

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

ITA No.680 of 2010

Date of decision: 16.3.2016

The Commissioner of Income Tax, Delhi II, New Delhi

...

Appellant

Vs.

M/s U.G.Hospitals Pvt. Limited

.....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? **YES**
3. Whether the judgment should be reported in the Digest?

Present: Ms. Urvashi Dhugga, Advocate for the appellant-revenue.
Mr. Ajay Vohra, Sr. Advocate with Mr. Rohit Jain, Advocate
for the assessee in ITA Nos.680 and 730 of 2010)

Mr. Ashim Aggarwal, Advocate for the assessee in ITA No.288 of
2011.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos.680, 730 of 2010 and 288
of 2011. ITA No.680 of 2010 has been filed by the revenue and ITA No.730
of 2010 has been filed by the assessee against the same assessment order
dated 24.9.2009, Annexure A.III for the same assessment year i.e. 2005-06
whereas ITA No.288 of 2011 has been filed by the assessee against the
order dated 28.2.2011, Annexure A.3 for the assessment year 2006-07. The

facts have been extracted from ITA No.680 of 2010.

2. ITA No.680 of 2010 has been filed by the revenue under Section 260A of the Income Tax Act, 1961 (in short, “the Act”) against the order dated 24.9.2009, Annexure A.III passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'B' Chandigarh (in short, “the Tribunal”) in ITA No.1057/CHANDI/2008, for the assessment year 2005-06, claiming following substantial questions of law:-

- “I. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal was legally justified in deleting the entire disallowances under section 30(1) without adjudicating on Explanation I to Section 30?
- II. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal was legally justified in deleting 50% of the disallowance sustained by the CIT(A) without giving a finding as to what was legally/factually wrong in the order of the CIT(A). The Hon'ble ITAT is the last fact finding authority and is bound to give an order which goes into all the aspects of the case?
- III. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal was legally justified in deleting/giving relief of ₹ 7,26,477/- of the quantum amount disallowed by the Assessing Officer under section 36(1)(iii) when factually nothing was brought forward by the assessee that any amount was his own money and therefore is squarely covered by the ratio laid down in *M/s Abhishek Industries Limited*, 286 ITR 1?”

3. The primary issue in ITA No.730 of 2010 at the behest of the assessee is regarding disallowance of interest under Section 36(1)(iii) of the Act for the assessment year 2005-06. The same order has been followed in ITA No.288 of 2011 filed by the assessee for the assessment year 2006-07.

4. A few facts relevant for the decision of the controversy involved as narrated in ITA No.680 of 2010 may be noticed. Return of income declaring income of ₹ 2,27,72,100/- was filed on 30.10.2005 by the assessee. The assessment was completed vide order under section 143(3) of the Act dated 18.12.2007, Annexure A.1 at a total income of ₹ 3,24,71,901/-. The Assessing Officer made total addition of ₹ 96,99,801/- (i.e. disallowance under section 37(1) - ₹ 67,28,214/-, borrowed capital under section 36(1)(iii) - ₹ 24, 21,587/-, interest of ₹ 50,000/- as capital expenditure and ₹ 5 lakhs on account of personal and inadmissible expenses). Aggrieved by the order, the assessee filed appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Vide order dated 15.10.2008, Annexure A.II, the CIT(A) partly allowed the appeal of the assessee giving relief on disallowance of expenditure incurred on repair and renovation of building at Lajpat Nagar amounting to ₹ 33,64,107/- (i.e. 50% of ₹ 67,28,214/-) and relief on account of disallowance of interest under section 36(1)(iii) - ₹ 7,26,477/- (out of ₹ 24,21,587/-) and also a relief of ₹ 15,000/- out of ₹ 50,000/- was given. Aggrieved by the order, the revenue as well as the assessee filed appeals before the Tribunal. The Tribunal vide order dated 24.9.2009, Annexure A.III partly allowed the appeal of the assessee and dismissed the appeal filed by the revenue observing that expenses of ₹ 67,28,214/- incurred for the purpose of renovation of Lajpat Nagar Hospital, New Delhi were of revenue nature. In the matter of disallowance of ₹ 24,21,587/- made by the Assessing Officer on account of claim of interest expenses, the Tribunal affirmed the view taken by the CIT(A) and also confirmed the disallowance to the extent of ₹ 16,95,110/-

and deleted the balance amount of ₹ 7,26,477/-. According to the revenue, the assessee had taken huge unsecured loans of ₹ 21.78 crores by paying interest on the same at the rate of 10.75%. However, at the same time, it had not charged the interest on the loans and advances given to various persons. Hence the instant appeals by the revenue and the assessee.

5. We have heard learned counsel for the parties.

6. The first two questions are inter-related and are regarding claim of expenditure of ₹ 67,28,214/- incurred on repair and renovation of the Lajpat Nagar Hospital. In respect of claim of expenditure of ₹ 67,28,214/- incurred on repair and renovation of Lajpat Nagar Hospital, it has been categorically recorded by the Tribunal that the expenditure had been incurred by the assessee on the hospital building which had been taken on lease under an agreement dated 25.2.2004 between the assessee and Malhotra Heart Institute and Medical Research Centre Private Limited. This expenditure had not been incurred either by way of demolition of old structure or construction of a new hospital, as recorded by the CIT(A). After examining the entire material on record and the case law on the point, it was concluded by the Tribunal that where the expenses are incurred towards repair of the premises taken on lease so as to make it fit for its business activity, such expenditure would fall within the expression of repair as appearing in section 30(a)(i) of the Act. In the present case, the impugned expenditure was held to be revenue in nature. The relevant findings recorded by the Tribunal read thus:-

“7. We have considered the rival submissions, perused the material on record and the orders of the authorities below. The controversy as raised before us, essentially involves the

claim of expenditure of ₹ 67,28,214/- representing expenditure incurred on repair and renovation of Lajpat Nagar hospital. This expenditure has not been incurred either by way of demolition of old structure or construction of a new hospital, as brought out by the CIT(A). The revenue has not assailed the above finding before us in any manner. There is no specific plea in the grounds raised in the memo of appeal. Even the learned DR in the course of hearing before us has not disputed the above factual conclusion recorded by the CIT(A) on the basis of any cogent material. Moreover, even the details of the expenditure as stated before us do not lead us to infer that such expenditure has been incurred for construction of a new hospital.....

8. It is not in dispute that the above expenditure had been incurred on the hospital building which has been taken on lease by the assessee under an agreement dated 25.2.2004 between assessee (party of the second part) and Malhotra Heart Institute & Medical Research Centre Pvt. Limited (Party of the first part).....

10. On consideration of the above provisions, we find that what has to be disallowed is capital expenditure. However, in the instant case, expenditure is towards repair of hospital and not capital expenditure.

15. From the above said judicial pronouncements, an irresistible conclusion is that where the expenses are incurred by the assessee towards repairs of the premises taken on lease so as to make it fit for its business activity, such expenditure would fall within the expression of repair as appearing in section 30(a)(i) of the Act. In the instant case, there is nothing to distinct from the plea set up by the assessee that the impugned expenditure has not resulted in

demolition of old structure and construction of a new structure. The assessee has, therefore, been successful in establishing that the impugned expenditure was revenue in nature. The case laws referred to by the learned DR are primarily in the context of the expression 'current repairs' as appearing in section 30(a)(ii) of the Act whereas the instant case is to be considered in the light of section 30(a)(iv) of the Act. Infact, the distinction between the presence of expression 'repairs' in section 30(a)(ii) which covers the case of rented premises and the expression "current repairs" in section 30(a)(ii) has been elaborately brought out by the Hon'ble Delhi High Court in the case of **High Line Pens (P) Limited** (supra).”

7. Nothing was shown that the said findings of the Tribunal are perverse. Accordingly, the first and second questions are answered against the revenue.

8. With regard to the third question qua disallowance of interest of ₹ 24,21,587/- claimed by the assessee under section 36(1)(iii) of the Act, which is common in all the three appeals, 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.”

9. Further, in ***Kapson Associates's*** case (supra), while considering disallowance of interest under section 36(1)(iii) of the Act, it was recorded 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.”

10. In view of the above, all the appeals are disposed of in the manner indicated above.

(Ajay Kumar Mittal)
Judge

March 16, 2016
'gs'

(Raj Rahul Garg)
Judge