

आयकर अपीलीय अधिकरण "D" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 6339/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2009-10)

D B Properties Private Limited, DB House, Yashodham, Gen. A.K. Vaidya Marg, Goregaon (East), Mumbai - 400 063.	बनाम/ v.	The Addl. Commissioner of Income Tax, Range -9(1), Aayakar Bhavan, Mumbai - 400 020.
स्थायी लेखा सं./PAN : AACCD5197L		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Ms. Arati Vissanji
Revenue by :	Shri Ajitkumar Srivastava, CIT DR

सुनवाई की तारीख / **Date of Hearing** : 18-01-2016

घोषणा की तारीख / **Date of Pronouncement** : 23-03-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee company, being ITA No. 6339/Mum/2012, is directed against the order dated 14-08-2012 passed by learned Commissioner of Income Tax (Appeals)-19, Mumbai (hereinafter called "the CIT(A)") , for the assessment year 2009-10.

2. The ground raised by the assessee company in the memo of appeal filed with the Tribunal reads as under:-

"1. On the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals) ought to have held that

no penalty is leviable on the appellant U/s. 271(1)(c) of the Act in relation to withdrawal of claim for deduction of interest expenditure / financial charges of Rs.14,98,08,096/ - in assessment of its income for assessment year 2009-2010 and accordingly, ought to have directed the AO to delete the penalty levied vide order dated 29th February,2012 of Rs.4,71,89,550/ -.

2. It is humbly prayed that the reliefs as prayed for hereinabove and/or such other reliefs as may be justified by the facts and circumstances of the case and as may meet the ends of justice should be granted.”

3. The brief facts of the case are that the assessee company is engaged in the business of development and/or construction of complexes.

4. During the course of the assessment proceedings u/s 143(3) read with Section 143(2) of the Income Tax Act,1961 (hereinafter called “the Act”) , on 15-07-2011 , the assessee company was asked by learned assessing officer(Hereinafter called “the AO”) to explain why not the interest claimed in the Profit & Loss A/c of Rs.14,91,61,322/- be disallowed as there are interest free advances out of the borrowed funds. In response there-of, the assessee company submitted its reply dated 16.07.2011 on 20.07.2011 and also filed a revised computation of income in which the assessee company itself made the disallowance of said interest expenditure . Further, in the said submission, disallowance u/s.14A of the Act was also made of Rs.6,45,774/-. The assessee company did not file any revised return of income with the Revenue and only when the above said facts were brought to the notice of the assessee company during the course of assessment proceedings u/s 143(3) read with Section 143(2) of the Act, the assessee company filed revised computation of income with the AO. The revised computation of income filed by the assessee company was considered and found acceptable by the AO.. Since , the assessee company has not filed revised return of income with the Revenue and the assessee company filed revised computation of income only after issue of notice u/s.143(2) of the Act and after being cornered by the revenue

whereby the AO specifically queried the assessee company on 15-07-2011 with respect to disallowance of the said claim of interest expenditure, the penalty proceedings u/s 271(1)(c) of the Act were initiated against the assessee company for furnishing of inaccurate particulars of income leading to concealing of particulars of income and penalty notice u/s.274 r.w.s.271(1)(c) of the Act was issued to the assessee company on 18.08.2011. Further, on verification of the records by the AO, it is found that assessee company has not filed appeal before the CIT(A) against the quantum assessment order dated 18.8.2011 passed by the AO u/s 143(3) of the Act. The assessee company in its reply in penalty proceedings submitted before the AO that in the course of the assessment proceedings u/s 143(3) read with Section 143(2) of the Act, the Ms. Hetal Sangani, Taxation Manager had drew the attention of the A.O. that the assessee company shall be withdrawing its claim for allowance of interest expenditure of Rs.14,91,61,322/- paid by it to its Holding Company (the captioned disallowance) under the following facts and reasoning for such withdrawal:

(a) The assessee company had in the preceding previous year, i.e. year ended 31st March, 2008 received funds and were utilized in connection with granting of advances in relation to the proposed development for eviction, re-settlement and re-development of Slums on the encroached Airport Lands at Mumbai Airports at Santacruz and Sahar, Mumbai. However, during the year, the MOU entered into with the Housing Development & Infrastructure Limited in this regard was cancelled and advances so granted were recalled.

(b) Keeping in view the overall utilization of funds received from the Holding Company, interest expenditure / financial charges of Rs.14,91,61,322/- was claimed as an allowable deduction:

(i) Nature of business of the assessee company, being that of development of real estate;

(ii) Nature of advance so granted, being for a proposed real estate project;

(iii) Principle of commercial expediency;

(iv) Guiding principles laid down by the Hon. Supreme Court of India in the matter of SA Builders reported in 288 ITR 1.

(c) The necessary disclosure of claim of such interest expenditure / financial charges has been made vide Note No. 1 forming part of the statement of computation of total income submitted to your goodself vide our letter dated 1st June, 2011.

(d) The Holding Company has divested its investment in the assessee company during the financial year 2010-2011 and therefore, by virtue of Section 79 of the Act, the right to carry forward losses lapses and as such claim of interest expenditure / financial charges resulting into business loss has become infructuous.

(e) Hence, the withdrawal of the claim is made on account of the applicability of the provisions of Section 79 of the Act as well as avoidance of protracted litigation, in the event of disallowance of such expenditure either in part or otherwise.

(f) Accordingly, it was submitted not to consider the said expenditure as 'admissible' expenditure in assessing the total income.

The assessee company submitted that before any question was raised by the A.O. in relation to the admissibility of the captioned expenditure, attention was drawn by the Taxation Manager Ms.Hetal Sangani for the proposed withdrawal by the assessee company of its claim of allowance of the captioned expenditure, more particularly to the fact that during the financial year 2011-2012, there was a change in the shareholding of the assessee company which triggers the applicability of the provisions of Section 79 of the Act. The

assessee company drew the attention of the A.O. to the following Note No.1 forming part of the computation of total income:-

“The Company had in the preceding previous year received funds and utilised the same for granting advances in connection with the proposed development for eviction, re-settlement and re-development of Slums on the encroached Airport Lands at Mumbai Airport at Santacruz and Sahar Mumbai. However, during the year, the Memorandum of Understanding (MOU) dated 27th October 2007 for eviction, re-settlement and re-development of Slums on the encroached Airport Lands at the Mumbai Airport at Santacruz and Sahar, Mumbai stands cancelled. Consequent to which, the funds received have been repaid by loan obtained by the holding company on the behest of the Company. Accordingly, the holding company has recovered financial charges of Rs. 149,161,322/- incurred on the loan so obtained on Company's behalf. The said financial charges have been claimed as an admissible deduction, since incurred wholly and exclusively for the purpose of the Company's business and should be allowed accordingly”.

Thus, the assessee company submitted that the interest bearing funds upon receipt were utilized in connection with granting of advances in relation to the proposed development for eviction, resettlement and re-development of slums on the encroached Airport lands at Mumbai Airports at Santacruz and Sahar. The advances were granted to the Housing Development & Infrastructure Limited(hereinafter called “HDIL”). Hence, it could not be said that expenditure made based on withdrawal of claim by the assessee company for its admissibility in the facts and circumstances as applicable, cannot be equated to the assessee company having either concealed the particulars of income or furnished inaccurate particulars of such income, hence, the question of levy of penalty u/s 271 (1)(c) of the Act does not and cannot survive in law. The assessee company relied upon the decision of the Hon’ble Supreme Court in the case of CIT v. Reliance Petroproducts (P) Ltd., reported in 322 ITR 158(SC). The assessee company also relied upon the decision of Hon’ble Gujarat High Court in case of New Sorathia Engineering Co. v. CIT 282 ITR 642(Guj.)

The AO, however, rejected the submissions of the assessee company and held that since this issue has come to light during the assessment proceedings and the assessee company withdrew the claim as this case was selected for scrutiny assessment otherwise the assessee company had no intention to offer this income to tax. The AO held that the case laws relied upon by the assessee company is distinguishable and are not applicable to assessee company's case. The AO held that the assessee company has filed revised computation of income only after service of notice u/s 143(2) of the Act and further the assessee company has not preferred any appeal against the quantum assessment order. The A.O. held that claiming wrong or excessive deductions also amounts to concealment of income as well as furnishing of inaccurate particulars of income. The A.O. relied upon the decision of UOI v. Dharmendra Textiles Processors, [2008] 306 ITR 277 (SC). The AO held that the initial burden of discharging the onus of rebuttal is on the assessee company and the assessee company has to substantiate to prove the same to be bonafide. In view of all these facts, the A.O. came to the conclusion that the assessee company's case is a fit case to impose penalty u/s 271(1)(c) of the Act and accordingly levied minimum @100% of the tax calculated on concealed income of Rs. 14,98,08,096/- and penalty of Rs.4,71,89,550/- was levied u/s 271(1)(c) of the Act vide penalty orders dated 29.02.2012.

5. Aggrieved by the penalty order dated 29.02.2012 passed by the A.O., the assessee company preferred an appeal before the CIT(A).

6. Before the CIT(A), the assessee company submitted that the assessee company is a closely-held company, incorporated with the main object of carrying on the business of real estate development. Its main stream of revenue is share of profit in the capacity as a partner, engaged in the business of real estate development. Apart from the above revenue stream, the assessee company had utilized funds obtained from the holding company

in granting of advances to Housing Development & Infrastructure Ltd., (in short "HDIL") in relation to the proposed development for eviction, re-settlement and redevelopment of slums on the encroached airport lands at Mumbai Airports at Santacruz and Sahar under the Memorandum of Understanding (MOU) dated 27th October, 2007 entered into with the HDIL. The said MOU was cancelled during the year under appeal i.e. assessment year 2009-10 and the advances outstanding were recalled. During the previous year ended 31st March, 2009, the Holding Company of the assessee company, viz. DB Realty Private Limited recovered Rs. 14,91,61,322/- representing recovery of financial charges referable to funds granted to the assessee company. The said charges were accounted in the Profit & Loss Account under the head "Recovery of Financial Charges in respect of Unsecured Loans". The same was claimed as admissible deduction, in returning the loss for the year in the return of income filed with the Revenue. The same charges were incurred in connection with placing of advances in terms of MOU dated 27th October, 2007, representing a business venture in the hands of the assessee company, which is a revenue expenditure incurred in the course of the business of the assessee company, keeping in view the commercial expediency. In support, the assessee company relied upon the judgment of the Hon'ble Supreme Court in the case of S.A. Builders reported in 288 ITR 1 (SC). In the Statement of income attached with the return of income furnished for the year, adequate disclosure was made in relation to the said claim for deduction. The assessee company also submitted that the assessee company was a wholly owned subsidiary company of DB Realty Private Limited up to the year ended 31st March, 2011. After 31st March, 2011, the said Holding Company divested its investments in the shares of the assessee company to a third party viz. Adani Properties Pvt. Ltd., having consequential effect of attracting the applicable provisions of Section 79 of the Act, whereby the right to carry forward the losses relating to preceding years lapsed. To evidence the same, a copy of share transfer form signed by the

Holding Company, together with copy of one of the share certificate of the assessee company with the Memorandum of Transfer Form of Share(s) were submitted before the CIT(A). The assessee company submitted that in the course of assessment proceedings conducted in the month of July, 2011, the Taxation Manager, Ms Hetal Sangani of CA firm drew the attention of the AO that the assessee company was withdrawing its claim for allowance of interest expenditure of Rs.14,91,61,322/- recovered by the Holding Company and shall be filing appropriate communication in this regard, which was filed vide letter dated 16-07-2011. The assessee company submitted that it had carried forward the said amount as unabsorbed business loss and even if the claim would have been allowed in the course of assessment proceedings, the assessee company could not have taken the benefit there against for carry forward and set-off of losses in its assessment of income consequent to the applicability of Section 79 of the Act pursuant to the change in the shareholding pattern of the assessee company by more than 51%. Thus, there was no warrant to enter into protracted litigation with the Revenue in relation to the admissibility of the said claim. The aforesaid factual aspects were communicated vide letter dated 16th July, 2011 to the A.O and stated in the Order of assessment dated 18th August, 2011 passed by the AO u/s. 143(3) of the Act. Consequent to this withdrawal of the interest expenditure, the A.O disallowed the same in computing the loss for the year and the penalty proceedings were initiated for filing in-accurate particulars of income. The A.O. rejected the claim of the assessee company on the ground that the assessee company did not file any revised return of income and it has filed only revised computation of income with the AO. The assessee company submitted that the observations of the A.O. are not relevant/ and are erroneous in view of the fact that the Provisions of Section 79 of the Act were attracted consequent to divesting of investments by the Holding Company after 31st March, 2011. By that time, the return of income for the year could not have been revised in terms of the applicable provisions of the Act. The

assessee company drew the attention of the AO in the course of assessment proceedings for voluntary withdrawal of the captioned expenditure. The assessee company submitted that by that time, the AO was only collecting the information. In nutshell, the assessee company submitted that the claim in relation to the captioned charges was not an improper claim in law. There was a proper disclosure of the claim in the statement of income attached along with the return of income furnished for the year and there was a change in the shareholding pattern of the assessee company which attracted the provisions of Section 79 of the Act, resulting into disentitlement of the right to carry forward the loss for future set off. The said change took place after 31st March, 2011 and revised return of income could not have been filed for withdrawal. The assessee company submitted that with a view to avoid litigation and to buy peace and also the said claim would have been disallowed due to provisions of Section 79 of the Act, the claim of the interest expenditure/financial charges was withdrawn in the course of the assessment proceedings. This withdrawal of the claim of the interest expenditure/financial charges voluntarily cannot be equated to filing of inaccurate particulars of income. In support, the assessee company relied upon the decision of the Hon'ble Delhi Court in the case of CIT v. Nath Bros. Exim International Ltd. reported in 288 ITR 670 and the decision of the Hon'ble Apex Court in the case of CIT v. Reliance Petroproducts (P) Limited reported in 322 ITR 158 (SC). In the light of the above discussion, the assessee company prayed before the CIT(A) that penalty levied by the Revenue should be deleted.

7. The CIT(A) after carefully considering the facts of the case and the submissions of the assessee company and the penalty order, rejected the contentions of the assessee company and held that it is a matter of undisputed fact that the assessee company has claimed interest expenditure of Rs. 14,91,61,322/-. The A.O. at the time of assessment proceedings vide

letter dtd.15.07.2011 asked the assessee company to explain why the interest claimed in P&L should not be disallowed as they are interest free advances out of the borrowed funds and in response to this, the assessee company submitted its reply vide letter dtd.16.07.2011 on 20.07.2011, filed a revised computation of income in which it itself withdrew the interest expenditure of Rs.14,91,61,322/- and also made disallowance u/s.14A of the Act of Rs. 6,46, 774/-. The CIT(A) observed that one of the reasons for withdrawing this claim as stated by assessee company was to avoid protracted litigation and buy peace and the second reason stated was that after 31.03.2011 the holding company has divested its investment in the assessee company and therefore by virtue of section 79 of the Act the right to carry forward losses lapses and as such claim of interest expenditure resulting into business loss become infructuous. The CIT(A) observed that the fact is that the assessee company suo-motu did not withdraw its claim but the claim was withdrawn after it was pointed out to the assessee company during the course of assessment proceedings that the assessee's claim is not correct . The assessee company did not forward any evidence in support of its claim. It is a settled principle that onus lies on the assessee company to prove genuineness of any expenditure which is claimed as deduction in computing taxable income. The applicability of provision of section 79 of the Act and taking its shelter under that provision is also an afterthought. The onus is on the assessee company to furnish evidence in support of its claim. By not furnishing evidence in support of its claim and merely withdrawing the claim, the assessee company has not discharged its onus of proving its claim. The claim of the assessee company that to buy peace, it withdrew the claim has no legal sanctity and once the return of income is filed and accounts submitted , assessee company is bound to furnish evidence in support of its claim. In the instant case , the assessee company instead of furnishing any evidence just withdrew the claim after a query was raised on the issue by the A.O. . The CIT(A) held that the A.O. is right in concluding that assessee

company has furnished inaccurate particulars of income and has rightly levied the penalty u/s 271(1)(c) of the Act. In support of his contention, the CIT(A) relied on the judgment of Hon'ble supreme Court in the case of JCIT v. Saheli Leasing & Industries Ltd. [2010] 191 Taxman 165 wherein it was held that the penalty u/s 271(1)(c) of the Act has been rightly levied by the A.O., even in cases of disallowances whereby still there is not a positive income and the returned losses has been reduced. The CIT(A) also concluded that the assessee company has not produced any evidence to justify that interest expenditure of Rs.14,91,61,322/- has been incurred by the assessee company wholly and exclusively for the purposes of business. The CIT(A) relied on the judgment of Hon'ble Delhi High Court in the case of Zoom Communication Ltd., 327 ITR 510 and also the judgment of Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt. Ltd. 322 ITR 158(SC). In nutshell, the CIT(A) held that the assessee company has furnished inaccurate particulars of income by claiming interest expense in its accounts and in the light of the judgments of various courts, the penalty is required to be levied in the case of the assessee company for furnishing inaccurate particulars of income leading to concealment of income of Rs. 14,91,61,322/- and accordingly the action of the A.O. of levying penalty u/s 271(1)(c) of the Act of Rs. 4,71,89,550/- was upheld vide orders dated 14/08/2012.

8. Aggrieved by the orders dated 14.08.2012 of the CIT(A), the assessee company is in appeal before the Tribunal.

9. The ld. Counsel for the assessee company submitted that the assessee company is in the business of development and construction of complexes. Section 271(1)(c) of the Act has been invoked for furnishing of inaccurate particulars of income leading to concealment of income whereby penalty of Rs. 4,71,89,550/- has been levied by the Revenue on the assessee company. The assessee company received funds in the preceding financial year and

utilized the same for further advancing to HDIL in terms of MOU dated 27th October, 2007 which is in connection with the eviction, resettlement and redevelopment of slums on the encroached airport lands at the Mumbai Air Port at Santacruz and Sahar. The ld. Counsel for the assessee company submitted that Rs.145 crores were borrowed and Rs 266 crores were advanced to HDIL in terms of MOU . The said MOU is entered into with HDIL as the said HDIL has entered into an agreement with Mumbai International Airport Limited(MIAL) for eviction, resettlement and redevelopment of slums on the encroached airport lands at the Mumbai International Airport Limited (MIAL) at Santacruz and Sahar . The said HDIL was to get TDR and certain percentage of encroached land at Airport as per the said MOU with MIAL. However, during the year, the MOU entered with the HDIL in this regard was cancelled and the advances granted were recalled. Consequent to which funds received have been repaid by loan obtained by the holding company on the behest of the assessee company. The assessee company has claimed deduction of interest of Rs. 14,91,61,322/- which was recovered by the holding company for the loans obtained by the holding company at the behest of the assessee company. The assessee company filed the return of income on 22nd September, 2009 for the assessment year 2009-10 whereby the said interest was claimed as expenditure. It was submitted that the assessee company is a subsidiary of DB Realty Private Limited up to the year ended 31st March, 2011 and after 31st March, 2011 the holding company divested its investments in the shares of the assessee company to a third party viz. Adani Properties Pvt. Ltd. The share transfer form and copy of share certificate is placed at paper book page 52 to 57 of the paper book. In view of provisions of section 79 of the Act, the said claim is not available to the assessee company for carry forward and set-off of losses as there is change in shareholding. Notice u/s 142(1) of the Act dated 14-06-2011 was issued by the AO to the assessee company and the assessee company vide its letter dated 15-7-2011 furnished details of unsecured loan received with the name of parties,

address etc. as asked by the A.O., which is placed at paper book page No. 11 & 12. On 15-07-2011, the assessee company was asked by the AO that why interest expenditure should not be disallowed. The claim of interest was withdrawn vide letter dated 16th July, 2011 filed on 20-07-2011 by the authorized representative of the assessee company. The ld. Counsel for the assessee company drew our attention to the assessment order dated 18-08-2011 passed by the A.O. u/s 143(3) of the Act, wherein the A.O. asked the assessee company vide letter dated 15.07.2011 to explain why not the interest claimed in P&L be not disallowed as there are interest free advances out of the borrowed funds and the assessee company vide letter dated 16-07-2011 filed on 20-07-2011 before the AO withdrew its claim for interest expenditure of Rs.14,91,61,322/- and also revised computation of income withdrawing the said interest expenditure claimed. The ld counsel also submitted that during the course of hearing prior to the pointing by the AO on 15-07-2011 regarding show-cause with respect to the disallowance of the claim of the interest expenditure by the assessee company, it was submitted that Ms. Hetal Sangani, Taxation Manager has drawn attention of the AO that the assessee company shall be withdrawing its claim of interest expenditure of Rs.14,91,61,322/-.

10. The ld. D.R., on the other hand, submitted that the A.O. pointed out to the assessee company as to why not the interest claimed in P&L account of Rs.14,91,61,322/- be disallowed as there are interest free advances out of the borrowed funds and therefore, once the assessee company was cornered, it withdrew the claim of interest expenditure. The applicability of provision of section 79 of the Act and taking its shelter under that provision is also an afterthought. The ld DR strongly refuted the claim of the assessee company that it voluntarily surrendered the claim of allowance of interest expenditure and submitted that rather the assessee company was cornered. The assessee company had not submitted any details and evidences to substantiate its

claim of interest expenditure despite being asked during assessment and appellate proceedings , rather the same was withdrawn to buy peace and also in view of Section 79 of the Act. The decision of Hon'ble Supreme Court in the case of Dharmendra Textiles Processors (2008) 306 ITR 277(SC) and Mak Data Private Limited v. CIT (2013) 358 ITR 593 (SC) is directly applicable to the assessee company's case. The return of income was filed on 22nd September, 2009 , while the shareholding has been transferred in the year 2011. The ld. DR submitted that the assessee company has failed to prove that the interest expenditure has been incurred wholly and exclusively for the purposes of business of the assessee company. The ld. D.R. further relied on the orders of A.O. and the CIT(A). He submitted that the advance has been given free of interest while the assessee company is paying interest on borrowed funds. The assessee company has surrendered and withdrawn the claim of interest after it was cornered by the A.O. . He further relied upon the decision of Tribunal in the case of Trans Polyurethane Private Limited in ITA No. 8125/Mum/2010 dated 25-03-2015 and Hon'ble Delhi High Court decision in the case of Zoom Communications Limited (2010) 327 ITR 510 (Del. HC) and CIT v. Dr R C Gupta & Co. (1980) 122 ITR 567(Raj. HC) and decision of Mumbai Tribunal in the case of Ultramarine & Pigments Limited v. ACIT (2010) 39 SOT 115(Mum-Trib.).

11. The ld. Counsel for the assessee company, in the rejoinder, submitted that the MOU was cancelled in current year before closure of the previous year relevant to the assessment year 2009-10. The funds have been utilized for the purpose of business. The disclosure has been made in the computation of income. The assessee company has submitted the entire details of particulars of income and it cannot be said that the assessee company has furnished inaccurate particulars of income or concealment of income.

12. We have considered the rival submissions and also perused the material available on record including the case laws cited by both the parties. We have observed that the assessee company has entered into an MOU with HDIL dated 27th October, 2007 in relation to the proposed development for eviction, re-settlement and redevelopment of slums on the encroached airport lands at Mumbai Airports at Santacruz and Sahar. The said MOU was stated to be cancelled in the current financial year. It is also stated that funds have been received by the assessee company and further advanced to HDIL in terms of MOU dated 27-10-2007 and in the Note attached to computation of income which is placed at paper book page No. 9, it has been stated by the assessee company that the assessee company had in the preceding previous year received funds and utilized the same for granting advances to HDIL in connection with the proposed development for eviction, re-settlement and re-development of slums on the encroached Airport lands at Mumbai Airport at Santacruz and Sahar, Mumbai. However, during the previous year, the MOU dated 27th October, 2007 for eviction, re-settlement and re-development of slums on the encroached Airport lands at Mumbai Airport at Santacruz and Sahar, Mumbai was stated to be cancelled and the advances were recalled from HDIL. It is also stated in the said note that the funds received have been repaid by the loan obtained by the holding company on the behest and on behalf of the assessee company and accordingly the holding company has recovered financial charges of Rs. 14,91,61,322/- incurred on the loan so obtained on the behalf and at the behest of the assessee company which has been claimed as an admissible deduction in the return of income filed with the Revenue and was claimed to have been incurred wholly and exclusively for the purpose's of the company's business and hence should be allowed accordingly. We have observed that there is no claim of interest expenditure in the immediately preceding assessment year and this is the first year when such a claim of allowability of interest expenditure was made by the assessee company. We have observed that the Revenue has issued notice u/s 143(2)

and 142(1) of the Act dated 14th June, 2011 whereby all the details were called and the information have been furnished by the assessee company on 15-07-2011. The assessee company also supplied the details of unsecured loans with name, address of parties and amount involved etc.. On 15-07-2011, the AO asked the assessee company why the claim of interest expenditure should not be disallowed .We observed that vide its letter dated 16th July, 2011 filed on 20-07-2011, the assessee company has withdrawn allowance of interest expenditure of Rs. 14,91,61,322/- which was stated to be recovered by the holding company for loans obtained on behalf and at behest of the assessee company to repay the funds received by the assessee company . Vide para 2.4 of its letter dated 16-07-2011, the assessee company stated that to avoid protracted litigation and to buy peace, the assessee company decided to withdraw its claim for the said interest expenditure having regard to the fact that after 31st march, 2011, the holding company has divested its investment in the assessee company and therefore by virtue of section 79 of the Act, the right to carry forward losses lapses and as such claim of interest expenditure/financial charges resulting into the business loss has become infructuous and, hence, the interest expenditure of Rs. 14,91,61,322/- for the assessment year under reference stand withdrawn and the computation of income to that extent be considered as modified. The assessee company stated in the said letter that the amount of loan was obtained for business purposes keeping in view commercial expediency and necessary disclosure was made vide note no 1 forming part of statement of computation of total income filed with the return of income. The assessee company has contended that its taxation manager has stated before the AO during course of discussions that the assessee company will be withdrawing its claim of interest expenditure prior to issue of show-cause notice dated 15-07-2011 by the AO but the said plea is not accepted by the Revenue as it is not proved , further no affidavit has been filed of Ms Hetal Sangani of CA with regard to this plea . We have also observed that the A.O. in the assessment

order passed u/s 143(3) dated 18th August, 2011 had accepted the contention of the assessee company withdrawing the claim of Rs. 14,91,61,322/- without any verification as the assessee company itself surrendered its claim of allowance of interest expenditure and the AO invoked the provisions of section 271(1)(c) of the Act for levying the penalty. We have also gone through the MOU entered into by the assessee company with HDIL dated 27th October, 2007 whereby it has been stated that HDIL has been issued letter of intent dated 15th October, 2007 by Mumbai International Airport Private Limited for the eviction, resettlement and redevelopment of slums on the encroached Airport lands at Mumbai Airport at Santacruz and Sahar, Mumbai and pursuant to the said letter of intent dated 15th October, 2007, the said Mumbai International Airport Pvt. Ltd. and HDIL have entered into an agreement dated 15th October, 2007 which agreement is subject to the provisions of Operation, Management and Development Agreement dated 4th April, 2006 executed between Mumbai International Airport Pvt. Ltd. and Airport Authority of India entered into for the purpose of operation, management and development of the Mumbai Airport. We further noted that under the agreement dated 15th October, 2007, the HDIL has undertaken the obligation of removal of the slum dwellers encroaching on the Airport land, resettlement of such slum dwellers on any land outside the Airport land and to hand over vacant and peaceful possession of the encroached airport land to Mumbai International Airport Pvt. Ltd. . HDIL, under the said agreement dated 15th October, 2007 is, inter alia, entitled to receive the Transferable Development Rights (TDR) for the resettlement of the slum dwellers as may be permitted under the rehabilitation scheme as also entitled to development rights in respect of 55% of certain encroached land, upon removal and resettlement of slum dwellers from the said encroached land which is described as “Released Land” in the said agreement amongst other such benefits as more particularly described and provided in the said agreement and upon the terms and conditions as provided in the said agreement. The

assessee company has agreed to join with HDIL for the performance of the purposes and object of the said agreement dated 15th October, 2007 and to receive and obtain along with HDIL all the benefits there under and for that purpose to form a consortium along with HDIL and with prior written consent of Mumbai International Airport Pvt. Ltd. . It was also decided to register a special purpose vehicle (SPV), whether being a corporate entity or such other legal entity. The said SPV shall have authorized share capital of Rs. 100 crores which will be contributed by the parties in the proportion as 49.27% in the case of D.B. Properties and 50.73% in the case of HDIL. If any further funds required for the working of the SPV and to be spent on completion of the business of SPV, shall be brought in and arranged by the said HDIL and D.B. Properties in the ratio of 72:28 respectively and shall be entitled to interest on all amounts advanced by each one of them to the SPV to be calculated on the basis of SBI prime lending rate + 2% per annum, payable by the SPV. It is also agreed that the purchase for an on behalf of the consortium, certain lands situated at Kurla at consideration of Rs. 1,900 crores in which HDIL has also executed a term sheet pursuant to the said negotiation and the consideration payable under the said term sheet is required to be paid as Rs. 950 crores on or before 29th October, 2007, Rs. 950 crores on or before 28-11-2011. It is also agreed that the payment of the aforesaid Rs. 950 crores was to be paid on or before 29.10.2007. D.B. Properties has contributed prior hereto an amount of Rs.266 Crores, which amount is paid by D.B. Properties by Pay Order No.465919 dated 25.10.2007. The land at Kurla is negotiated as aforesaid to be purchased for and on behalf of the Consortium. It is agreed term of negotiation that the said Kurla Land shall be mainly used for reallocation and rehabilitation of the slum dwellers from the encroached slum dwellers land. It was also agreed that the payment of Rs.950 Crores shall be paid by HDIL and D.B. Properties on or before 28.11.2007 in proportion of 72:28. This MOU is stated to have been cancelled during the impugned previous year relevant to assessment year 2009-10.

We have further observed that it is stated that the assessee company has made claim for the interest expenditure of Rs.14,91,61,322/- which was recovered by the holding company incurred on the loan so obtained on assessee company's behalf and at the behest of the assessee company in the return of income filed with the Revenue on 22.09.2009 and the assessee company immediately withdrew the said claim of interest expenditure after being pointed out by the A.O. on 15-07-2011 . The A.O. accepted the contentions of the assessee company and did not verify further whether the claim was made bona-fide at the time of filing of the return of income in 2009 as the assessee company itself surrendered and withdrew the said claim of allowance of interest expenditure. The AO invoked the penalty provisions u/s 271(1)(c) of the Act for furnishing of in-accurate particulars of income. The assessee company has not submitted complete and full details with respect to these loans and its terms and conditions stated to be obtained by the holding company on behalf and at the behest of the assessee company and payment of interest even during the appellant proceedings to substantiate whether the claim made by the assessee company was legitimate and bonafide claim keeping in view the provisions of the MOU entered into dated 27th October, 2007 and also the background of the said MOU, despite being asked by the Revenue. Under the penalty provisions u/s 271(1)(c) of the Act, the assessee company is duty bound to offer explanation which is bona-fide and to substantiate its claim made in the return of income filed with the Revenue. We have also observed that the authorities below have also stated that the assessee company has not brought on record the evidence to substantiate its claim of interest expenditure Rs. 14,91,61,322/- as a bonafide claim while filing return of income with the Revenue rather the assessee company is repeatedly contending that it is withdrawing its claim to buy peace and also the claim of carry forward of losses shall not be allowable for set off in subsequent years owing to provisions of Section 79 of the Act . The assessee

company ought to have brought on record complete evidences to substantiate bona-fide of its claim that it was bona-fide and legitimate claim while filing return of income with the Revenue in 2009, the interest expenditure was a revenue expenditure duly allowable under the provisions of Act of 1961 and was incurred wholly and exclusively for the purposes of the business of the assessee company. The complete terms and conditions along with copies of loan agreements, of the loans so obtained by the holding company which are stated to be at the behest and on behalf of the assessee company should have been brought on record with the Revenue along with details of terms of cancellation(deed of cancellation) of the MOU with the said HDIL as the loans have been obtained by holding company on behalf and at behest of the assessee company to pay funds earlier received by the assessee company which was stated to have been advanced to HDIL and are now been recalled from HDIL pursuant to cancellation of MOU dated 15-10-2007 with HDIL and instead of bringing complete and true facts on record to substantiate its claim of allowance of interest/financial charges expenditure, the assessee company chose to take plea of withdrawing its claim to buy peace and that the losses in any case will not be allowed to be carried forward and set off in subsequent years in view of provisions of Section 79 of the Act of 1961 as the holding company has divested its shareholding in the assessee company in the year 2011 while return of income in which said claim of allowance of interest/financial charges expenditure was made , was filed on 22.09.2009 , so it is incumbent on the part of the assessee company to explain that the claim of the allowance of interest / financial charges expenditure was legitimate and bona-fide within the four corners of the Act of 1961, when the return of income was filed in the year 2009 and not the later developments happening in the year 2011. Thus, keeping in view all these peculiar facts and circumstances of the case, in our considered view and in the interest of justice, one more opportunity needs to be given to the assessee company to bring all the relevant and cogent material on record with the revenue to

substantiate that its claim of allowance of interest/financial charges expenditure was bona-fide and legitimate, the matter is now hereby set aside to the file of the A.O. to decide the issue of levability of penalty u/s 271(1)(c) of the Act, de-novo after considering all the relevant facts and evidences to be filed by the assessee company in its defense, after affording adequate opportunity to the assessee company of being heard. The assessee company is directed to bring on record all cogent material and evidences to substantiate the bonafide of its claim with respect to the interest expenditure of Rs. 14,91,61,322/- made by it at the time of filing of return of income with Revenue on 22nd September, 2009. We order accordingly.

13. In the result, the appeal filed by the assessee company in ITA NO. 6339/Mum/2012 for the assessment year 2009-10 is allowed for statistical purpose.

Order pronounced in the open court on 23rd March, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 23-03-2016 को की गई ।

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated **23-03-2016**

I

व.नि.स/ व.क., Ex. Sr. PS

आदेश की प्रतिलिपि अद्येषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "D" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai