

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

ITA No.228 of 2010 (O&M)

Date of decision: 27.4.2016

M/s Trident Infotech Corporation Limited

...

Appellant

Vs.

The Commissioner of Income Tax, Ludhiana and another

.....Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

HON'BLE MRS. JUSTICE RAJ RAHUL GARG

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: Ms. Radhika Suri, Sr. Advocate with Ms. Rinku Dahiya, Advocate
for the appellant-assessee.

Mr. Rajesh Katoch, Advocate for the revenue.

Ajay Kumar Mittal,J.

1. The delay in re-filing the appeal is condoned.
2. This appeal has been filed by the appellant-assessee under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 31.10.2008, Annexure A.4 passed by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (in short, "the Tribunal") in ITA No.724/2008, for the assessment year 2004-05, claiming following substantial question of law:-

Whether in the facts and circumstances of the case, the ITAT was right in law in upholding the disallowance on account of interest claimed under Section 36(1)(iii) of the Income Tax Act, 1961 in view of the ratio of the Hon'ble Supreme Court in the case of *S.A.Builders vs. CIT*, (2007) 288 ITR 1?"

3. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The appellant-assessee filed its return for the assessment year 2004-05 declaring a loss of ₹ 38,28,164/-. The return was selected for scrutiny. The Assessing Officer disallowed the amount of ₹ 45,14,373/- on account of interest claimed under section 36(1)(iii) of the Act vide order dated 28.11.2006, Annexure A.1 by holding that the assessee had given interest free advances of an amount of ₹ 6,94,51,894/- to its sister concern. The Assessing Officer without ascertaining the use of these funds by the sister concern disallowed the proportionate amount of ₹ 45,14,373/- under Section 36(1)(iii) of the Act. Subsequently, an order dated 20.9.2007, Annexure A.2 was issued under section 154 of the Act by the Assessing Officer rectifying the order dated 28.11.2006 by withdrawing the claim of depreciation and business loss which had been adjusted for the assessment year 2003-04. Aggrieved by the order, the assessee filed appeal before the Commissioner of Income Tax (Appeals) [CIT(A)] claiming that the advances made to the sister concern were not out of interest bearing funds and the same could not be disallowed. The CIT(A) rejected the contention of the assessee following the judgment of this Court in *CIT vs. Abhishek Industries*, (2006) 286 ITR 1 and dismissed the appeal vide order dated 9.6.2008, Annexure A.3. Still not satisfied, the assessee filed appeal before the Tribunal. The Tribunal

dismissed the appeal vide order dated 31.10.2008, Annexure A.4. Hence the instant appeal by the assessee.

4. We have heard learned counsel for the parties.

5. The issue involved in the present appeal is with regard to the disallowance of interest of ₹ 45,14,373/- claimed by the assessee under section 36(1)(iii) of the Act. In the light of the judgment of the Apex Court in *Hero Cycles (P) Limited vs. CIT, Ludhiana*, (2015) 281 CTR 481 and judgment of this Court in *Commissioner of Income Tax vs. Kapsons Associates*, (2016) 381 ITR 204, the matter is remanded to the Tribunal to decide afresh in accordance with law. In *Hero Cycles (P) Limited's* case (supra), the Apex Court was considering the issue with regard to interest on borrowed capital (interest free loans). It was held that once it is established that there is nexus between the expenditure and purpose of business, revenue cannot justifiably claim to put itself in arm chair of businessman or in position of Board of Directors and assume role to decide how much is reasonable expenditure having regard to the circumstances of the case. It was recorded as under:-

"26.The expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency.

27. No doubt, as held in *Madhav Prasad Jatia v. CIT* [1979 (118) ITR 200 (SC)], if the borrowed amount was donated for some sentimental or personal reasons and not on the ground of commercial expediency, the interest thereon could not have been allowed under section 36(1)(iii) of the Act. In *Madhav*

Prasad's case [1979 (118) ITR 200 (SC)], the borrowed amount was donated to a college with a view to commemorate the memory of the assessee's deceased husband after whom the college was to be named, it was held by this court that the interest on the borrowed fund in such a case could not be allowed, as it could not be said that it was for commercial expediency.

28. Thus, the ratio of Madhav Prasad Jatia's case [1979 (118) ITR 200 (SC)] is that the borrowed fund advanced to a third party should be for commercial expediency if it is sought to be allowed under section 36(1)(iii) of the Act.
29. In the present case, neither the High Court nor the Tribunal nor other authorities have examined whether the amount advanced to the sister concern was by way of commercial expediency. 30. It has been repeatedly held by this court that the expression "for the purpose of business" is wider in scope than the expression "for the purpose of earning profits" vide CIT v. Malayalam Plantations Ltd. [1964 53 ITR 140 (SC), CIT v. Birla Cotton Spinning and Weaving Mills Ltd. [1971 82 ITR 166 (SC)], etc."

In the process, the Court also agreed that the view taken by the Delhi High Court in 'CIT v. Dalmia Cement (B.) Ltd.' [2002 (254) ITR 377] wherein the High Court had held that once it is established that there is nexus between the expenditure and the purpose of business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case.

It further held that no businessman can be compelled to maximize his profit and that the income tax authorities must put themselves in the shoes of the assessee and see how a

prudent businessman would act.

The authorities must not look at the matter from their own view point but that of a prudent businessman.”

6. Further, in *Kapson Associates's* case (supra), while considering disallowance of interest under section 36(1)(iii) of the Act, it was recorded by this Court as under:-

“The Commissioner of Income Tax (Appeals) and the Tribunal found as a matter of fact that the company had interest free advances from its directors/shareholders and the members of their families amounting to ₹ 315.11 lakhs as against the interest free advances made by the company aggregating to ₹ 219.72 lakhs as on March 31, 2008. In view thereof, it was rightly inferred that the respondent/assessee had enough interest free funds which would cover the advances also made interest free.

The matter is covered against the appellant in this regard by our order and judgment dated July 16, 2015 in ITA No.413 of 2014, Gurdas Garg vs. CIT(Appeals) [2016] 6 ITR-OL 101 (P&H) where we held as under (page 108):-

“It is a little difficult to understand these observations. It has not been denied that interest free funds were available. Nor has it been denied that interest free advances were made by the appellant. In fact, the latter has been accepted by the Assessing Officer. The contention that the appellant has not established that it was the interest free funds that were actually advanced as interest free advances is without substance. Money has no identity. So long it is established that the interest free advances are made by an assessee who has adequate free reserves, it is sufficient to establish that the amounts advanced interest free cannot be added to the assessee's income. It was not contended that the interest

free advances exceeded the interest free funds available with the appellant. Nor was it established that a particular advance received was in turn advanced by the assessee interest free.”

Questions Nos. 1 to 3 are therefore, answered against the appellant.”

7. In view of the above position of law, the matter is remanded to the Tribunal to decide afresh after hearing the parties in accordance with law. The appeal stands disposed of accordingly.

(Ajay Kumar Mittal)
Judge

April 27, 2016
'gs'

(Raj Rahul Garg)
Judge