IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI

BEFORE SH. S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SH. SUDHIR KUMAR, JUDICIAL MEMBER

ITA No.2624/Del/2017
Assessment Year: 2011-12

ACIT **Circle – 32 (1)** **New Delhi**	**Vs**	**Bhawan Mohan Garg** **C-16, Green Park Extension, New Delhi** **PAN No.AAHPG2084K**
(APPELLANT)		**(RESPONDENT)**

Appellants by	**Sh. Kanv Bali, Sr. DR**
Respondent by	**Sh. VK Bindal, CA** **Sh.Saurabh Sharma, Advocate** **Ms. Rinki Sharma, ITP**

Date of hearing:	16/07/2024
Date of Pronouncement:	13/08/2024

ORDER

PER SUDHIR KUMAR, JM:

This appeal by the revenue is directed against the order of the Commissioner of Income Tax (Appeals)-11, New Delhi, [hereinafter referred to as "CIT(A)"], vide order dated 09.02.2017 pertaining to A.Y. 2011-12 and arises out of the order passed by

the Assessing Officer dated 28.03.2014 under Section 143(3) of the Act, 1961 [hereinafter referred as 'the Act'].

2. The revenue has raised the following grounds of appeal :-

1. Whether the td. CIT (A) was justified in deleting the addition of Rs.1,29,93.310/- made by 40 on account of disallowance of interest expenses claimed by the assessee despite the fact that the assessee failed to establish live one to one nexus between the interest payments related to loans & investment in the projects from which the assessee has declared income in the present year out of the real estate business.

2 Whether the id. CIT(A) was justified in deleting the addition of Rs. 1,29,93,310/- made by Ad on account of disallowance of interest expenses claimed by the assessee ignoring that the assessee has followed hybrid system of accounting, considering that the assessee b submitted "mercantile" to be the accounting method in the tax audit report whereas during the assessment proceedings the assessee submitted" cash" to be the accounting method. which is impermissible as per the provisions of section 145 of the Income Tax Act and which prevented the AO from arriving at true business profits.

3. Whether the Ld. CIT(A) was justified in deleting the addition of Rs. 1.29,93,310/- and another addition of Rs. 27,37,856/- made by AO on account of disallowance of interest expenses claimed by the assessee ignoring the fact that the assessee has extended interest free loan & advances (appearing in the consolidated balance sheet as non-business) amounting to Rs 10 crores to his family members,

relatives and sister concerns for non-business purposes and the fact that the assessee had availability of only Rs. 10.98 crores as non interest bearing funds excluding amount of Rs. 13 34 cr. shown against sundry creditors)

4. Whether the Ld. CIT (A) was justified in deleting the addition of Rs. 16,52,800/con account claim of CE certification charges ignoring the statutory provision stipulated in section 40tan read with Explanation -2 of section 195 of the I.T. Act, wherein the assessee was liable to deduct TDS on CE certification charges, being the "other sums chargeable under the paid outside India.

3. Brief fact of the case is that the assessee company engaged in the business of manufacturing of door hinges and real estate in the name of M/s. Garg Industries. The assessee had filed his return of income declaring total income of Rs.42,73,728/- on 28.09.2011. Thereafter, assessee has filed revised return of income of Rs.4,24,245/-. The reason for the revised return as explained by the assessee was that two of his real estate projects got materialized and the income and the expenses there upon got inadvertently left out to be included in the total income as the figures of only the manufacturing business were fed in the return of income. The case was selected for scrutiny assessment under CASS and notice u/s.143(2) dated 03.08.2012 was issued and served upon the assessee by the ACIT, Circle 24(1), New Delhi. The AO has completed the

assessment of total income Rs 2,79,94,800/-by making the following additions :-

i-Addition of Rs 16,52,800/-on account of disallowance of CE certification u/s 40(a)(i) of the ACT

ii Addition of Rs 1,35,14,686/- on account of disallowance of interest

iii. Addition of Rs 96,65,203/- on account of share of profit in two projects

iv. Disallowance of interest of Rs 27,37,856/-

4. The assessee has filed the appeal before the Ld CIT(A) who vide his order dated 09-02-2017 partly allowed the appeal. Aggrieved the order of the Ld CIT(A) the revenue is in appeal before us.

5. The DR vehemently supported the order of the Assessing officer. He submitted that M/s Exova Warringtonfire certification Ltd, was rendering the technical service on behalf of the assessee outside India. The assessee case was covered for TDS on foreign remittance outside India. He has further submitted that assessee was following the mixed /hybrid system of accounting which was not permissible as per law. According to him the learned commissioner of income Tax

(Appeals) had erred by allowing the appeal. He further submitted that the order of AO be upheld.

6. The Ld AR has submitted that the assessee has the sufficient interest free funds to make the investments or to make advances for non-business purposes. He has also submitted that AO has made the double addition of the share of profit shown by the assessee. He has further stated that the Ld CIT(A) had rightly deleted the addition made by AO. He has submitted that the appeal of the revenue be dismissed. In the support of his contention he has filed the paper book containing pages no 1-372.

7. Ld CIT(A) has observed in his order us under :-

> *"5.9 I have considered the submissions of the appellant and the facts of the case and the materials on record. The assessee is an individual engaged in the business of manufacturing of hardware items i.e. hinges in his proprietorship concern M/s Garg Industries and has also claimed to be running a real estate business along with other associates on profit sharing basis. The assessée prepares two balance sheets. One is of M/s Garg Industries and another is of personal statement of affairs and a perusal of the same shows that the real estate advances have been given by the appellant through M/s Garg Industries as well as personal balance sheet. The AO has disallowed interest of Rs.*

27,37,856/- and also of Rs. 1,35,14,686/ by stating that interest bearing funds have been diverted for non-business purposes. In this regard, it is to be understood that the appellant is having two businesses i.e. of manufacturing of hardware items as well as of Real Estate. This fact is not disputed as the AO has also accepted that the appellant is having Real Estate business. The AO however, is not convince about the method of accounting followed by the appellant for Real Estate business. The fact that the appellant is having Real Estate business is further accepted in the assessment orders as well as appellate orders for the AYs. 2008- 09 to 2010-11. Since the appellant has made investment in properties from the balance sheet of M/s Garg Industries as well as personal balance sheet, it will be appropriate to analyze the position of funds through a consolidated balance sheet for better understating of facts related to utilization of funds. The appellant has produced consolidated balance sheet as on 31.03.2011, a perusal of which shows that the total interest bearing funds available with the appellant amount to Rs. 16,94,67,459/- and the non-interest bearing funds available with the appellant amount to Rs.24,32,35,514/-. As against this, the non-interest advances amount to Rs. 13,39,47,231/-. In addition to this, the Real estate business advances amount to Rs. 14,68,23,990/-. As it is accepted that the appellant is in the business of Real Estate, there is no question of any disallowance of interest to be made in relation to the funds invested in the Real Estate business. In this context, it is also to be observed that in the assessment order

the income arising from two properties during the year amounting to Rs.96,65,203/ has been accepted as business income of the appellant. In addition, perusal of the consolidated balance sheet shows as under:

Interest bearing funds	*24.32 Crores*	*Real Estate business advances*	*14.68 Crores*
Non-interest bearing funds	*16.94 Crores*	*Sundry Debtors and Inventory*	*8.27 Crores*
		Other Business Assets	*4.92 Crores*
		Non-interest bearing investments / advances	*13.39 Crores*
	41.26 Crores		*41.26 Crores*

From the above analysis, it is quite clear that the appellant has sufficient interest free funds to make investments or to make advances for non-business purpose. The appellant has also relied upon various judgments which are as under:

*(a**) CIT Vs. Reliance Utilities & Power Ltd ITA No. 1398/MumHC/20 (2009) 313 ITR 340 [DoD: 09/01/09]***

Where an assessee has his own funds as well as borrowed funds, a presumption can be made that the advances for non-business purposes have been made out of the own funds and that the borrowed funds have not been used for this purpose Accordingly, the disallowance of the interest on the borrowed funds is justified.

(b) CIT Vs. UTI Bank Ltd. (2013) 215 Taxman 8(Mag.) (Guj.) (HC) (A.Y. 2003-04)

Where the assessee had sufficient interest free funds to meet its tax investments yielding exempt income, it could be presumed that such investment were made from interest free funds and not loaned funds and, thus disallowance u/s.14A being warranted. Ratio in case of CIT Vs. Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom.) (HC) is followed.

(c) Delair India Pvt. Ltd. Vs. DCIT [2013-TIOL-791-ITAT-DEL

Income Tax –Sections 14A, 26 (1) (iii) – Whether there can be presumption that interest free funds were invested or advanced as interest free loans/ advances when the

interest free funds are available with the assessee-Held yes.

(d) ADIT (IT) Vs. Credit Agricole Indosuez (2013) 21 ITR 345 / 58 SOT 97 (Mum.) (Trib.) (A.Y. 1997-98)

Assessee, carrying on banking business, was maintaining nostro accounts for receipt and payment of money in foreign, currency. Interest earned from overseas branches chargeable hence no disallowance of interest expenditure paid by assessee. Interest on foreign currency loans was allowable on gross interest and not on net interest. Assessee was utilizing interest-free funds at its disposal for Investment in interest free securities. No disallowance qua the investment in tax-free securities.

e) ***Intas Pharmaceuticals Ltd. Vs. DCIT [2014-TIOL-60-ITAT-AHM]***

Income tax Sections 14A, 36 – Whether when the assessee has substantial interest free fund to meet his tax free investments yielding exempt income, it can be presumed that such investment free investments yielding exempt income, it can be presumed that such investments were made from interest free funds and not loan funds - Whether when revenue have not found that on global examination of availability of interest free funds with the assessee was not sufficient for advancing interest free

advance to the subsidiaries, no proportionate disallowance can be made.

It is also contended by the AR of the appellant that the Hon'ble Apex Court in Munjal Sales Corporation (2008) 168 Taxman 43 has upheld that when there were available sufficient non-interest bearing funds to advance amounts to business associates then no interest can be disallowed. In view of the above facts, I am of the opinion that the appellant had sufficient non-interest bearing funds to extend advances for non-business purposes and therefore, no disallowance of interest is called for. However, it is to be noted that the details of total interest paid by the appellant is as under:

Lender's Particulars	Loan outstanding as on 31/03/11 (Rs.)	Interest Amount (Rs.)	
For Hinges Business			
Canara Bank FBD	2,08,08,058/-	10,82,777/-	
Canara Bank Packing Credit	2,49,27,074/-	16,55,080/-	27,37,857/-
For Real Estate Business			
Reliance Capital -1	Nil	1,96,274/-	
Reliance Capital -2	Nil	3,25,102/-	
HDFC Bank Ltd.	Nil	3,534/-	
Barclays Bank PLC	2,76,41,034/-	29,12,322/-	
ICICI Bank	9,60,91,293/-	1,00,77,454/	1,35,14,686/

From the above details, it is observed that the appellant has paid interest to Reliance Capital-I & Reliance capital-II amounting to Rs. 1,96,274/- & Rs. 3,25,102/- respectively. It is pointed out by the AO that the appellant has no deducted TDS on these amounts

which have been paid to non-banking finance companies and therefore, these amounts are liable to be disallowed u/s 40(a)(ia) of the Act. The AO has not made any separate addition as he has disallowed the total interest claimed by the appellant. However, as stated above, no disallowance of interest is called for u/s 36(1) (iii) of the Act. Therefore, the amount of interest paid to Reliance Capital amounting to Rs.5,21,376/- without deduction of TDS is liable to be disallowed u/s 40(a)(ia) of the Act. Accordingly, the addition of Rs.5,21,376/ is confirmed u/s 40(a)(ia) of the Act and the addition made u/s 36(1)(iii) of the Act is deleted. The grounds of appeal are partly allowed.

7.2 I have gone through the facts of the case. The appellant has paid a sum of Rs. 16,52,800/- on account of testing charges to an UK based company M/s Exova Warrington Fires Certification Ltd. The appellant has contended that the aid testing was done in a laboratory located in UK. The AO has made the disallowance u/s 40(a)(ia) of the Act by stating that the appellant has not deducted TDS on this amount paid to a non-resident. In the opinion of the AO, ne said company has rendered technical services on behalf of the appellant business income of M/s Exova Warrington Fires Certification Ltd. from a business connection in India and is also holding that the said company is providing technical services on

behalf of the appellant outside India. In this regard, it is to be noticed that the said certifying company is not having any permanent establishment in India. Even the AO has not been able to place on record any material to prove the existence of such PE in India. Therefore, the provisions of section 9(1)(i) of the Act are not applicable in this case. As far as fees for technical services is concern, the appellant has contended that its case does not fall in the definition of fees for technical services as contained in Article 13 of the Double Taxation Avoidance Agreement (DTAA) between India & United Kingdom. The certifying company is not providing any technical knowledge, experience or skill to the appellant and is not making available any technical services in India. The appellant has relied upon various judgments on the issue in his favour. According to the definition contained in DTAA, fees for technical service means payment of any kind made to any person in consideration of services of technical nature if such services make available technical knowledge, experience, skill, know how or processes, which enables the person acquiring the service, to apply technology contained therein for his benefit. Here, in this case, no such technical knowledge or skill etc. is being transferred to the appellant. In view of these facts, I am of the opinion that the case of appellant is not covered by the provisions of Section 9(1)(vii) of the Act either. Therefore, the addition

mad by the AO is deleted and the ground of appeal is allowed.

8. We have heard the rival arguments and perused the material available on record.

9. In the instant case the assessee had given interest free loans and advances to his family members relatives and sister concerns/companies amounting Rs 13.39 crores. The assessee has prepared the two balance sheets by having two business. The assessee has invested the funds in the real state. The balance sheet shows as under:-

Interest bearing funds	*24.32 Crores*	*Real Estate business advances*	*14.68 Crores*
Non-interest bearing funds	*16.94 Crores*	*Sundry Debtors and Inventory*	*8.27 Crores*
		Other Business Assets	*4.92 Crores*
		Non-interest bearing	*13.39 Crores*

		investments / advances	
	41.26 Crores		*41.26 Crores*

10. The assessee has two business one for manufacturing of hardware items and another of Real Estate. This contention of the assessee was not disputed by AO. The assessee has the sufficient funds as he has shown in the balance sheet. In the case of Munjal Sales Corporation (2008) 168 Taxman 43 SC the Hon'ble Apex Court held as under :-

> *"16. As stated above, in this batch of civil appeals we are concerned with the assessment years 1993-94, 1994-95, 1995-96, 1996-97 and 1997-98. At this stage, it may be mentioned that as far back as in August/September 1991, assessee herein had given interest-free advances to its sister concerns. These advances stood reduced over a period, till assessment year 1997-98 Each year the balances stood reduced. Further, vide Order dated 3-1-2003 the Tribunal held, for assessment year 1992-93, that the assessee had given interest-free loans from its Own Funds and not from interest bearing loans taken by the firm from the parties and consequently, the assessee was entitled to claim deduction under section 36(1)(iii). In other words, the Tribunal held that loans were given for*

business purposes. Similarly, for assessment year 1993-94, the Tribunal had taken the view that the said loans given to the firm's sister concerns were for business purposes. Accordingly, the Tribunal had deleted the disallowances during the assessment years 1992-93 and 1993-94. It is equally true that for the assessment year 1904-95, the Tribunal took a contrary view in view of change in law brought about by Finance Act, 1992. Prior to 1-4-1993 payment of interest to the partner had to be added back to the assessable income of the firm whereas after Finance Act, 1992 such payment became an item of deduction for computing the assessable income of the firm and it became part of the business income of the partner In view of this change of law, the Tribunal disallowed payment of the interest in the present case for assessment years 1904-05, 1995-96, 1996-97 and 1997-98. However, the point which has been left out from consideration is that the loans which were given in August/September 1991 to the sister concerns got wiped out only in assessment year 1997-08. As stated above, for assessment year 1992-93 and assessment year 1993-94, the Tribunal held that the loans given to the sister concerns were out of the firm's Funds and that they were advanced for business purposes. Once it is found that the loans granted August/September 1991 continued up to assessment year 1997-98 and that the said loans were advanced for

business purposes and that interest paid thereon did not exceed 18/12 per cent per annum, the assessee was entitled to deductions under section 36(1)(iii), read with section 40(b)(iv) of the 1961 Act.

17. One aspect needs to be mentioned during the assessment year 1995-96, apart from the loan given in August/September 1991, the assessee advanced interest-free loan to its sister concerned amounting to Rs. 5 lakhs, According to the Tribunal, there was nothing on record to show that the loans were given to the sister concern by the assessee-firm out of its Own Funds and, therefore, it was not entitled to claim deduction under section 36(1)(iii). This finding is erroneous. The Opening Balance as 1-4-1994 was Rs.1.91 crores whereas the loan given to the sister concern was a small amount of Rs. 5 lakhs. In our view, profits earned by the assessee during the relevant year were sufficient to cover the impugned loan of Rs. 5 lakhs."

11. In the case of Commissioner of income Tax v Reliance Industries Ltd. {2019}102 taxmann.com 52 in this case Hon'ble Supreme Court held as under :-

"7. Insofar as the first question is concerned, the issue raises a pure question of fact. The High Court has noted the finding of the Tribunal that the interest free funds

available to the assessee were sufficient to meet its investment. Hence, it could be presumed that the investments were made from the interest free funds available with the assessee. The Tribunal has also followed its own order for Assessment Year 2002-03.

8. In view of the above findings, we find no reason to interfere with the Judgment of the High Court in regard to the first question. Accordingly, the appeals are dismissed in regard to the first question."

12. The assessee has sufficient interest free funds to make investments or to make advances for non-business purpose. The assessee has paid the interest on the loan amount. The Ld CIT(A) had disallowed the amount of interest Rs 5,21,376/- which was paid to Reliance Capital 1&2 without deducting the TDS and CIT(A) has rightly deleted the addition made by AO u/s 36(1)(iii) of the Act which interest was paid to the Banks.

13. From the perusal of the order of the Ld CIT(A) it is evident that the AO assessee has filed the revised return of income and included the share of profit from the two projects amounting to Rs 96,65,203/-. The AO has again added the amount in the income of the assessee. The Ld.CIT(A) had rightly deleted the addition made by AO.

14. The Ld. DR has submitted that the Ld CIT(A) had wrongly deleted the addition of Rs16,52,800/- ignoring the statutory provision. The assessee has paid the sum on account of testing charges to UK based company. The AO has treated the said payment as the business income in India and was hold that the said company was providing technical services on behalf of the assessee out side India. The certifying company has not had any permanent establishment in India. The provisions of section 9(1)(i) of the Act are not applicable in this case. Addition made by AO was rightly deleted by the Ld CIT(A).

15. From the above discussion, we do not find any reason to interfere with the findings of the Ld CIT(A). The appeal of the revenue is liable to be dismissed.

16. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 13.08.2024.

Sd/-	**Sd/-**
(S. RIFAUR RAHMAN)	**(SUDHIR KUMAR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

NEHA, Sr. PS
Date:-13.08.2024