. The two concerns are family concerns having different lines of manufacturing. The assessee is manufacturing sewing machines under the brand name of 'Luxmi' and as per the assessee major portion of the sales are being made to M/s Usha International Ltd. The sister concern is engaged in the manufacturing of fans under the brand name 'Luxmi' and 90% of the sales are being made to M/s Usha International

Ltd. Both the concerns had taken independent credits limits from Punjab National Bank and the assessee had stood guarantor to the credit limits advanced to the sister concern. However, M/s Luxmi Engineering works had gone into huge losses and the bank account was proposed to be declared NPA by the bank. The fear of the assessee was that the amount could have been recovered from its being the guarantor which in turn would have affected its working and in turn its goodwill and reputation in business. In order to safeguard its business interest, the assessee claims to have raised a loan of Rs. 100 lacs from bank and advanced the same to its sister concern

10. The basis for allowing an expenditure in the hands of the assessee is an expenditure incurred for the purpose of business. Applying the ratio of commercial expediency propounded by the Hon'ble Supreme Court in S.A. Builders Vs. CIT (Supra), we find that the intention of the assessee in advancing the said loan interest free to its sister concern is not for the purpose of business. The two concerns were carrying on independent lines of manufacturing and the products manufactured were different by each of the concern.The end products were being supplied to one concern i.e M/s Usha International Ltd. The plea of the assessee in this regard is that the products were being supplied under the same brand name 'Luxmi' by the two concerns does not establish the stand of the assessee that its reputation will be affected specially in the facts and circumstances of the case where both the concerns were supplying different items to M/s Usha International Ltd. No evidence has been brought on record to show how the non supply by the sister concern M/s Luxmi Engineering Works would affect the business of the assessee. Further, the availing of independent loans from the banks and its non payment by the sister concern or the sister concern being declared NPA has no relation with the business being carried on by the assessee. The fear of the amount being recovered from the assessee because of the guarantees given, does not mean that the advancing of interest free loans to the sister concern is being in the course of carrying on the business by the assessee. The plea of the loss of reputation and goodwill of the assessee in view of sister concern being declared NPA does not justify the advancing of interest free loan out of borrowed funds, as the same is not for the purpose of business of assessee.

11. We find support from the ratio laid down by the Chandigarh Bench of the Tribunal in M/s Hero Cycles Ltd Vs. ACIT (ITA No. 768/ Chandi/2005) relating to Assessment Year 2001-02 wherein while allowing the claim of deduction u/s 37(1) of the Act, the expression 'for the purpose of business' has been considered in the light of the ratio laid down in various judgments by the Hon'ble Apex Court. A reference has been made to the ratio

laid down by Apex Court in CIT Vs. Chandu Lal Keshav Lal & Company [38 ITR 601], which reads as under:-

> *"11.3Infact, a gainful reference can be made to the judgement of the Hon'ble Apex Court in the case of CIT v. Chandulal Keshavlal and Co. reported in 38 ITR 601. In the said case, assessee was a managing agent of a company and commission of Rs 309114/- accrued to it. The financial position of the managed company was not good and as such it gave up full amount of claim of commission and agreed to take only Rs 100000/- only. The AO taxed the entire amount of Rs 309114/- as income of the assessee. The ITAT held that the amount of Rs 209114/- given up was for the purposes of business and hence allowable as business expenditure. It held that the assessee 's business prosperity is linked up with managed company, if the managed company grew assessee 's commission would also grow and consequently the amount given up was a justified expenditure. The Hon'ble High Court and Supreme Court upheld the findings of the ITAT. The Hon'ble Apex Court while approving the order of ITAT made the under mentioned observations:-*
>
> *"<u>Another fact that emerges from these cases is that if the expense is incurred for fostering the business of another only or was made by way of distribution of profits or was wholly gratuitous or for some improper or oblique purpose outside the course of business then the expense is not deductible.</u> In deciding whether a payment of money is a deductible expenditure one has to take into consideration questions of commercial expediency and the principles of ordinary commercial trading. if the payment or expenditure is incurred for the purpose of the trade of the assessee it does not matter that the payment may inure to the benefit of a third party (Usher's Wiltshire Brewery Limited v. Bruce). Another testis whether the transaction is properly entered into as a part of the assessee's legitimate commercial undertaking in order to facilitate the carrying on of its business; and it is immaterial that a third party also benefits thereby (Eastern*

Investments Ltd. v. Commissioner of Income-tax). But in every case it is a question of fact whether the expenditure was expended wholly and exclusively for the purpose of trade or business of the assessee. In the present case the finding is that it was laid out for the purpose of the assessee's business and there is evidence to support this finding. Mr. Palkhivala referred in this connection to Atherton v. British Insulated & Helsby Cables Limited where at page 191 Viscount Cave L.C., observed:

"It was made clear in the above cited cases of Usher's Wiltshire Brewery v. Bruce and Smith v. Incorporated Council of Law Reporting that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency and in order indirectly to facilitate the carrying on of the business may yet be expended wholly and exclusively for the purposes of the trade; and it appears to me that the findings of the Commissioners in the present case bring the payment in question within that description. They found (in words which I have already quoted) that the payment was made for the sound commercial purpose of enabling the company to retain the services of existing and future members of their staff and of increasing the efficiency of the staff; and after referring to the contention of the Crown that the sum of pound 31,784 was not money wholly and exclusively laid out for the purposes of the trade under the rule above referred to, they found that the deduction was admissible--thus in effect, although not in terms, negativing the Crown's contention. I think that there was ample material to, support the findings of the Commissioners, and accordingly that this prohibition does not apply." (Underlined for emphasis by us)"

12. Applying the test of commercial expediency propounded by the Apex Court in S.A. Builders Ltd (Supra), the Tribunal in Hero Cylces Ltd Vs. ACIT held as under:-

".....In fact, learned counsel for the assessee had relied upon the judgement of the Hon'ble Apex Court in the case of S.A.Builders Ltd. (supra) for the proposition that the purpose of the business need not necessarily be the business of the assessee itself. In the said judgement, the Hon'ble Apex Court has noted that where it is obvious that a holding company has a deep interest in a subsidiary and if the holding company advanced borrowed money to a subsidiary and the same is used by the subsidiary for some business purpose, the assessee would be entitled to deduction of interest on its borrowed loans. On the basis of the aforesaid, it is argued by the learned counsel that in this case, subsidy has been provided to MAL to recoup its losses and even if it is said that the subsidy is not for assessee's own business purpose, but it can be said to be for the purposes of MAL's business purposes and thus, the said expenditure would be allowable for deduction u/s 37(1) of the Act because the assessee has deep interest in MAL. We have carefully considered this plea and in our opinion, the case of the assessee has to fail. We are unable to appreciate and nor is there any evidence or pleading set up as to how the money provided to MAL as subsidy has been used by it for its business purposes. As noted earlier, in terms of the judgement of the Hon'ble Apex Court in the case of Chandu Lal Keshav Lal & Co. (supra) where the expenditure is incurred for only fostering the business of another concern or the payment is wholly gratuitous or is for some oblique purpose outside the course of business, such expenditure is not deductible. The instant is a case where the business of the other concern has been sought to be fostered by way of a gratuitous disbursement and hence, the reasoning enunciated by the Hon'ble Apex Court in the case of S.A.Builders Limited (supra) does not help the case of the assessee..... ".

13. We find that the assessee has failed to establish its case of commercial expediency. That in the circumstances where interest bearing borrowed loans have been advanced for non business purposes, the ratio laid down by the Hon'ble Punjab & Haryana High Court in CIT Vs. Abhishek Industries (Supra) is applicable. Accordingly, we uphold the disallowance of 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.

The order of the CIT(A) is upheld. Thus, the grounds of appeal raised by the assessee are dismissed."

(iv) Decision of Bangalore bench of Tribunal in the case of Coffeeday Enterprises Ltd. in ITA No.1367/Bang/2017 dated 29.11.2017, wherein held as under:

"5. I have considered the rival submissions. I find that the claim of the assessee is this that as per the Memorandum & Articles of Association of the assessee company, the main business of the assessee company is to deal and investment in shares. As per the balance sheet of the assessee company available at page Nos.1 to 11 of the paper book, it is seen that the assets of the company includes investments of Rs.192 crores and deposit with a company M/s Mysore Amalgamated Coffee Estates Ltd. Rs.17.95 crores and Yes bank Rs.49 lakhs and there is no inventory or stock in trade. As per P&L account available at page 12 of the paper book, the assessee is showing income of Rs.3,44,869/-on account of interest on FDs and the activity in respect of purchase of shares of various companies is not shown as purchase and closing stock in trade. Specific query was raised by the Bench and in reply it was submitted by the ld AR of the assessee that there is no stock in trade and in my considered opinion, in the facts of the present case, it cannot be said that the assessee is doing any business activity and any income is to be taxed under the head 'income from business'. Therefore, no deduction is allowable u/s 36(1)(iii) in respect of interest paid by the assessee and claimed as allowable expenditure because as per the sec. 36(1)(iii), interest is allowable if it is incurred in respect of capital borrowed for the purpose of business. Since there is no business activity, no deduction is allowable u/s 36 (1)(iii). Hence, I reject these grounds."

7. I have duly considered the rival contentions and perused the materials on record. First of all, I consider Memorandum of Articles of Association of the company so as to decide the issue of foundation on which the company has been formed and its object clauses. This Memorandum of Association is a Constitution, on, its incorporation, the company can pursue only the main objects which are listed therein and it can also undertake all ancilliary and incidental objects in pursuance of the main objects of the assessee company. If any of

the other objects are to be pursued which are in clause 3(b) of the object clause same could be pursued with the company with the appropriate resolutions of the competent body. In general, what is not expressly prohibited is said to be permitted. However, under the Company Act objects which are not expressly permitted are prohibited. In the present case, the company was borne with the main object, inter-alia to carry on following objects:

"3. The objects for which the Company is established are:

(a) THE OBJECTS TO BE PURSUED BY THE COMPANY ON ITS INCORPORATION ARE:-

1. *To own, construct, run, establish, conduct, manage, take on lease, let out or hire, render technical advice in constructing, furnishing and running of, take over and carry on the business of hotels, motels, restaurants, café tavern, holiday homes, cottages, bars, refreshment rooms, boarding and lodging, house keepers, guest houses, pubs, theatres, clubs as owners, proprietors, lessors, lessees, or managers in India or abroad.*

2. *To carry on the business of hotels, land agents, advertisement for sale or purchase, assist in selling or purchasing and to find out or introduce purchasers, vendors and to manage lands, buildings and other property, to collect rents and income and to supply to tenants and occupiers and others refreshments, clubs, public halls, messengers, lights, writing rooms, reading rooms, meeting rooms, lavatories, laundry, conveniences, garages and other facilities in India and abroad.*

3. *To fit up, equip, decorate and furnish any buildings, hotels, cottages, structures or constructions and any property for the purpose of letting out the same to visitors or guests or to customers or persons doing business with the Company whether in single rooms, suits, cottages or in any other form or manner, and to establish and provide for all kinds of comforts and facilities for the customers.*

4 *To carry on the business of builders, contractors, operators, developers of land and building and maintaining and providing*

various infrastructural facilities in or to various sectors by setting up hotels, motels, restaurants, food courts, shops & business establishments, shopping malls, commercial complexes, holiday resorts, clubs, pubs, bars, eating joints, cafes, tavern, beer-houses, refreshments, tea rooms, milk and snack bars, baths, boutiques, swimming pools, boat clubs, dressing rooms, laundries, reading rooms, libraries, play grounds, places and equipments of all kinds and description including altering, improving, enlarging, developing, decorating, furnishing and maintaining of structures, buildings, sites, for and in connection with the industry of hospitality, boarding, lodging, entertainment, amusement, recreation, sports, and/or pleasure, cottages, rest rooms, resorts, time share resort holiday rooms, tourist bungalows, dance halls, drama stages, apartment houses, gardens and orchards and to provide transport/pick up vans or other modes of transportation, conveniences or facilities for the comfort and hospitality of residents, either by way of purchase, lease, rent or by any other means in India or abroad."

7.1 As per clause 3(b), the assessee is permitted to carry on following objects also:

"3***(b) MATTERS WHICH ARE NECESSARY FOR FURTHERANCE OF THE OBJECTS SPECIFIED IN CLAUSE 3(a) ARE:-***

1. *To act as contractors, sub-contractors, builders and property developers, architects or engineers, decorators, designers, planners, advisers for all types of construction and works of all description including electric works, highways, tunnels, pipelines, building roads, drainage and sewage work.*

2. *To purchase for investments, resale land and building and other property of any tenure and any interest therein and to create, sell and deal in freehold and leasehold land and to make advances and upon security of land, house or other property or any interest therein and generally to deal in or sell, lease, exchange or otherwise with land and other property real or present and to turn the same into account as may seem expedient.*

3. *To acquire land, building and other immovable properties by purchase, hire, lease or otherwise and to construct hotels, accommodation, apartments, rest rooms, lounges, commercial*

buildings, shop, offices, godowns, industrial sheds and other allied structures, buildings and works of common utility for allocation or allotment to members of the Company on ownership, lease, licence or on such other basis and/or to grant right of use, exploitation and enjoyment therefrom.

4. *To acquire by purchase, lease, exchange, or otherwise lands, buildings and heriditaments of any tenure or description, and any estate or interest therein and any rights over or connected therewith and to turn the same to account as may seem expedient to the Directors of the Company and in particular by preparing and laying out building sites, and by constructing, reconstructing, pulling out building sites, and improving, decorating, furnishing, fittings up maintaining offices, mansions, hotels, restaurants, accommodations, bungalows, factories, warehouses, shops, sheds, works and conveniences of all kinds and by consolidating or connecting or sub dividing properties and by leasing renting out and disposing of the same.*

5. *To collaborate with foreign firms for acquiring or offering technical know-how, or to employ foreign technicians or experts or advisers on a contract basis or otherwise and to loan on suitable terms in Company's technicians, experts and others to other parties in or outside India for pursing the main objects and to send out to foreign countries the Company's own technicians, plants, machinery tools, etc., for pursuing the main objects in foreign countries on a joint venture basis or otherwise and to send out Company's men to foreign countries for further training.*

6. *To administer/manage land, building, bungalows and other properties, colony or colonies whether belonging to the Company or not and to collect rents and income and to supply to tenants, occupiers and others refreshments attendants, messengers, lights and to provide waiting-rooms, reading rooms, meeting rooms, lavatories, laundries and all conveniences, stables and other advantages.*

7. *To acquire and take over any business or undertaking carried on in connection with any land or building which the Company may desire to acquire or become interested in and the whole or any of the assets and liabilities of such business or undertaking and to carry on the same or to dispose or remove or put an end thereto or otherwise deal with the same as may seem expedient.*

8. *To apply for, tender, purchase or otherwise acquire any contracts decrees or any concessions for or in relation to the construction, execution, carrying out equipments, improvements, management, administration or control of public and civil works and conveniences and undertake, execute, carry out, dispose of or otherwise turn into account the same. To sub-let all or any contracts from time to time and upon such terms and conditions as may be thought expedient.*

09 *To enter into any arrangements with any Government or authorities, municipal, local or otherwise or any person, institution or company in India or abroad that may seem conducive to the objects of the Company or any of them and to obtain from such Government Authority, person, institution or company, rights, all sorts of assistance, privileges, charters, contracts, licenses and concessions which the Company may think it desirable to carry out and exercise and comply therewith.*

10. *To acquire and secure membership, seat or privileges either in the name of the Company or its nominee or nominees in and of any association, exchange, market, club or other institution in India or any part of the world or furtherance of any business, trade or industry.*

11. *To adopt such means of making known the products of the Company as may seem expedient and in particular by advertisement in the press, by circulars, by purchase and exhibition or works or art or interest, by publication of books and periodicals and by granting prizes, rewards and donations.*

12. *To undertake and execute any contracts for works involving the supply or use of labour, equipment and appliances and to carry out any ancillary or other works comprises in such contracts, concerning the main objects.*

13. *To prepare and submit preliminary report on the project and/or prepare and submit final project report, plant layout, designs and blue-prints and/or to undertake and execute construction, erection and operation of plan for commercial and industrial undertakings, Government and Semi-Government Undertakings, Local Authorities and for other public and private bodies.*

14. *To apply or join in applying to any Parliament, Government, Local Improvement Trust or other authority or body Municipal, Local or otherwise in Dominion of India, Native States, colonies or foreign countries for and to obtain or in any way assist in obtaining any Act of Parliament, Laws, decrees, concessions, orders, rights or privileges or advantages that may seem conducive to the objects of this or any other company or for enabling this or any other company's constitution to oppose any proceeding or applications which may seem calculated directly or indirectly or prejudice the interests of this or any other company to be legalized, registered or incorporated if necessary in accordance with the laws of any country, state or place in which it may propose to carry on operation to establish and maintain any agencies of the Company and to open and keep a colonial or a foreign register of this or any other company in any Foreign country, Native States, colony or dependency and to allocate any number of these or any other shares in this or any other company to such register or registers.*

15. *To register trade names, brand names, marks and also to permit their uses to such persons, firms, companies or corporations which adhere to such terms and conditions as laid down by the Company by making such rules and regulations as are necessary from time to time in that regard.*

16. *To pay out of the funds of the Company all expenses of and incidental to the formation, registration, advertisements and establishment of this Company and the issue and subscription of the share or loan capital including brokerage and/ or commission for obtaining applications for all placing or guaranteeing the placing of shares or any debentures and other securities of this Company and also all expenses attending the issue of any circular of notice and the printing, stamping, circulating of proxies and forms to be filled up by the members of the Company.*

17. *To effect all such insurances in relation to the carrying on of the Company's business and any risks incidental thereto as may seem expedient and if thought fit, to join or become a member of any mutual Insurance company or to carry a part or the whole of such Insurance risk in connection with the Company's business.*

18. *To improve, manage, develop, grant-rights, or privileges in respect of, or otherwise deal with all or any part of the property and rights of the Company.*

19. *To draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, warrants, debentures and other negotiable or transferable instruments.*

20. *To establish agencies, branches or appoint representatives in India and elsewhere for any one or more of the objects of the Company and to regulate and discontinue the same.*

21. *To invest and deal with the moneys and other assets of the Company, not immediately required in any manner.*

22. *Subject to Section 58-A of the Companies Act, 1956 and the Directives of the Reserve Bank of India in this regard to receive money on deposit or loan and borrow or raise money at interest or otherwise in such manner as the Company shall think fit, and in particular by the issue of debentures, perpetual or otherwise, term loans and if necessary, to secure the repayment of any money borrowed, raised or owing by mortgage, charge, pledge, hypothecation or lien upon all or any of the property or assets of the Company, both present and including its uncalled capital and also by a similar mortgage, charge, pledge, hypothecation or lien to secure and guarantee the performance by the Company or any other person or company of any obligation undertaken by the Company or any other person or company as the case may be, and on such other terms and conditions like rate of interest repayment schedule, creation of trust, powers of trustees and lenders, convertibility clause, nomination of Directors etc. as the Directors may deem fit so, however, that the Company shall not do any Banking Business as defined in the Banking Regulation Act, 1949.*

23. *Subject to the provisions of the Companies Act, 1956, to lend and advance money or give credit with or without security, to such persons, companies, corporation or firms and on such terms as may seem expedient and in particular, to customers and others having dealing with the Company and to release or discharge any debt or obligation owing to the Company, guarantee the performance of any contract or obligation of any company, firm or person and to guarantee the payment and repayment of the capital and principal interest or premium payable on any stock, shares or securities, debentures,*

mortgages, loan or other securities issued by any company, corporation, firm or person, including (without prejudice to the said generality) bank overdrafts, bills of exchange and promissory notes and generally to give guarantee and indemnities so, however, that the Company shall not do any Banking Business as defined in the Banking Regulation Act, 1949.

24. *To vest any movable or immovable property, rights or interest acquired by, received or belonging to the Company in person or persons or company on behalf of or for the benefit of the Company and with or without any declared trust in favour of the Company.*

25. *To apply for, purchase or otherwise acquire and protect and renew any patent, patents, rights, inventions, trade-marks designs, licences, concessions, and the like, conferring any exclusive or non-exclusive or limited rights to their use or any secret or other information as to any inventions which may seem capable of being used directly or indirectly for any of the purposes of the Company and to use, exercise, develop or grant licences in respect of or otherwise turn to account the property, rights/information so acquired and to expend money in experimenting upon, testing or improving any patents, inventions or rights.*

26. *To insure with any person or company against losses, damages, risks and liabilities of any kind which may affect the Company either wholly or partly.*

27. *To open current, overdraft, loan, cash credit, deposit or savings account with any Bank and to draw and endorse cheques, pay slips, telegraphic transfers and to withdraw money from such accounts and otherwise to operate thereon.*

28. *To accept gifts, bequests or donations of any movable or immovable property or any right or interest therein from members or others and to make gifts to members or others of moneys, assets, and properties of any kind.*

29. *To rent out and give on hire or lease or share with others or otherwise deal with any property or assets of the Company, not immediately required or any part thereof in excess of the requirements of the Company*

from time to time for such consideration, terms and conditions as the Directors may deem fit.

30. *To purchase, take over or otherwise acquire for cash or exchange or otherwise, all or any part of the undertaking, business goodwill, property-rights, assets or liabilities of any Company or persons carrying on or about to carry on any business which the Company is authorized to carry on.*

31. *To incur debts and obligations for the conduct of any business of the Company and to purchase or hire goods or materials or machinery on credit or otherwise for any business or purposes of this Company.*

32. *To amalgamate or enter into partnership or into any arrangement for sharing profits, union of interests, co-operation, joint ventures, reciprocal concession, limiting competition or otherwise, with any person, firm or Company carrying on or engaged in or about to carry on or be engaged in, any business or transaction which this Company is authorised to carry on or and to lend money to guarantee the contracts or otherwise assist or subsidise any such person, firm or company and to take or otherwise acquire, share and securities of any such Company, and to sell, hold, reissue with or without guarantee or otherwise deal with the same and to give to any persons, firm or company special rights and privileges in connection with control over this Company, and in particular the right to nominate one or more Directors of the Company.*

33. *To remunerate, whether by fixed sum or commission or participation in profits or partly in one way and partly in another the Employees and Directors of the Company or any parties for services rendered for acquisition of fixed and current assets or loans or rights or conduct of the business or activities or any other valuable consideration, by cash payment or by allotment of the shares, debentures or other securities of the Company credited as paid-up in full or in part or in kind or otherwise.*

34. *To make pecuniary grants by way of donations, bonus, subscription, allowance, provident fund, gratuity, guarantee or otherwise to or for the benefit of persons, who are or have been employed by the Company or otherwise and widows, orphans, and dependents of any such persons, and to or in aid*

of Association or Funds for the benefit of any of these objects and to hospital and for other charitable or benevolent object or public institution.

35. *To employ or otherwise appoint technical experts, engineers, mechanics, foremen, skilled and unskilled labour for the business of the Company.*

36. *To provide for the welfare of shareholders, Directors, Employees and Ex-directors and ex-employees of the Company and the wives, widows and families of the dependents by building of houses, dwellings or by grants of money, pensions, allowances, bonus or other payments, or by creating and subscribing and contributing to provident fund, gratuity, pension, funds or trusts, and by providing or by subscribing or contributing towards places of instructions and recreation, hospitals, and dispensaries, medical and other attendants and other assistance as the Company shall think fit and to subscribe or contribute or to assist or to guarantee money to charitable, benevolent, religious, scientific, national or other institutions and objects which shall have any moral or other claim to support or aid by the company either by reason of locality of operation or of public and general utility or otherwise.*

37. *To let out or hire all or any of the property or personnel of any company for such consideration as may be deemed fit.*

38. *To give donations and to advance and lend money to any person, institution, organization, trust, fund on such terms and conditions and with or without interest or at a concessional rate of interest as may seem expedient for the fulfillment of objects.*

39. *To establish or promote or concur in establishing or promoting any company or firm for the purposes of acquiring all or any of the property-rights, and liabilities of the Company and to place or guarantee the placing of underwrite, subscribe for or otherwise acquire all or any part of the shares, debentures or other securities or any such other company.*

40. *To employ agents or experts to investigate and examine and conditions, prospects, value, character and circumstances of any business concerns and undertakings and generally of any*

assets, properties or rights or business or industry or profession.

41. *To procure the recognition of the Company in or under the law or regulations of any place outside India and to do all acts necessary for carrying on, in any foreign country, any business or profession of the Company.*

42. *To create any depreciation fund, reserve fund, sinking fund, insurance fund, provident fund or any other special fund whether for depreciation or for repairing, replacing, improving, extending or maintaining any of the property of the Company or for any other purpose conducive to the interests of the Company.*

43. *To distribute as bonus, shares amongst the members or to place to reserve or otherwise to apply as the Company may, from time to time, think fit, any moneys received by way of premium on shares or debentures issued at a premium by the Company and any money, received in respect of forfeited shares and moneys arising from the sale by the Company of forfeited shares.*

44. *To refer or agree to refer any claims, demands, disputes, or any other question by or against the Company or in which the Company is interested or concerned and whether between the Company and the member and members or his or their representatives or between the Company and third party to arbitration in India or at any place outside India and to observe and perform and to do all acts, deeds, matters and things to carry out or enforce the awards.*

45. *To institute, conduct, defend or compound any legal proceedings, by or against the Company or its officers or otherwise concerning the affairs of the Company, and pay, satisfy or compromise any claim made against the Company or any of its officers notwithstanding that the claim may not be valid at law.*

46. *To act as trustees, executors, administrators, attorneys, nominees and agents and to undertake and execute trusts of all kinds and (subject to compliance with any statutory conditions) to exercise all the powers of custodians, trustees and trust corporations.*

47. *To contribute or to sponsor or assist any political party or any person, organization or body corporate for the political purposes which, in opinion of the Directors, is beneficial to the Company and is not prohibited by any law, order or regulation for the time being in force.*

48. *To carry out all or any of the objects of the Company and to do all or any of the above things in any part of the world, either along and on own account or through others or for others or in conjunction with others which expressions shall, without prejudice to their generality, include sole proprietary, agreement to share profits, joint ventures, partnerships, agency, trusteeship, contractors, brokers, consignees, technical consultants and other agencies and the like.*

49. *To distribute among the members in specie any property of the Company or any proceeds of sale or disposal of any property of the Company subject to the provisions of the Companies Act, 1956 in the event of the winding up of the Company.*

50. *To act as selling agents, sale organizers as well as consultants, agents and advisers in all the respective branches and in such capacity to give advices and information and render advices in person, a firm, company or body corporate or authority or Government.*

51. *To investigate on behalf of any company, corporation, body corporate, industries, firm, association or any person and to collect information and data and submit reports, feasibility or new projects and/or improvements to and/or expansion of existing projects and to diagnose operational difficulties and weakness and suggest remedial measures to improve and moderate existing units.*

52. *To prepare and submit overall and detailed plans for civil, industrial execution to any company, corporation and body corporate, industries, firm, association or any person with regard to New Projects and/or Improvements and/or expansion of the existing projects.*

53. *To invest in and acquire and hold and otherwise deal in shares, stocks, debentures, debenture stock, bonds, obligations and securities issued or guaranteed by any*

company constituted or carrying on business in India or elsewhere and debentures, debenture stock, bonds, obligations and securities issued or guaranteed by any government, state, dominion, sovereign, ruler, commissioner, public body or authority supreme, municipal, local or otherwise whether in India or elsewhere.

54. *To carry on the business of merchants, traders, commission agents, buying and selling agents, brokers, adatias, buyers, sellers, importers, exporters, dealers, collectors, or in any other capacity in India or elsewhere and to import, export, buy, sell, barter, exchange, pledge, mortgage, advance upon or otherwise trade and deal in goods produce, articles and merchandise of any kind whatsoever.*

55. *To carry on the business as manufacturers, dealers, stockiest, importers and exporters of buckets, bathtubs, tanks, trunks, metal furniture, sales, chimneys, pipes, utensils and pressed parts.*

56. *To promote and for and to be interested in and take old of and dispose off shares in other companies for all or any of the objects mentioned in this Memorandum and to subsidise or otherwise assist any such Company and to deal in stocks, shares, debentures and securities of every kind, lands, buildings, houses, flats, bungalows, shops, etc.*

57. *To carry on the business of buying, selling, leasing, hiring, hire-purchase and hire-purchase financing of all types of plants and machineries, industrial and office equipment, furniture and fixtures, appliances, vehicles, vessels, ships, real estates, moveable and immovable properties and to do all kinds of financing, hire-purchase and leasing business.*

58. *To carry on the business of exporters and importers and to manufacture, sell, purchase, export, prepare for market and otherwise deal in all goods, merchandise, articles and things produced by the company."*

7.2 Thus, it is evident from the Memorandum of Association that assessee is permitted to carry on above activities. More specifically, as specified in object clause 3(b) in sub clause 21 the following activities also could be carried on by the assessee:

21. "To invest and deal with the moneys and other assets of the Company, not immediately required in any manner.

……

39.To establish or promote or concur in establishing or promoting any company or firm for the purposes of acquiring all or any of the property-rights, and liabilities of the Company and to place or guarantee the placing of underwrite, subscribe for or otherwise acquire all or any part of the shares, debentures or other securities or any such other company.

……

51. To investigate on behalf of any company, corporation, body corporate, industries, firm, association or any person and to collect information and data and submit reports, feasibility or new projects and/or improvements to and/or expansion of existing projects and to diagnose operational difficulties and weakness and suggest remedial measures to improve and moderate existing units.

……

53. To invest in and acquire and hold and otherwise deal in shares, stocks, debentures, debenture stock, bonds, obligations and securities issued or guaranteed by any company constituted or carrying on business in India or elsewhere and debentures, debenture stock, bonds, obligations and securities issued or guaranteed by any government, state, dominion, sovereign, ruler, commissioner, public body or authority supreme, municipal, local or otherwise whether in India or elsewhere.

……

56. To promote and for and to be interested in and take old of and dispose off shares in other companies for all or any of the objects mentioned in this Memorandum and to subsidise or otherwise assist any such Company and to deal in stocks, shares, debentures and securities of every kind, lands, buildings, houses, flats, bungalows, shops, etc.

7.3 These incidental objects mentioned in the Memorandum of Association of assessee company permits the assessee company to invest in the shares of any company and to hold a deal in any shares of any other company and to cause the sale or any of them to be vested in or held by a nominee or nominees for and on behalf of the company and upon distribution of assets or division of profits, to distribute in such shares, etc. Thus, it is evident from the Memorandum of Association that a company is permitted to carry on the business of investment by holding shares also to deal in shares. With the above background let me consider the grounds of appeal before me. In the present case, pursuant to the object as mentioned above, the assessee has advanced a sum of Rs.41 crores towards purchase of shares of M/s. Akarshaka Infrastructure Pvt. Ltd. To invest this amount of Rs.41 crores, the assessee availed loan from M/s. Millenia Realtors Pvt. Ltd., Ulsoor, Bangalore. The assessee paid an interest of Rs.99,02,829/-. The shares have not been allotted to the assessee in this assessment year under consideration. However, same has been allotted to the assessee in subsequent financial year 2018-19 relevant to assessment year 2019-20. According to the lower authorities said M/s. Akarshak Infrastructure Pvt. Ltd. became holding company of the assessee company from the financial year 2018-19 relevant to assessment year 2019-20. Hence, he disallowed the claim of deduction of payment of interest on the loan borrowed from M/s. Millenia Realtors Pvt. Ltd. At Rs.99,02,829/-. However, it is not doubted that assessee has been investing in various companies and in the assessment year under consideration assessee shown the impugned investments in the balance sheet on 31.3.2018 under the head “Advance towards purchase of shares” under sub-head “other non-current assets” at

Rs.41 crores and the said borrowed loan has been utilised for the purpose of acquiring the shares of M/s. Akarshak Infrastructure Pvt. Ltd. Thus, loan was borrowed for the purpose of investments and loan has been shown in the balance sheet as on 31.03.2018 under head "Current liabilities – Financial Liabilities – Other current financial liabilities" as on 31.3.2018. The investment activity is one of the business of the assessee and this loan continues to be for business purposes. The activity of investment of the assessee cannot be said that it is not the business activity of the assessee company. In other words, when the assessee has borrowed the funds for the purpose of making investment in shares and that investment is one of the business activity of the assessee company amount borrowed for such investment is for the purpose of business and the interest incurred on such borrowals to be wholly and exclusively for the purpose of business and it has been fulfilled the condition laid down in section 36(1)(iii) of the Act, which reads as under:-

> *"36(1)(iii):*
> *The amount of interest paid in respect of capital borrowed for the purpose of business or profession:*
>
> *[**Provided** that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset [***] (whether capitalized in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction].*
>
> *Explanation:- Recurring subscriptions paid periodically by shareholders, or subscribers in Mutual Benefit Societies which fulfill such conditions as may be prescribed, shall be deemed to be capital borrowed within the meaning of this clause"*

7.4 Further, business of investing in shares can assume various forms. It is not that only when there is a frantic buying and selling activity, it would be considered to be a business in shares. Besides

buying and selling, one may invest for not too a long-term but wait for some appreciation in the price and then off load the shares to make profit out of it. The Law Lexicon by P. Ramanatha Aiyar (2nd Edn.) says that the word "investment" is not a word of art but has to be interpreted in a popular sense. It is not capable of legal definition but a word of current vernacular. The words "invest" and "investment" are to be taken in the business sense of laying out of money for interest or profit. Thus, there can be a case where the company may not enter into a frantic trading activity, but hold on to the shares and yet it can be said that it is carrying on the business of investment. In fact, if one carefully reads cl. 21 of the incidental objects of the company, it permits not only to purchase and sell the shares but also to hold the shares in any other company. Thus, the holding of shares can also be a part of business activity. Further, the assessee is a company has earned consultancy charges at Rs.7,75,000/-, though quite meagre, but still irrespective of the quantum it has the characteristics of carrying on the business of land acquisition, construction, development, leasing and maintenance of commercial office spaces and serviced residences/hotel.

7.5 The AO has not disallowed any expenditure claimed by the assessee which is allowable as business expenditure only in case of a business. The assessee has also claimed following expenditure under other expenses:

Amount in INR hundreds

Particulars	For the year ended 31st March 2018
Manpower service charges (refer note 26)	6,588
Audit fees	463

Business promotion expenses	--
Legal and professional charges	7,105
Printing and stationery	23
Rates and taxes	116
Miscellaneous expenses	159
Total	14,454

7.6 These expenses are also allowable only in case of business income and which has not been disallowed by the AO. In fact, the AO treated the income as business income. Though the shares have not been shown as stock-in-trade in the balance sheet, the method of valuation has been shown to be Fair Market Value which can be seen from notes to financial statements, which are as follows:

3.2 Financial Instruments

i. Recognition and initial measurement

Trade receivables and debt securities issued are initially recognized when they are originated. All other financial assets and financial liabilities are initially recognized when the Company becomes a party to the contractual provisions of the instrument.

A financial assets or financial liability is initially measured at fair value plus, for an item not at fair value through profit and loss (FVTPL), transaction costs that are directly attributable to its acquisition or issue.

ii. Classification and subsequent measurement

Financial assets

On initial recognition a financial asset is classified as measured at.

- *Amortised cost*
- *Fiar value through other comprehensive income (FVTOCI) – debt investment;*
- *Fair value through other comprehensive income (FVTOCI) – equity investment; or*
- *Fair value through profit & loss (FVTPL)*

Financial assets are not reclassified subsequent to their initial recognition, except if and in the period the company changes its business model for managing financial assets.

A financial asset is measured at amortised cost if it meets both the following conditions and is not designated as at FVTPI.

- *The asset is held within a business model whose objective is to hold assets to collect contractual cash flows; and*
- *The contractual terms of the financial asset give rise on specific dates to cash flows that are solely payments of principal and interest on the principal amount outstanding.*

A debt instrument is measured at FVOCI if it meets both of the following conditions and is not designated as at FVTPL;

- *The asset is held in a business model whose objective is achieved by both collecting contractual cash flows and selling financial assets; and*
- *The contractual terms of the financial asset give rise on specific dates to cash flows that are solely payments of principal and interest on the principal amount outstanding.*

On initial recognition of an equity investment that is not held for trading, the Company may irrecoverably elect to present subsequent changes in investments fair value in OCI (designated as FVOCI – equity investment). The election is made on an investment-by-investment basis.

All financial assets not classified as measured at amortized cost or FVOCI as described above are measured at FVTPL. This includes all derivative financial assets. On initial recognition, the Company may irrevocably designate a financial asset that otherwise meets the requirements to be measured at amortized cost or at FVOCI as at FVTPL if doing so eliminates or significantly reduces an accounting mismatch that would otherwise arise.

Financial assets: Business model assessment

The Company makes an assessment of the objective of the business model in which a financial asset is held at a portfolio level because this best reflects the way the business is managed and information is provided to the management. The information considered includes:

- *The stated policies and objectives for the portfolio ad the operation of those policies in practice. These include whether management's strategy focuses n earning contractual interest income, maintaining a particular interest rate profile, matching the duration of the financial asset to the duration of any related liabilities or expected cash outflows or realizing cash flows through the sale of the assets;*
- *How the performance of the portfolio is evaluated and reported to the Company's management.*
- *The risk that effects the performance of the business model (and the financial asset held within that business model) and how those risks are managed;*
- *How managers of the business are compensated – e.g. whether compensation is based on the fair value of the assets managed or the contractual cash flows collected; and*
- *The frequency, volume and timing of sales of the financial assets in prior periods, the reasons for such sales and expectations about about future sales activity.*

Transfers of financial assets to third parties in transactions that do not qualify for derecognition are not considered sales for this purpose, consistent with the Company's continuing recognition of the assets.

Financial assets that are held for trading or are managed and whose performance is evaluated on fair value basis are measured at FVTPL."

7.7 It is quite trite that the entries in the books or classification of a particular item in the annual accounts do not determine the character

of the income or asset. One has to consider the basic intention and conduct of the assessee. The intention to carry on the business of investment in shares is evident from the objects in the memorandum of association. The conduct is also evident that it acquired the shares not only as per the mandate in the memorandum of association but also with a view to acquire controlling interest in associate concerns. None of these facts has been disputed or refuted by the Department. Further, it is admitted fact that on the date of acquisition of shares M/s. Akarshak Infrastructure Pvt. Ltd. became only subsidiary of RMZ Hotels Pvt. Ltd. and this subsidiary company M/s. Akarshak Infrastructure Pvt. Ltd. is having primary objection in clause 3(a) of the Object clause as follows:

> *"To carry on the business of designing, planning, managing, developing and construction of apartments, homes, factory buildings, warehouses hotels, holiday resorts, industrial sheds, housing colonies, multistoried buildings, schools, colleges, community halls, dams, bridges, canals and other hydraulic structures, roads, highways, playgrounds and to act as civil, mechanical, electrical, water supply, sanitary contractors and estate agents."*

7.8 As seen from the above to carry on the business of Hotels, Resorts is one of the primary object of Akarshak Infrastructure Pvt. Ltd.. Viewed from this perspective, it can be seen that the assessee company being a holding company has made investment in furtherance of his business interest. When both the holding company and subsidiary company are in the business of hotels and resorts, such an investment is a strategic investment to wrest control over the subsidiary. The immediate advantage derived may not be in the money terms; wresting control over the Board of Directors of the subsidiary is an advantage in business in furtherance of business interest of the holding company especially when both the holding and subsidiary are in same line of business. That being so, it is to be held that nexus

between expenditure and purpose of business. It has been repeatedly held by various Courts in the expression used in section 36(1) (iii) "for the purpose of business" is wider in scope than the expression "for the purpose of earning profits".

7.9 For this proposition reliance is placed on the Judgment of the Hon 'ble Supreme Court in the case of CIT vs Malayalam Plantations Ltd 53 IT 140 and CIT Vs Birla Cotton Spinning and Weaving Mills Ltd 82 IT *166. It* therefore follows that even in the event of no profit/revenue immediately emanating from investment, such investment is dictated by commercial expediency; no business man can be compelled to maximize profits.

7.10 The Hon 'ble Supreme Court in the case of Hero Cycles (P) Ltd Vs CIT (Central) in Civil Appeal No 514/2008 has held that when the assessee has significant interest in the business of the subsidiary and utilizes even borrowed money for furthering its business no disallowance can be made under section 36(1) (iii). In the said case the Hon'ble Supreme Court upheld the finding of the lower authorities that when the interest paid by assessee of which deduction was claimed, on the facts of the case, was for business purpose, the entire interest paid by assessee should be allowed as business expenditure. It has been observed by the Hon'ble Supreme Court that it was for the AO to establish nexus between the borrowing and advancing to prove that expenditure was for non-business purpose which Assessing Officer failed to do. The Hon'ble Supreme Court has also cited from the judgment of the Delhi High Court in CIT Vs Dalmia Cement Ltd 254 ITR 377 and agreed with the view that once it is established there is nexus between expenditure and

purpose of business (which need not necessarily be business of assessee itself) the test of commercial expediency is satisfied.

7.11. In the present case there is specific provision in the memorandum that the assessee is permitted to acquire controlling interest as mentioned earlier, cl. 21 in the incidental objects clearly permits the assessee not only to acquire but also to hold shares in any other company. This power to hold shares is enough to permit the company to acquire and hold controlling interest in any other company. In my opinion, as such an activity can itself constitute a business when the real intention of the company is not to earn profit but to acquire and exercise control of the group company. When it is said that the shares were acquired to have controlling interest, it does not necessarily mean that the acquiring company should have majority share holding in the other company. Many group concerns may be holding shares in the other company and all their holdings put together will enable the group as a whole to exercise control on the other company. It is with this perspective in mind, I observe that it is for the assessee to decide as a businessman as to how much number of shares would be sufficient to control its stake and the motive of the company cannot be to earn profit if, it was to acquire controlling interest, which is the commercial expediency. Further, the Hon'ble Supreme Court observed in the case of S.A. Builders Ltd. vs. CIT(A) & Anr. 158 Taxman 74 that the decisions relating to s. 37 of the Act are applicable to s. 36(l)(iii) because in s. 37 also the expression used is "for the purpose of business". The Court also observed that it has been consistently held in the decisions relating to s. 37 that the expression "for the purpose of business" includes expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits thereby. The Calcutta High Court in the case of CIT

vs. Kanoria Investments (P) Ltd. (1999) 151 CTR (Cal) 160 : (1998) 232 ITR 7 (Cal) observed that once the capital has been borrowed for the purpose of business, it is immaterial as to how the borrowed money was applied, the interest payment would be deductible under s. 36(l)(iii) of the Act. The Supreme Court in the case of CIT vs. Malayalam Plantations Ltd. (1964) 53 ITR 140 (SC) drew a distinction between the expressions "for the purpose of business" and "for the purpose of earning profits". The former is wider in scope than the latter to the extent that it may take in not only the day-to-day running of a business but also the rationalization of its administration and modernization of its machinery; it may include measures for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile title; it may also comprehend payment of statutory dues and taxes imposed as a precondition to commence or for carrying on of a business; it may comprehend many other acts incidental to the carrying on of a business. Further, Mumbai 'D' Bench in the case of ACIT Vs. M/s. Rideema Toll Pvt. Ltd. in ITA No.521/Mum/2021 dated 9.2.2022 on similar circumstances by answering the question that "whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) was right in deleting the addition made u/s 36(1)(iii) without appreciating the fact that the investments made in the shares of M/s. Baramati Tollways Pvt. Ltd. is out of borrowed funds and the assessee has failed to prove commercial expediency" has held as under:

> *"We have noted that the investments are made by the assessee company in the ordinary course of its business. There is no dispute about the fact that the said investments have been made in equity shares of another company in materially similar line of activity. If is only elementary that as long as the funds borrowed the assessee are used for the purposes of business, the interest*

thereon will constitute an admissible deduction u/s. 36(l)(iii) of the Act. An investment in equity of another company is materially different in nature and character from an interest free advance or loan to another company. The question of diversion of funds for non-business purposes would only come into play in the case of the latter and not for in the case of investment in another company. The very foundation of the impugned disallowance therefore is vitiated in law, as it proceed on the basis that investment in share capital of another company would amount to diversion of funds for non-business purpose. Whether such an investment yields returns in the present year or not does not make a difference. It is pertinent bear in mind fact that in the present case interest disallowance has been made on the premises that investment in share capital of another company amounts to diverting the borrowed funds for the business of another company but then as we noted earlier an equity investment as inherently and materially different vis-a-vis an interest free loan and advance. That distinction has been lost side of. In our considered view, therefore, learned CIT(A) was indeed justified in deleting the disallowance of interest, We approve the conclusion arrived by the learned CIT(A) and decline to interfere in the matter."

7.12 Therefore, I am of the view that since I have given a finding that the business of the assessee is to invest in shares and that the borrowing was for the purpose of business, the entire interest has to be allowed under s. 36(l)(iii) of the Act.

7.13 In view of this, I allow this ground of appeal of the assessee.

8. Next ground for my consideration is with regard to disallowance of Rs.7,10,500/- being the expense incurred on legal and professional charges debited to P&L account. This expenditure disallowed on the reason that it was incurred for purchase of shares of AIPL and it was the observation of the lower authorities that "acquisition of shares of AIPL is the result in capital gain. The cost of acquisition of such a capital asset would include the expenditure incurred for acquiring it. The legal and professional charges paid by the assessee thus go to increase the cost of acquisition of capital asset acquired and hence, it cannot be allowed."

8.1 I have heard both the parties on this issue. While adjudicating the earlier ground for making investment in shares is for business activity of the assessee company and it was carried in terms of the object clause mentioned in the Memorandum of Articles of Association and it cannot be considered as acquisition of capital assets. Accordingly, I hold that the above expenditure incurred under the head "Professional and legal charges" to be allowed as expenditure incurred for wholly and exclusively for the purpose of business of the assessee and accordingly, this ground of the assessee is allowed.

9. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 22nd Feb, 2023

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 22nd Feb, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.