

आयकर अपीलीय अधिकरण न्यायपीठ “एक-सदस्य” मामला रायपुर में

**IN THE INCOME TAX APPELLATE TRIBUNAL  
RAIPUR BENCH “SMC”, RAIPUR**

**श्री रवीश सूद, न्यायिक सदस्य के समक्ष  
BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER**

**आयकर अपील सं./ ITA No. 235/RPR/2017**

**निर्धारण वर्ष / Assessment Year : 2008-09**

The Assistant Commissioner of Income Tax,  
Circle-1(1), Raipur (C.G.)

.....अपीलार्थी / Appellant

**बनाम / V/s.**

M/s. Hotel Ishika,  
A-08, Shubham Vihar,  
New Purena Raipur,  
PAN : AADFH8557L

.....प्रत्यर्थी / Respondent

Assessee by : None  
Revenue by : Shri Piyush Tripathi, Sr. DR

सुनवाई की तारीख / Date of Hearing : 18.04.2023

घोषणा की तारीख / Date of Pronouncement : 28.04.2023

**आदेश / ORDER****PER RAVISH SOOD, JM**

The present appeal filed by the revenue is directed against the order passed by the Commissioner of Income-Tax (Appeals)-1, Raipur dated 15.05.2017, which in turn arises from the order passed by the A.O under Sec. 147 of the Income-tax Act, 1961 (in short 'the Act') dated 26.03.2015 for the assessment year 2008-09. The revenue has assailed the impugned order on the following grounds of appeal:

"1. "Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs. 14,99,670/- made by the AO on account of interest on interest free advances given to the sister concern/relatives for non-business purpose?"

2. Whether on points of law and on points of facts, the Ld. CIT(A) was justified in deleting the disallowance of proportionate interest on non-interest bearing advances given to the relatives and group concerns of assessee, which is in violation of the legal provisions of the Act u/s 36(1)(iii) of the I T Act, 1961?"

3. "Whether on points of law, the Ld. CIT(A) was justified in not considering the ratio laid down by the Hon'ble Apex Court in the case of S.A. Builders Ltd. vs CIT [288 ITR 1,9, Supreme Court], since as per the facts on record the assessee has advanced the interest free funds to the sister concern/relatives without establishing the components of "commercial expediency" in these transactions?"

4. "Whether on points of law and on facts & circumstances of the case, the Ld. CIT (A) was justified in holding that since the re-opening was done on the basis of change of opinion by the AO, thereby quashing the reopening proceedings u/s 147 of the I T Act?"

5. "Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) was justified in placing reliance on the case of Anil Nagapal 291 ITR 272 (P&H)(2017), for quashing the proceedings u/s 147 of the I T Act which is factually distinguishable with the case of the assessee?"
6. "Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) has erred in ignoring the ratio of the decision of the Apex Court in the case of CIT vs P.V.S. Beedies Pvt. Ltd. (SC) 237 ITR 13 where in the Hon'ble Apex Court has held that "the reopening of the assessment on the basis of error pointed out by the Audit Parties valid?"
7. "Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) has erred in giving a finding that the material available on the record cannot be used for the reopening of the assessment, thereby ignoring the ratio of the decision of the Hon'ble Supreme Court in the case of M/s Kalyanji Mavji & Co. vs CIT (SC) 102 ITR 287, wherein it has been held that reassessment is permissible on the basis of the material already available on record and the information need not be from external source?"
8. "Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) was justified in accepting the fresh evidence produced by the assessee, if any, without allowing the AO, proper opportunity to examine the same, thereby violating the provision on law under Rule 46A of I T Rules.?"
9. "Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) has erred by giving a finding which is contrary to the evidence on record, as the Id CIT(A) has accepted the submission of the assessee which is factually incorrect, thereby rendering the decision, which is perverse?"
10. "The order of Ld. CIT(A) is erroneous both in law and on facts".
11. "Any other ground that may be adduced at the time of hearing".

2. Succinctly stated, the assessee firm had e-filed its return of income for A.Y.2008-09 on 30.09.2008, declaring an income of Rs.9,63,120/-. Original assessment was thereafter framed by the A.O vide his order passed u/s.143(3) of the Act dated 30.12.2010, determining its total income at Rs.10,38,120/-.

3. As is discernible from record, the A.O on the basis of further verifications carried out after culmination of the original assessment, had observed, that the assessee firm had diverted its interest bearing funds for advancing interest free loans to certain concerns. The A.O holding a conviction that proportionate interest of Rs.14,99,670/- pertaining to the interest free advances/loans given by the assessee firm out of its interest bearing funds was liable to be disallowed u/ss. 36(1)(iii)/14A of the Act, thus, reopened its case u/s.147 of the Act. The A.O vide his order passed u/ss. 143(3)/147 dated 26.03.2015 disallowed the assessee's claim for deduction of interest of Rs.14,99,670/- u/s.36(1)(iii) of the Act and assessed its income at Rs.25,37,790/-.

4. Aggrieved the assessee carried the matter in appeal before the CIT(Appeals). The CIT(Appeals) was of the view that now when the A.O while framing the original assessment vide his order passed u/s.143(3) dated 30.12.2010, had considered the issue on the basis of which the

case of the assessee was reopened u/s.147 of the Act and had considered it proper not to make any addition, therefore, in absence of any fresh material having been brought on record there was no justification for the A.O to have reopened the said concluded assessment on the basis of a mere change of opinion.

4.1 On merits, the CIT(Appeals) found favour with the claim of the assessee that as the A.O while framing the original assessment had accepted the allowability of the assessee's claim for deduction of corresponding interest expenditure, for the reason that the respective amounts were advanced due to commercial expediency and future business needs for smooth running of the day to day business of the assessee, therefore, the same could not have been disallowed u/s 36(1)(iii) of the Act. It was also observed by the CIT(Appeals) that as the assessee firm had advanced an amount of Rs.1,80,29,000/- to M/s Tanushree Regency (P) Ltd. Raipur, a sister concern, for purchase of land at the backside of its hotel premises, which, thereafter was leased out to the assessee firm for construction of a hotel on the same, therefore, interest expenditure corresponding to the said advance that was given in the normal course of business could not have been disallowed u/s.36(1)(iii) of the Act. Apart from that, it was observed by the CIT(Appeals) that as the assessee firm had advanced certain amounts in the normal course of its business, viz. (i) Hotel Marina:

Rs.20,75,000/-; and (ii) Topaz Restaurant: Rs.14,41,780/-, therefore, no disallowance of the interest expenditure pertaining to the said amount of advances was called for in the hands of the assessee u/s. 36(1)(iii) of the Act. Accordingly, the CIT(Appeals) finding favour with the claim of the assessee that no adverse inferences as regards the allowability of claim for deduction of interest expenditure u/s. 36(1)(iii) of the Act was called for in its hand, thus, vacated the said disallowances.

5. The revenue being aggrieved with the order of the CIT(Appeals) has carried the matter in appeal. As the assessee respondent despite having been intimated about the hearing of appeal had failed to put up an appearance, therefore, I am constrained to proceed with and dispose off the appeal as per Rule 25 of the Appellate Tribunal Rules, 1963, i.e, after hearing the appellant revenue and perusing the orders of the lower authorities.

6. As is discernible from the order of the CIT(Appeals), it transpires that he had after taking cognizance of the fact that the A.O had reopened the concluded assessment on the basis of mere change of opinion, thus, concluded that the reopening proceedings were initiated on the basis of invalid assumption of jurisdiction. For the sake of

clarity the relevant observations of the CIT(Appeals) are culled out as under:

“2.3 Facts being as above, two issues are to be decided in appeal. First is whether the AO was justified in assuming jurisdiction u/s 147 and second whether the disallowance of Rs. 1499670/- u/s 36(1)(iii) was justified.

The assessment was originally made on 30/12/2010 at an income of Rs.1038120/- against the returned income of Rs. 963120/-. Thereafter, the AO decided that proportionate interest of Rs.1499665/- on the amount advanced to friends and relatives is disallowable. Therefore, the AO issued notice u/s 147 and proceed further to complete the assessment u/s 147/143(3). Appellant contended that this issue was considered at the time of original assessment, therefore, issue of notice u/s 147 was due to change of opinion. At the time of original assessment the issue was considered and assessee had furnished following reply a copy of which was submitted-as under: -

"Our firm gives an advance of Rs. 18029000/- to Tanushree Regency (P) Ltd, Raipur (Sister concern of our firm). Tanushree Regency (P) Ltd, Raipur purchased a land backside of the hotel Ishika from the above advance. Thereafter the company given the said land to our firm on lease and our firm constructed the hotel on the above said land. Hence this advance given by our firm for future increase of hotel business, hence our firm not charge any interest on the same i.e. the advances purely used for legitimate purpose of business. Further we want to explain that our company has given advances of Rs.2075000/- to hotel Marina & Topaz restaurant Rs.1441780/- from the above concern transaction during the year done hence this advances given in the routine business of our firm."

After considering reply of the assessee the AO, in the original assessment, considered it proper to not make any addition. No fresh material has been brought on record. Therefore the jurisdiction assumed by the AO cannot be said to be as per the provisions of Sec 147. As has been held recently

by Hon'ble Punjab & Haryana High Court in the case of Anil Nagapal 291 ITR 272 (P 8C H) (2017) that since the AO raised queries and sought information/documents which were admittedly supplied, it is not on the basis of same materials that the case is sought to be reopened which is not permissible.

On a perusal of the aforesaid observations of the CIT(Appeals), I am principally in agreement with him that now when the issue as regards the allowability of assessee's claim for deduction of interest expenditure u/s.36(1)(iii) of the Act had been deliberated upon by the A.O while framing the original assessment vide his order passed u/s.143(3) dated 30.12.2010, then in absence of any fresh material having been placed on record after culmination of the said assessment the assessee's case could not have been validly reopened u/s.147 of the Act. I am in agreement with the view taken by the CIT(Appeals) that reopening of a concluded assessment that is merely prompted by a change of opinion of the successor A.O as against that taken by his predecessor can by no means be held to be justified. The aforesaid view is fortified by the judgment of the **Hon'ble Supreme Court** in the case of **CIT Vs. Kelvinator of India (2010) 320 ITR 561 (SC)**. The Hon'ble Apex Court in its aforesaid order, had held, that the case of an assessee cannot be reopened on the basis of a mere "change of opinion" by observing as under:-

"On going through the changes, quoted above, made to s. 147 of the Act, we find that, prior to Direct Tax Laws (Amendment)

Act, 1987, reopening could be done under above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the AO to make a back assessment, but in s. 147 of the Act (w.e.f. 1st April, 1989), they are given a go by and only one condition has remained, viz., that where the AO has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post 1st April, 1989, power to reopen is much wider. However, one needs to ITA No.1212/Mum/2019 A.Y. 2012- 13 M/s Medley Pharmaceuticals Ltd. Vs. DCIT-10(2)(2) give a schematic interpretation to the words "reason to believe" failing which, we are afraid, s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the AO. Hence, after 1st April, 1989, AO has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to s. 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in s. 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the AO. We quote hereinbelow the relevant portion of Circular No. 549, dt. 31st Oct., 1989 [(1990) 82 CTR (St) 1], which reads as follows: "

"7.2 Amendment made by the Amending Act, 1989, to re-introduce the expression "reason to believe" in s. 147.-- A number of representations were received against the omission of the words "reason to believe" from s. 147 and their substitution by the "opinion" of the AO. It was pointed out that the meaning of the expression, "reason to believe" had been explained in a number of Court rulings in the past and was well settled and its omission from s. 147 would give arbitrary powers to the AO to reopen past assessments on mere change of opinion. To

allay these fears, the Amending Act, 1989, has again amended s. 147 to reintroduce the expression has reason to believe in place of the words for reasons to be recorded by him in writing, is of the opinion. Other provisions of the new s. 147, however, remain the same."

7. Adverting to the observations of the CIT(Appeals) as regards the merits of the case, I find that he had therein observed that as the assessee had advanced the aforesaid respective amounts in question to the aforementioned parties in the normal course of its business, therefore, no part of interest expenditure corresponding to the said respective amounts was liable to be disallowed u/s.36(1)(iii) of the Act. For the sake of clarity the relevant observations of the CIT(Appeals) are culled out as under:

"Coming to the merit of addition, the advances of Rs. 18029000/- was given, for getting land and constructing hotel thereon. The other two advances of Rs.1441780/- and Rs. 2075000/-also related to the same purpose. As the amounts are business advances and not loan, no interest was charged. Vide Sec.36(1)(iii) interest on capital borrowed for the business purposes is allowed. Since the amount in question was borrowed for the purpose of business and was utilized for the purpose of business only by making advances for the purpose of consideration of hotel, the interest on the same is duly allowable u/s.36(1)(iii). Even if the amount has been advanced to family members and sister concerns unless it is shown that excessive benefits has been given to these persons the interest cannot be disallowed. Sec. 36(1)(iii) gives discretion to the AO only to allow deduction of interest paid claimed by the assessee if concerned amount is borrowed for the purpose of business and not to make disallowance out of interest by deeming interest earned on interest free advances given by the assessee. Therefore the action of the AO in making disallowance out of

interest paid without having finding about utilization of borrowed funds, on which interest was paid, for non-business purposes is not as per law (Kolkata ITAT in the case of ITO Vs. Snowtex Investment Ltd ITA No. 356/Ko1/2012 dated 06/11/2015). On the same issue Hon'ble Supreme Court in the case of Delhi Safe Deposits Co. Ltd 133 ITR 756 held that the true test of an expenditure laid out wholly and exclusively for the purposes of trade of business is that it is incurred by the assessee as incidental to his trade for the purpose of keeping the trade going and of making it pay and not in any other capacity than that of a trader.

In fine since the amount in question has been spent for the purpose of business the addition of proportionate interest cannot be justified. The same is therefore deleted and appellant's grounds are allowed.”

8. I have given a thoughtful consideration to the aforesaid observations of the CIT(Appeals) and concur with the view taken by him. As observed by the CIT(Appeals) and, rightly so, as the amounts in question were advanced by the assessee firm in the normal course of its business, therefore, no part of the same could have been disallowed by triggering the provisions of Section 36(1)(iii) of the Act. No perversity in the aforesaid observations of the CIT(Appeals) have been brought to my notice by the ld. D.R. I, thus, in terms of our aforesaid deliberations approve the deletion of the disallowance of Rs.14,99,670/- made by the A.O u/s.36(1)(iii) of the Act.

9. Resultantly, the appeal filed by the revenue is dismissed in terms of my aforesaid observations.

Order pronounced in open court on 28<sup>th</sup> day of April, 2023

Sd/-

(रवीश सूद / RAVISH SOOD)

न्यायिक सदस्य/JUDICIAL MEMBER

रायपुर / Raipur; दिनांक / Dated : 28<sup>th</sup> April, 2023.

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**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-1, Raipur (C.G.)
4. The Pr. CIT-1, Raipur (C.G.)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "एक-सदस्य" बेंच, रायपुर / DR, ITAT, "SMC" Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव /Private Secretary

आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur