

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "E" MUMBAI**

**BEFORE SHRI JOGINDER SINGH (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 801/MUM/2012  
Assessment Year: 2008-09**

**&**

**ITA No. 252/MUM/2013  
Assessment Year: 2009-10**

M/s. Shubh Enterprises  
102 Wing, J Nisarg Bldg. Opp.  
UTI Bank, Mahavir Nagar, Kandivali(W)  
Mumbai - 400067

Vs. ACIT CIR 15(2)  
Mumbai

**PAN No. AAYFS3688J**

**(Appellant)**

**(Respondent)**

Assessee by: Mr. N.M. Porwal, AR  
Revenue by: Mr. Vishwas Mundhe, DR

Date of Hearing : 21/02/2017  
Date of pronouncement: 19/05/2017

**ORDER**

**PER N.K. PRADHAN, AM**

The captioned appeals are directed against the order of the Commissioner (Appeals) – 26, Mumbai and arise out of order u/s 143(3) of the Income Tax Act, 1961 (the 'Act'). As some common issues are involved, we are proceeding to dispose them off by this consolidated order for the sake of convenience.

2. The grounds raised by the assessee in these appeals are that (i) the learned CIT(A) erred in confirming the interest received by the appellant of Rs. 56,23,221/- (A.Y. 2008-09) and Rs. 64,05,656/- (A.Y. 2009-10) as

assessable under the head 'income from other sources' and not under the head 'income from business' as claimed by the assessee and (ii) the learned CIT(A) erred in rejecting (a) the claim of the assessee that interest received of Rs. 56,23,221/- should be allowed to be set off against the interest paid of Rs. 86,04,016/- and balance amount should be included in work-in-progress for A.Y. 2008-09 and (b) the claim of the assessee that interest received of Rs. 64,05,656/- should be allowed to be set off against interest paid of Rs. 1,03,10,013/- and the balance amount of Rs. 36,04,357/- only should be considered work-in-progress for A.Y. 2009-10.

The other ground for the A.Y. 2009-10 is that the learned CIT(A) erred in confirming the addition of Rs. 3,68,325/- being calculated @ 10% on increased work-in-progress by 57.50% of interest paid amounting to Rs. 64,05,656/-.

3. Briefly stated the facts of the case are that the nature of business of the assessee-firm is that of a builder and developer. The Assessing Officer (A.O.) found during the course of assessment proceedings that the assessee has netted off (i) interest income of Rs. 56,23,221/- against interest expenditure of Rs. 86,04,016/- for A.Y. 2008-09 and (ii) interest income of Rs. 64,05,656/- against interest expenditure of Rs. 1,03,10,013/- for A.Y. 2009-10. The assessee submits before the A.O. that while valuing work-in-progress, it has allocated all the direct expenses related to each project and the expenses like interest etc which cannot be directly attributable to any project are apportioned to various projects on a suitable basis i.e. on the basis of value of work-in-progress incurred for each project. The assessee further explains to the A.O. that it has earned the interest income for giving loan or advance during the normal course of business to associates or other concerns. The assessee also submits before the A.O. that it has netted off

the interest earned from the value of interest paid and the net amount has been charged to work-in-progress.

The A.O. was not convinced with the above explanation of the assessee for the reasons that (i) the main activity of the assessee is development of residential building and the interest received is not related to the business activity and therefore, the entire interest paid should be debited to the profit & loss account, (ii) the assessee has not established the business connection i.e. the construction activity with related concerns, (iii) the business of the assessee firm is not money lending, (iv) since the assessee is following percentage competition method, the entire expenditure on account of the interest payment should become the part of work-in-progress.

The details of loan as tabulated by the A.O. are as under:

Name of the Associate concern	Loan as on 31.03.2006	Loan as on 31.03.2007	Loan as on 31.03.2008	Loan as on 31.03.2009	Remarks
Arpit Samani	43,545	15,13,545	34,35,569	31,47,319	Increased
Shub Hotel P Ltd.	Nil	15,36,003	1,43,83,433	2,08,07,427	Increased
Shir Shub Builders P Ltd.	Nil	1,72,71,840	2,73,09,016	3,60,26,172	Increased
Nisha Enterprise	2,00,000	2,00,000	2,00,000	2,00,000	No change
Parikh Granito	2,00,000	2,00,000	2,00,000	2,00,000	No change
Shri Shankar Sanitation		1,50,000	1,50,000	1,50,000	No change
Vijay Parikh & Associates	24,00,000/-	24,00,000	24,00,000	14,00,000	No change for 3 years

The assessee submitted vide letter dated 10.12.2010 to the A.O. the applicability of "A.S. – 16 Borrowing Costs" which is extracted below:

"To the extent that the funds are borrowed specifically for the purpose of obtaining a qualifying asset, the amount of borrowing costs eligible for

capitalization on that asset should be determined as the actual borrowing costs incurred on that borrowing during the period less any income on the temporary investment of those borrowings.”

The A.O. observed that the loans advanced for more than three/four years to M/s. Vijay Parikh & Associates; Arpit Samani; Parikh Granito, M/s. Nisha Enterprise cannot be treated as temporary investment of borrowed funds. Even the loan provided to M/s. Shri Shankar Sanitation, Shub Hotel P Ltd. and Shri Shub Builders P. Ltd. have crossed the limit of more than two years. In view of the above, the A.O. brought to tax Rs. 56,23,221/- in A.Y. 2008-09 and Rs. 64,05,656/- in A.Y. 2009-10 as income from other sources.

4. Aggrieved by the order of the A.O., the assessee filed an appeal before the learned CIT(A). For the A.Y. 2009-10, the learned CIT(A) held as under:

“After considering the rival submissions, it is seen that the appellant has substantial surplus funds which have primarily come out of the advance booking of the flats, but such surplus funds were not used for the business activities, rather in a systematic manner, such funds have been advanced mainly to the two sister concerns i.e. M/s. Shub Hotels Pvt. Ltd. and Shree Shubh Builders Pvt. Ltd. In both these cases, it is noted that even during the year under consideration, there was huge opening balance of loans of Rs. 1.43 crore and Rs. 1.72 crore respectively (totalling to Rs. 3.15 crores). During the year under consideration, loans to these two concerns have been increased to Rs. 2.08 crore and Rs. 2.73 crore (totalling to Rs. 4.81 crore). Similar is the position in earlier years, meaning thereby, the appellant has given long term advance to these concerns which are parallel to the long term fixed deposits. Such long term loans cannot be held as short term advances of surplus funds. Under these circumstances, interest income generated from such long term deposits with the sister concerns or banks is taxable under the specific head ‘Income from other Sources’ because such loans have not been advanced as routine short term business loans and the income of interest earned on such loans cannot be held as business income, because neither the business of the assessee is of financing nor the interest income has been earned in routine business activity. Under these circumstances, I do agree with the A.O. that when in its main construction activity, the appellant is following the percentage completion method, the interest expenditure should become part

of the WIP alongwith the other expenditure and it should not be netted off with the interest income on long term advances made out of surplus money, which are taxable under separate head i.e. income from other sources. Therefore, considering the totality of facts and circumstances of the case, it is noted that the facts of the instant case are distinguishable from the case of CIT Vs. M/s. Lok Holdings 308 ITR 356 relied upon by the appellant. In that case advances received from customers were temporarily invested in the advances to some customers and banks, whereas in the instant case, the advances given to sister concerns are long term advances and not temporary advances. Therefore, assessment of interest income under the head 'Income from other Sources' is confirmed."

4.1 On the same reasons the learned CIT(A) confirmed the addition made by the A.O. of Rs. 56,23,221/- (A.Y. 2008-09) and Rs. 64,05,656/- (A.Y. 2009-10) under the head 'Income from other sources'

5. Before us, the learned counsel of the assessee relies on the decision in the case of *CIT vs. Lok Holdings* (2009) 308 ITR 356 (Bom.), *Shree Krishna Polyester Ltd. vs. DCIT* (2005) 274 ITR 21(Bom.), *CIT vs. Paramount Premises (P) Ltd.* (1991) 190 ITR 259 (Bom.) and *Chhaganlal Khimji & Co. Pvt. Ltd. vs. ACIT* (2015) 45 CCH 0082 Mum Trib.

6. *Per contra*, the learned DR relies on the order of the Hon'ble Supreme Court in the case of *M/s. The Totgar's Co-op Sale vs. ITO* (Civil Appeal No. 1622 of 2010) dated 08.02.2010.

7. We have heard the rival submissions and perused the relevant material on record. We begin with the decision relied on by the learned counsel of the assessee. In the case of *Lok Holdings* (supra), the assessee-firm was involved in the business of development of properties. In the course of its business, the assessee-firm received monies in advance from customers intending to purchase flats in the properties as developed by the assessee. These monies were of the nature of booking / advances. Since these monies received could not be immediately utilised for the business of

the firm, the surplus amounts from such money received came to be temporarily invested with banks and other concerns. Such deposits with accrued interest thereon which was received by the assessee-firm was deducted from the work-in-progress till the conclusion of the project. For the A.Y. 1992-93, the income from such interest was Rs. 52,28,289/-. The A.O. assessed this interest income from other sources and thus made an addition under the head 'Income from other Sources'. The Hon'ble Bombay High Court has held that the interest earned on deposits of surplus money is business income and cannot be assessed as income from other sources.

In *Shree Krishana Polyster Ltd.* (supra), the assessee was engaged in the business of manufacture of synthetic yarn and money lending was never the business activity of the assessee. The assessee received surplus money in public issue and the said money was invested in bank deposits for a period of 45 days. The Hon'ble High Court has observed that the facts which have been found by the Tribunal lead to the conclusion that the interest which the assessee earned from short term investment of surplus money received in public issue did not spring or emanate from the business activity of the assessee. The Hon'ble High Court has held that the income of interest earned by the assessee by investing surplus money received in public issue in bank deposits for a period of 40 days was assessable as income under the head 'income from other sources'.

In *Paramount Premises (P) Ltd.* (supra), for the A.Y. 1978-79, the assessee was engaged in the construction of three buildings. The assessee received deposits in instalments from prospective purchasers while the work of construction was in progress. Of the purchasers failed to make deposits by stipulated dates, they had to pay interest. Secondly, the authorised capital of the assessee was small but the amounts received as

deposits were large. Idle amounts were deposited with the bank or given on temporary loans until such time as they were required for construction. Thus, interest was earned on these amounts. The assessee was also required to give a guarantee to the State Bank of India in respect of the land taken on lease for construction work. For this purpose, certain amounts were kept in fixed deposits on which the assessee earned interest. In these circumstances, the Tribunal has given a finding of fact to the effect that the entire interest sprang from the business activity of the assessee and did not arise out of any independent activity. Accordingly, interest income was considered as the business income of the assessee.

In *Chhaganlal Khimji & Co. Pvt. Ltd.* (supra), appellant was in to business of real estate and it required fund for making investment and to carry on the construction activity. Funds borrowed from MNRPL was in turn invested in PPL which was engaged in construction of a commercial complex by name Marathone Future X. Appellant being one of the JV partner the borrowal was utilized only in the construction activity and there was no room for any doubt. Alternatively it could be treated as part of activity in construction business. The A.O., did not controvert this claim of the appellant. The appellant did not receive any interest from PPL for the investment made. Mere non-receipt of interest income during the year cannot lead to the conclusion that the appellant is not into finance activity. The CIT(A) held that the assessee company was engaged in the business of construction as well as lending of money, both constituted its main business activity. Both these objects were clear from the 'Memorandum and Articles of Association' of assessee-company. As per clause 55 of 'Memorandum and Articles of Association', assessee was authorized to carry business of money lending.

Both construction as well as lending constituted the business activity hence, the claim of the appellant that the interest income earned was from business was in order. The ITAT held the interest earned as business income.

7.1 Now we come to the decision relied on by the learned DR. In *M/s. The Totgar's Co-op Sale* (supra), the assessee-society was assessed to tax as a Co-operative Society. Its business was to provide credit facilities to its members and to market the agricultural produce to its members. The Hon'ble Supreme Court held as under:

“Interest on such investments, therefore, cannot fall within the meaning of the expression “profits and gains of business”. Such interest income cannot be said also to be attributable to the activities of the society, namely, carrying on the business of providing credit facilities to its members or marketing of the agricultural produce of its members. When the assessee-society provides credits facilities to its members, it earns interest income. As stated above, in this case, interest held as ineligible for deduction under Section 80P(2)(a)(i) is not in respect of interest received from members. In this case, we are only concerned with interest which accrues on funds not required immediately by the assessee(s) for its business purposes and which have been only invested in specified securities as “investment”. Further, as stated above, assessee(s) markets the agricultural produce of its members. It retains the sale proceeds in many cases. It is this “retained amount” which was payable to its members, from whom produce was bought, which was invested in short-term deposits/securities. Such an amount, which was retained by the assessee-society, was a liability and it was shown in the balance-sheet on the liability side. Therefore, to that extent, such interest income cannot be said to be attributable either to the activity mentioned in section 80P(2)(a)(i) of the Act or in section 80P(2)(a)(iii) of the Act. Therefore, looking to the facts and circumstances of this case, we are of the view that the Assessing Officer was right in taxing the interest income, indicated above, under section 56 of the Act.”

7.2 Now we go back to the facts of the present case. In the submission before the A.O. vide letter dated 10.12.2010 , the learned AR of the assessee has explained that (i) the assessee is engaged in the business of

construction and development of housing project, (ii) the assessee has followed the percentage completion method of accounting, (iii) the assessee has earned interest income of Rs. 56,23,221/- for giving loan or advance during the normal course of business to associates or other concerns; the assessee has netted off the interest earned Rs. 56,23,221/- from the value of interest paid Rs. 86,04,016/- and the net amount of Rs. 29,80,795/- has been charged to the work-in-progress for the A.Y. 2008-09 and this method of valuation has been followed in A.Y. 2009-10 also.

7.3 The learned AR of the assessee has submitted before the learned CIT(A) that the assessee is a partnership firm and the business clause as per the partnership deed of the firm is as under:

“That the partnership shall carry on the business of Builders and Contractors, Construction Contractors, Developers of Land and Estates and Construction of Residential Flat, Colonies, Office Building, Commercial and Multi-storied Complexes, Prefabricated and Pre-cast Houses, and to acquire by purchases, lease, exchange or otherwise land, building and hereditments of any tenure or description and any estate or interest therein and any rights over or connected with land, and in turn the same to account as may seem expedient and in particular by preparing building sites and by constructing, reconstructing, altering, improving, repairing, decorating, furnishing and maintaining offices, flats, houses, factories, warehouses, shops, wharves, buildings, works and convenience of all kinds and by consolidating or connecting or subdividing properties and by leasing and disposing of the same in any manner and / or any other business under the name & style of M/s. SHUBH ENTERPRISES or such other name or names as may be mutually decided by and between the partners from time to time.”

7.4 We observe that the assessee has not disputed before the learned CIT(A) (i) the details of loan mentioned at page 4 of the assessment order for the A.Y. 2008-09 and at page 6-7 of the assessment order for the A.Y. 2009-10 and (ii) the details of loan given by the assessee where there was

no transaction during the F.Y. 2008-09 mentioned by the A.O. at page 6 of the assessment order for the A.Y. 2009-10.

7.5 We find that there is merit in the finding of the A.O. that the loan advanced for more than three/four years to M/s. Vijay Parikh & Associates, Arpit Samani, Parikh Granito, M/s. Nisha Enterprise cannot be treated as a temporary investment of the borrowed funds. Even the loan provided to M/s. Shri Shankar Sanitation, Shubh Hotel P. Ltd. and Shub Builders P. Ltd. has crossed the limit of more than two years. Thus there is merit in the finding of the A.O. that "AS-16: Borrowing Costs" is not applicable in the present case.

7.6 Let us illustrate the funds advanced by the assessee to its two sister concerns i.e. M/s. Shub Hotels Pvt. Ltd. and Shree Shubh Builders Pvt. Ltd. In the case of Shub Hotels Pvt. Ltd. the loan was Rs. 15,36,003/- as on 31.03.2007, Rs. 1,43,83,433/- as on 31.03.2008 and Rs. 2,08,07,427/- as on 31.03.2009. In the case of Shree Shub Builders P. Ltd. the loan was Rs. 1,72,71,840/- as on 31.03.2007, Rs. 2,73,09,016/- as on 31.03.2008 and Rs. 3,60,26,172/- as on 31.03.2009.

7.7 However, the solitary issue in the instant appeal is whether the interest earned by the assessee on loans and advances given to parties / concerns (in the Table given at para 3 here-in-above) emanate from the business activity of the assessee or it is case of simple diversion of fund for non-business activity. The issue of netting off of interest income against interest expenditure shall arise when the interest earned by the assessee emanate from its business activity and there is relationship between the two. The above issue shall not arise if there is diversion of fund for non-business activity. These aspects have not been examined either by the A.O.

or the learned CIT(A). In view of the above, we set aside the order of the learned CIT(A) and restore the matter to the file of the A.O. to examine the above and pass an order after giving reasonable opportunity of being heard to the assessee. The assessee is also directed to file the relevant details before the A.O.

7.8 Ground No. 2 of ITA No. 252/Mum/2013 is consequential.

8. In the result, the appeals are allowed for statistical purposes.

**Order pronounced in the open Court on 19/05/2017**

Sd/-

(JOGINDER SINGH)  
JUDICIAL MEMBER

Sd/-

(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai:

Dated: 19/05/2017

*Biswajit. Sr. P.S.*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**