IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.751 of 2008 (O&M)
Date of decision: 17.9.2015

Commissioner of Income Tax, Faridabad

……Appellant

M/s Nuchem Limited

…..Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. Tajender K.Joshi, Advocate for the appellant.

Mr. P. C.Goyal, Advocate for the assessee.

Ajay Kumar Mittal, J.

1. This order shall dispose of ITA Nos.751 and 676 of 2008 as according to the learned counsel for the parties, the issues involved in both the appeals are identical. However, the facts are being extracted from ITA No.751 of 2008.

2. ITA No.751 of 2008 has been preferred by the revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 22.2.2008, Annexure A.IV passed by the Income Tax Appellate

Tribunal, Delhi Bench 'B' New Delhi (in short, "the Tribunal) in ITA No.6851/DEL/1995 for the assessment year 1991-92, claiming following substantial question of law:-

> "Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in law in reversing the order of the learned CIT(A) sustaining the addition made by the Assessing Officer on account of interest on interest free loans given to sister concern or persons covered under section 40A(2) of the Income Tax Act in contradiction with the judgment of jurisdictional High Court in CIT, Ludhiana vs. Abhishek Industries Limited, 286 ITR 1 (P&H)?

In ITA No.676 of 2008, in addition to the above mentioned question, the following two questions have also been claimed by the revenue:-

> "1. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in law in holding that the revenue had not filed appeal before the Hon'ble ITAT on the same point in the assessment year 1988-89 and therefore accepting the findings of the learned CIT(A) for the said year, disregarding the settled law that each assessment year is a separate year?
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> 2. Although tax involved is ₹ 1,81,770/- which is less than the limits laid down by the CBDT's instructions No.5/2008 dated 15.5.2008 issued under section 268A of the Income Tax Act, 1961, yet the appeal is being filed as per para 5 of the said instruction because it is a case of composite order of the ITAT which involved assessment years 1991-92, 1992-93 and 1993-94 and tax effect involved in one year i.e. in assessment year 1993-94 is more than the monetary limits prescribed in para 3 of the said instruction.

3. A few facts relevant for the decision of the controversy involved as narrated in ITA No.751 of 2008 may be noticed. The assessee

company filed its return on 31.12.1991 declaring loss of ₹ 27,63,950/- which was revised to ₹ 45,13,550/- vide revised return filed on 31.3.1993. Assessment under section 143(3) of the Act was completed on 29.3.1994, Annexure A.I at total income of ₹ 54,94,300/-. The Assessing Officer had inter alia disallowed ₹ 10,57,600/- out of interest paid by the assessee considering interest free loans given to sister concern or persons covered under Section 40A(2) of the Act. The Commissioner of Income Tax (Appeals) [CIT(A)] vide order dated 23.8.1995, Annexure AIII accepted the assessee's appeal in part and confirmed ₹ 6,03,234/- and allowed relief of ₹ 4,54,426/- to the assessee. Both the assessee and the department filed cross appeals before the Tribunal. The Tribunal vide combined order dated 22.2.2008, Annexure A.IV allowed both the appeals in part. The Tribunal upheld the allowance of relief of ₹ 4,54,426/- to the assessee and directed the Assessing Officer to allow further relief to the extent of interest charged on the loan given to M/s Novica Investment i.e. ₹ 80,000/.- by following its own decision passed in ITA No.7204/Del/92 in the assessment year 1988-89 by holding that no nexus was proved by the department regarding the amount advanced to Novica investment in the assessment year 1988-89. Hence the instant appeals by the revenue.

4. We have heard learned counsel for the parties.

5. With regard to question Nos.1 and 2 in ITA No.676 of 2008 as reproduced above are concerned, the same are general in nature and call for no consideration because the matter has been adjudicated by us on merits.

6. As regards question with regard to addition on account of interest on interest free loans to sister concern or persons covered under section 40A(2)

of the Act, which is common in both the appeals, it may be noticed that the Assessing Officer added ₹ 10,57,660/- as notional interest on interest free advances given by the assessee. The assessee contended on appeal before the CIT(A) that the loans were taken in the earlier years and thus they could not be said to have been diverted for non business purposes during the present year and no notional interest could be added. The CIT(A) upheld the addition to the extent of ₹ 6,03,234/-. The Tribunal deleted the interest disallowance referable to the amount advanced to Novica investments since no nexus between the borrowed funds and the amounts advanced to the above said concerns without interest was proved by the department. However, in the absence of any evidence on behalf of the assessee, the disallowance in respect of the other four concerns was sustained. The relevant findings recorded by the Tribunal read thus:-

> "7. Ground No.6 is directed against the disallowance of interest relating to loans. The Assessing Officer added ₹ 10,57,660/- as notional interest on interest free advances given by the assessee. On appeal, the CIT(Appeals) upheld the addition to the extent of ₹ 6,03,234/-. He has discussed this issue in paragraph 10 of his order. The contention of the assessee before us is that all the loans were taken in earlier years and therefore, they cannot be said to have been diverted for non business purposes during the present year and therefore, no notional interest can be added. Our attention is drawn to the judgment of the Karnataka High Court in CIT vs. Sridevi Enterprises 192 ITR 165 and the judgment of the Supreme Court in SA Builders 288 ITR 1. On the other hand, the learned CIT DR drew our attention to the judgment of the Hon'ble Delhi High Court in CIT vs. MGF 254 ITR 449 in support of the disallowance.
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> 8. We have carefully considered the facts and the rival contentions. As per the details given in page 601 of the paper book, the parties to

whom the assessee advanced interest free loans are M/s Novica Investments, Nuchem Investments Pvt. Limited, M/s SCDC Katha Industries Pvt. Limited, M/s RCA Leasing Pvt. Limited and M/s Ratan Chand Harjas Rai. The total amount of interest free advances was ₹ 66,10,378/-. According to the Assessing Officer, the assessee has charged interest from some of the debtors and not from all of them. According to him, the assessee had borrowed monies on interest and the interest was claimed as deduction and therefore the assessee cannot advance interest free monies. He estimated the interest at 16% on the amount advanced to the above concerns, which came to ₹ 10,57,660/-. Before the CIT(Appeals), the assessee submitted that it had its own funds from share capital reserves and surpluses which stood at ₹ 20,50,29,858/- as on 31.3.1991 and that interest free advances came out of the reserves and surpluses and not from interest bearing funds. As regards the amounts advanced to Southern Synthetics Limited, it was stated that the principal itself was doubtful of recovery and therefore, no interest can be added.

9. The CIT(Appeals) accepted the assessee's submission with regard to Southern Synthetics Limited but with regard to give parties named in the preceding paragraph, he did not accept the assessee's submission that the Assessing Officer could not prove any nexus between the borrowed funds and the amounts advanced to these concerns without interest. He noted that the assessee himself was unable to explain the sources from which it advanced the monies to these five concerns. As regards the contention based on the capital and reserves, the CIT(Appeals) found that they were already invested in the fixed assets and were therefore, not available to the assessee for making interest free advances. He noted that the assessee's interest liability was ₹ 4,64,33,153/- which was quite substantial which indicated that surplus funds were not available to the assessee for making interest free advances. He therefore, agreed with the Assessing Officer in principle but held that the disallowance of interest will be restricted to amount advanced as interest free to the five concerns mentioned earlier.

10. On a careful consideration of the matter, we find that so far as Novica Investment is concerned, the Tribunal has already accepted the assessee's contention that no nexus was proved by the department in ITA No.7204/Del/92 for the assessment year 1988-89 (paragraphs 48 to 51). Therefore, the interest disallowance referable to amount advanced to Novica Investments is deleted. However, with regard to the other four concerns, namely, Nuchem Investments Pvt. Limited, M/s SCDC Katha Industries Pvt. Limited, M/s RCA Leasing Pvt. Limited and M/s Ratan Chand Harjas Rai, we are unable to delete the disallowance in the absence of any evidence adduced on behalf of the assessee to support the ground. The assessee was not able to displace the finding of the CIT(Appeals) that the share capital and reserves having been invested in fixed assets were not available to the assessee for being advanced interest free to these four concerns. The availability of interest free funds including share capital and reserves,is a matter to be proved on the basis of the facts and figures and not theoretically or in the abstract. There is no material placed before us on behalf of the assessee to show that interest free funds in any form were available to the assessee to be advanced to these four concerns. The assessee's submission based on the decision of the Supreme Court in S.A.Builders (supra) cannot be accepted because there is no evidence to show that the amounts were advanced for the purposes of the assessee's business. Further, this is a new plea taken before us which is required to be proved by evidence. For these reasons, we sustain the disallowance of the interest in respect of the interest free advances given to the four concerns named above. The ground is thus partly allowed. The Assessing Officer will rework the disallowance accordingly."

7. The CIT(A) had allowed the relief of ₹ 4,54,426/- to the assessee out of total disallowance of ₹ 10,57,600/- on account of interest given as interest free loans to sister concerns. The Tribunal on appeal of the assessee

had allowed additional relief of ₹ 80,000/- which was referable to amount advanced to Novica Investments and upheld the allowance of relief of amount of ₹ 4,54,426/- to the assessee as was allowed by CIT(A). The findings of fact are based on material and evidence on record.Learned counsel for the appellant-revenue has not been able to show that the findings recorded by the CIT(A) as well as the Tribunal are perverse or erroneous in any manner which may call for interference by this Court. Moreover, similar issue relating to Novica Investments has been adjudicated by us today in ITA No.892 of 2008 and ITA No.130 of 2009 against the revenue. Thus, the substantial questions of law are answered accordingly. The appeals stand dismissed.

(Ajay Kumar Mittal)
Judge

September 17, 2015 **(Ramendra Jain)**
'gs' **Judge**