

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
KOLKATA 'A(SMC)' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Accountant Member**

**I.T.A. No. 2166 /KOL/ 2014  
Assessment Year: 2010-2011**

***Income Tax Officer,.....Appellant***  
***Ward-32(2), Kolkata,***  
***10B, Middleton Row, 2<sup>nd</sup> Floor,***  
***Kolkata-700 071***

**-Vs.-**

***M/s. Raghunath Exporters,.....Respondent***  
***5F, Park Plaza,***  
***71, Park Street,***  
***Kolkata-700 016***  
***[PAN: AADFR 8371 E]***

**Appearances by:**

*Shri Rajat Kumar Kureel, JCIT, D.R., for the Department*  
*Shri K.M. Roy, CA and Shri Manoj Kataruka, A.R., for the assessee*

Date of concluding the hearing : June 10, 2016

Date of pronouncing the order : August 10, 2016

**O R D E R**

This appeal is preferred by the Revenue against the order of Id. Commissioner of Income Tax (Appeals)-XIX, Kolkata dated 16.09.2014.

2. In Ground No. 1, the Revenue has challenged the action of the Id. CIT(Appeals) in deleting the addition of Rs.2,50,000/- made by the Assessing Officer on account of disallowance of commission.

3. The assessee in the present case is a partnership firm, which is engaged in the business of Processing, Trading & Export. The return of income for the year under consideration was filed by it on 24.09.2010 declaring total income of Rs.2,50,350/-. In the Profit & Loss Account filed along with the said return, a sum of Rs.2,50,000/- was debited by the assessee on account of commission paid to its sister concern M/s. Rex

Agro Pvt. Limited. In this regard, the assessee explained before the Assessing Officer that the said commission was paid to M/s. Rex Agro Pvt. Limited in respect of sales made to different parties through them. The assessee, however, could not furnish the relevant evidence to prove the genuineness of the commission and also could not furnish the exact details of sales claimed to be made through M/s. Rex Agro Pvt. Limited. The Assessing Officer, therefore, disallowed the claim of the assessee for commission of Rs.2,50,000/-.

4. On appeal, the Id. CIT(Appeals) deleted the disallowance made by the Assessing Officer on account of commission for the following reasons given in paragraph no. 4.2 of his impugned order:-

*"4.2 I have heard the contentions raised by the AR of the appellant and the findings of the AO. The disallowance of commission of Rs.2,50,000/- paid to M/s. Rex Agro Pvt. Ltd. was on account of consultancy and commission for effecting sales. The appellant had made payment of commission by account payee cheque to M/s. Rex Agro Pvt. Ltd. whereby the said payment has been accounted for by M/s. Rex Agro Pvt. Ltd. and shown in its income tax return. It is also noticed that tax has been deducted at source by the appellant on the payment made to M/s. Rex Agro Pvt. Ltd. From the comparative statement filed, it is seen that the percentage of commission on turnover during the year was 0.27% which has reduced from 0.78% in AY 2007-08, the year in which assessment was done u/s 143(3) and payments of commission to M/s Rex Agro Pvt. Ltd. was allowed. Principle of consistency is to be followed unless there is any material change in the facts of the matter. The genuineness of the commission payment by the appellant is not in doubt and in the absence of any counter material for disallowing the same by the A.O., I do not find any justification in the action of the AO, mote so for the fact that it has been paid on regular basis since the past many years for arranging of sales as well as providing consultancy services to the appellant. Under the facts and circumstances, the addition made by the AO of Rs.2,40,000/- does not merit any sustenance at the appellate stage for which the same stands deleted. The A.O. is directed accordingly".*

5. I have heard the arguments of both the sides and also perused the relevant material available on record. As rightly submitted by the Id. D.R., the fact that the commission in question was paid by cheque after

deduction of tax at source and the same was duly shown by M/s. Rex Agro Pvt. Limited in its return of income alone is not sufficient to allow deduction to the assessee in respect of such commission. The onus in this regard is on the assessee to establish on evidence the services rendered by M/s. Rex Agro Pvt. Limited in order to secure sales for the assessee. In this regard, the ld. counsel for the assessee at the time of hearing before me has submitted that the assessee is in the business of trading and export of tea and the commission in question was paid to M/s. Rex Agro Pvt. Limited on purchases. He has also submitted that such commission payment was regularly made by the assessee even in the earlier years and the same, in fact, was lower in the year under consideration as compared to the immediately preceding year. He, however, has not been able to explain the exact basis of commission paid to M/s. Rex Agro Pvt. Limited nor could he produce any evidence to establish the services rendered by the said party, which is a sister concern of the assessee, to support and substantiate the payment of commission in question. Having regard to all these facts of the case, I am of the view that the assessee has not been able to establish on evidence that the expenditure incurred on account of payment of commission in question is wholly and exclusively for the purpose of its business. I, therefore, find no justification in the impugned order of the ld. CIT(Appeals) deleting the disallowance made by the Assessing Officer on account of commission and setting aside the same on this issue, I restore that of the Assessing Officer. Ground No. 1 is accordingly allowed.

6. In Ground No. 2, the Revenue has challenged the action of the ld. CIT(Appeals) in deleting the disallowance made by the Assessing Officer in respect of payment of salary made by the assessee-firm to its partners.

7. The claim of the assessee for deduction on account of remuneration paid to partners amounting to Rs.2,40,000/- under section 40A(2)(b) was disallowed by the Assessing Officer on the ground that there was no mention or clause in the Partnership Deed allowing such remuneration.

Before the Id. CIT(Appeals), the assessee, however, produced a supplementary deed made on 1<sup>st</sup> day of April, 2008 incorporating the clause for payment of salary to partners and relying on the same, the claim of the assessee for deduction on account of partners remuneration was disallowed by the Id. CIT(Appeals).

8. I have heard the arguments of both the sides and also perused the relevant material available on record. The limited contention raised by the Id. D.R. before me is that the Supplementary Partnership Deed filed by the assessee for the first time before the Id. CIT(Appeals) was relied upon by him to give relief to the assessee on this issue without giving any opportunity to the Assessing Officer to verify the same, which is in violation of Rule 46A of the Income Tax Rules. Although the Id. counsel for the assessee has not disputed the fact that the Supplementary Partnership Deed was filed before the Id. CIT(Appeals) for the first time, he has submitted that the Assessing Officer never asked any query on this issue during the course of assessment proceedings and, therefore, the assessee got the opportunity to support and substantiate its claim for deduction on account of partners' remuneration by filing the relevant Supplementary Partnership Deed for the first time before the Id. CIT(Appeals). It is, however, observed that Rule 46A of the Income Tax Rules is very clear in this regard and as provided therein, the Id. CIT(Appeals) ought to have given an opportunity to the Assessing Officer to verify the additional evidence filed by the assessee in the form of relevant Supplementary Partnership Deed before giving relief to the assessee on this issue by relying on the same. I, therefore, set aside the impugned order of the Id. CIT(Appeals) on this issue and restore the matter to the file of the Assessing Officer for deciding the same afresh after verifying the Supplementary Partnership Deed. Ground No. 2 is accordingly treated as allowed for statistical purposes.

9. In Ground No. 3, the Revenue has challenged the action of the Id. CIT(Appeals) in deleting the addition of Rs.29,16,399/- made by the Assessing Officer on account of disallowance of interest.

10. As found by the Assessing Officer during the course of assessment proceedings, the assessee had given substantial advances to its sister concern during the year under consideration. In this regard, it was explained by the assessee before the Assessing Officer that the advances to M/s. Camellia Tea Group (P) Limited and M/s. Raghunath Exports (P) Limited had been given against purchases and even the advance given to M/s. Raghunath Exports Company was for commercial expediency. The Assessing Officer, however, held that the claim of the assessee of commercial expediency for giving advance to M/s. Raghunath Exports Co. was not properly established. He also found that no advances were given by the assessee against purchases made from unrelated parties while such advances against purchases were given only to the related concerns. Keeping in view these findings as well as other findings recorded by him in the assessment order, the Assessing Officer held that there was a diversion of borrowed funds by the assessee for non-business purpose and the claim of the assessee for deduction on account of interest paid on such borrowed funds amounting to Rs.29,16,399/- was disallowed by him.

11. The disallowance made by the Assessing Officer on account of interest was challenged by the assessee in the appeal filed before the Id. CIT(Appeals) and after considering the submissions made by the assessee as well as the material available on record, the Id. CIT(Appeals) deleted the disallowance made by the Assessing Officer for the following reasons given in paragraph no. 6.2 to 6.4 of his impugned order:-

*"6.2 I have heard and considered the contentions raised by the AR and perused the details on record and the assessment order. The AO has made disallowance of the entire amount of interest of Rs.29,16,399/- debited to the Profit & Loss Account on the sole reason that the appellant had given interest free advances to sister concerns and made investment in shares of related parties. The AO has discussed the order the details of the companies to whom the advances were given for an*

aggregate amount of around Rs.1.5 crores and investment in shares made to the extent of Rs.2.42 crores. In doing so, the AO has relied upon decision of CIT vs. Abhishek Industries 286 ITR 1 wherein it has been held that payments made to sister concerns without bearing any interest against borrowed funds resulted in disallowance of interest in the hands of the person making the payments. The disallowance made and upheld by the Punjab & Haryana High Court was on the reason that the burden of onus could not be discharged by the tax payer. The Punjab & Haryana High Court has discussed the decision of the Calcutta High Court in CIT vs. Britannia Industries Ltd. 280 ITR 525 (Cal.) and not accepted the same. As it clearly transpires from the judgment of the Punjab & Haryana High Court not accepting the decision of Jurisdictional High Court would imply that two different High Courts have taken two different vies, The Calcutta High Court in the case of CIT v. Britannia Industries Ltd. (Supra) has held at Paragraph 8 as under:-

"From the above discussion, we find in relation to each assessment years involved in this appeal that the recipient of interest-free loan was not a firm of relatives the advance was made for the purpose of business within the meaning of section 36(1)(iii), that there was regular course of business between the assessee and the firm, and that the advances were made to MCAP in regular course of business; such advances were made In the course of business for commercial expediency and for the purpose of business, the findings arrived at by the learned Tribunal wee not perverse the entire exp expenditure was made from the mixed account, therefore, there would be a presumption that the amount was made out of own fund of tile assessee and not from the borrowed capital, that there were sufficient fund and that the advances were made from the mixed account, Therefore. the CIT(A) and the Learned Tribunal both were right in presuming that the advance was made out from the assessee's own fund eligible for the benefit of section 36(1)(iii)".

6,3 The decision of tne Punjab & Haryana High Court In the case of CIT.- vs.-Abhishek Industries (Supra) being in contrary to the decision of the Jurisdictional High Court in the case of CIT vs, Britannia Industries l.td. (Supra), the same cannot be accepted and followed and the decision of the Calcutta High Court is to be respectfully followed. In another decision by the Punjab and Haryana High Court In case of CIT vs. Hero Cycles 323 ITR 518 it has been held that where there are mixed funds, presumption is that the investments are made out of own capital. In this decision of the Punjab & Haryana High Court, reliance was placed on CIT vs.- Winsome Textile Industries Limited, wherein decision of Abhishek Industries was distinguished as having no application, The appellant has submitted that the decision of Abhishek Industries Ltd. (Supra) even though not applicable due to the decision of the Calcutta High Court in the case of CIT vs. Britannia Industries Ltd is also distinguishable from the facts of the case, The appellant has made payment of interest on funds borrowed against security, In other words, the entire loan taken by the appellant are secured loans which

*are either secured against the stock or against book debts and packing credit loans. These loans are entirely used in the appellant's business for purchase of tea and sale of tea. A perusal of the accounts shows that the total purchases made by the assessee of Rs.8.52 crores has been paid by the banks except for a liability of sundry creditors for goods of Rs.8,71,467/-. The appellant is having sundry debtors of Rs.75,65,330/- and stock in hand of Rs.1.69 crores. The payments made against the purchases by the appellant are all against the secured loans which are directly or indirectly against such purchases which is ascertainable from the accounts as well as from the bank statements. The total secured loans by the appellant are of Rs.1.72 crores which is less than the stock and sundry debtors in the Balance Sheet.*

*6.4 The advances made by the appellant to the parties were in the course of business for purchase of tea and the advance made to Rex Agro Pvt. Ltd. was for share application and for the purpose of controlling interest. The appellant is having its own capital of Rs.6.11 crores and the aggregate advances made is Rs.1.75 crores and the entire amount is from appellants own capital. The Madras High Court in the case of CIT vs. RPG Transmissions Ltd. 359 ITR 673 (Mad.) has held that investments made in shares by the assessee, even if it was out of borrowed funds, were for the purpose of controlling interest of the assessee, the interest was allowable u/s 36(1)(iii) of the Act. Similar view has been decided by the Calcutta High Court in the case of CIT vs. Rajiv Lochan Kanoria 208 ITR 616 (Cal.)”.*

12. I have heard the arguments of both the sides and also perused the relevant material available on record. Besides reiterating the arguments raised on behalf of the assessee before the authorities below showing the commercial expediency of the advances in question given to the sister concerns, the ld. counsel for the assessee has invited my attention to the balance-sheet of the assessee placed at page no. 21 of his paper book, which clearly shows that the assessee at the relevant time was having own funds of Rs.6.61 crores, which were sufficient to give the impugned advances to its sister concern. On the other hand, the loans taken by the assessee at the relevant time stood only at Rs.1.65 crores, which were entirely used for the purpose of its business. In my opinion, these facts and figures clearly evident from the relevant balance-sheet of the assessee, which have remained undisputed or uncontroverted by the ld. D.R., are sufficient to show that there was no diversion of borrowed funds by the assessee for non-business purpose and the disallowance made by the Assessing Officer on account of interest was unsustainable. In that

view of the matter, I uphold the impugned order of the Id. CIT(Appeals) deleting the disallowance made by the Assessing Officer on account of interest and dismiss Ground No. 3 of the Revenue's appeal.

13. In Ground No. 4, the Revenue has challenged the action of the Id. CIT(Appeals) in deleting the addition of Rs.1,16,084/- made by the Assessing Officer being disallowance of 20% out of the business promotion expenses claimed by the assessee.

14. During the course of assessment proceedings, the claim of the assessee for business promotion expenses amounting to Rs.5,80,241/- was found to be not fully supported by proper bills/vouchers by the Assessing Officer. He, therefore, made a disallowance of 20% of such expenses. On appeal, the Id. CIT(Appeals) deleted the said disallowance made by the Assessing Officer on ad hoc basis on the ground that no specific defect whatsoever was pointed out by the Assessing Officer in respect of assessee's claim for business promotion expenses.

15. I have heard the arguments of both the sides and also perused the relevant material available on record. As rightly observed by the Id. CIT(Appeals), no specific instance was pointed out by the Assessing Officer to show any unverifiable element involved in the expenses claimed by the assessee on business promotion and this position clearly evident from the order of the Assessing Officer is not disputed even by the Id. D.R. I, therefore, find no infirmity in the impugned order of the Id. CIT(Appeals) deleting the ad hoc disallowance of 20% made out of business promotion expenses without pointing out any specific defect in the claim of the assessee and upholding the same, I dismiss Ground No. 4 of the Revenue's appeal.

16. In Ground No. 5, the Revenue has challenged the action of the Id. CIT(Appeals) in deleting the disallowance of Rs.1,18,942/- made by the

Assessing Officer under section 14A read with Rule 8D of the Income Tax Rules.

17. During the year under consideration, the assessee had made substantial investment in shares and although no dividend income on such shares was actually earned by the assessee, the Assessing Officer was of the view that the assessee ought to have offered a disallowance of expenses incurred in relation to the investment in shares under section 14A. Since no such disallowance was offered by the assessee, the Assessing Officer invoked Rule 8D and worked out the expenses incurred by the assessee in relation to the investment made in shares at Rs.1,18,942/-. Accordingly, the disallowance to that extent was made by him under section 14A.

18. On appeal, the Id. CIT(Appeals) deleted the disallowance made by the Assessing Officer under section 14A for the following reasons given in paragraph no. 8.2 and 8.3 of his impugned order:-

*"8.2. I have heard the contentions raised by the AR and perused the details and the assessment order. In the case of CIT -vs.- M/s. Lakani Mktg. Incl. In ITA 970 of 2008, the Punjab & Haryana High Court in dealing with Sec. 14A has held that where there is no exempt income or no taxable income in the year, no disallowance u/s 14A can be made. Further, the Gujarat High Court in the case of CIT -vs.- Comtech Energy pvt. Ltd. in ITA No. 239 of 2014 vide order dtd. 24.3.14 has upheld the judgment of the Tribunal which had observed and stated that there cannot be any disallowance u/s 14A when there is no exempt income in the hands of the assessee. Furthermore, in the case of CIT -vs.- Sivam Motors (P) Ltd. in ITA No. 88 of 2014, the Allahabad High Court has again held that where there is no taxable income, no disallowance u/s 14A can be made. The Hon'ble Tribunal, Chennai Bench, in the case of ACIT -vs.- N. Bhaskaran in ITA No. 1717/MDS/2013 has held that the CBDT Circular No. 5/2014 dated 11.02.14 is not a good law and no disallowance can be made if there is no exempt income.*

*8.3. Therefore, in view of the clear language of the statute u/s 14A, interpreted by the High Court and the I.T. Tribunal where there is no exempt income, no disallowance can be made u/s 14A of the Act. In view of the above, the disallowance made by the AO u/s 14A cannot be sustained and is hereby directed to be deleted".*

19. I have heard the arguments of both the sides and also perused the relevant material available on record. As rightly held by the Id. CIT(Appeals), the disallowance under section 14A cannot be made where there is no exempt income earned by the assessee during the relevant year and this position is duly supported by the various judicial pronouncements discussed by the Id. CIT(Appeals) in his impugned order. I, therefore, find no infirmity in the impugned order of the Id. CIT(Appeals) giving relief to the assessee on this issue and upholding the same, I dismiss Ground No. 5 of the Revenue's appeal.

**20. In the result, the appeal of the Revenue is partly allowed.**

Order pronounced in the open Court on August 10, 2016.

**Sd/-**

**(P.M. Jagtap)**  
**Accountant Member**

**Kolkata, the 10<sup>th</sup> day of August, 2016**

- Copies to :
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5F, Park Plaza,  
71, Park Street,  
Kolkata-700 016**
  - (3) **Commissioner of Income Tax (Appeals)-XIX, Kolkata;**
  - (4) **Commissioner of Income Tax- ,**
  - (5) **The Departmental Representative**
  - (6) **Guard File**

*By order*

*Assistant Registrar,  
Income Tax Appellate Tribunal,  
Kolkata Benches, Kolkata*

**Laha/Sr. P.S.**