

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.06.2018

CORAM

THE HONOURABLE Mr.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

T.C.(A) No.285 of 2007

Commissioner of Income Tax-I
Chennai.

.. Appellant

Vs.

M/s.Rambal Private Ltd.,
(now known as Rambal Properties Pvt. Ltd.)
No.150, Dr.Muthulakshmi Salai
Thiruvanmiyur,
Chennai – 600 041.

Prayer : Tax Case (Appeal) filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal Madras 'B' Bench, dated 23.06.2006 in ITA.No.603/Mds/2002, Assessment Year : 1988-99

For Appellant : Mr.T.Ravi Kumar
For Respondent : Mr.R.Sivaraman

JUDGMENT

[Judgment of the Court delivered by T.S.SIVAGNANAM,J.]

This appeal by the Revenue is directed against the order dated 23.06.2006 passed by the Income Tax Appellate Tribunal, 'B' Bench in I.T.A.No.603/Mds/2002, relating to the Assessment Year 1998-99. This

appeal before the Tribunal was filed by the respondent/assessee, challenging the order passed by the Commissioner of Income Tax (Appeals)-V, Chennai dated 26.02.2002, in and by which the appeal filed by assessee was partly allowed.

2. The brief factual background that would be necessary for considering the present appeal is that the respondent/assessee had entered into a Memorandum of Understanding (MOU) on 01.03.1996 with one M/s.Prime Developers for developing the property at No.150, Dr.Muthulakshmi Salai, Chennai. The MOU provided that the assessee shall sell a minimum of 33,571 sq.ft., out of the total extent of the land and the developer shall construct in the portion retained by the assessee and also to pay a sum of Rs.3.50 crores in addition to the said construction. The primary obligation on the assessee was to hand over the physical possession of the land on or before 15.5.1997. In the said property, there was a factory run by the assessee and therefore, the assessee had to shift his factory from the existing place to a new location, for which, it insisted upon a payment of Rs.3.50 crores. The MOU provides that if the vacant possession is not handed over to the developer within the stipulated time, the assessee is required to pay liquidated damages at the prescribed rates.

3.1. Admittedly, the vacant possession was not handed over to the developer within the cut-off date and consequently, the respondent/assessee had paid a sum of Rs.1.99 crores as liquidated damages to the developer.

This expenditure was claimed by the assessee as Revenue Expenditure. However, the same was disallowed by the Assessing Officer.

3.2. The Assessing Officer also disallowed the payments which were to be paid to the assessee towards Provident Fund and Employees State Insurance, on the ground that the relevant remittances were paid after the due date prescribed under the respective statutes viz., the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 and the Employees State Insurance Act. Aggrieved over which, the assessee preferred an appeal before the CIT(A). The Appellate Authority/CIT(A)-V, vide its order dated 26.02.2002, allowed the appeal in part holding that disallowance in respect of payment made towards Provident Fund alone was set aside, as it held that such payments were made well before the cut-off date prescribed in the statute, whereas it had disallowed the payments made towards ESI contributions, though it was paid within the extended period provided under the statute. Thus the assessee partially succeeded before the Appellate Authority with regard to disallowance of sums paid towards PF/ESI. As against that portion of the order passed by CIT(A), the respondent/assessee preferred an appeal before the Income Tax Appellate Tribunal, Chennai Bench 'B' (ITAT), and this issue was decided by ITAT in favour of the assessee vide its order dated 23.06.2006, challenging which, the Commissioner of Income Tax/appellant has preferred this appeal.

3.3 The next issue is as to the correctness of the order passed by the Tribunal in deleting a sum of Rs.6,16,83,896/- as interest amount in respect of advances and investments to sister concern/associates made out of borrowed funds.

3.4 The other issue is whether ITAT was right in arriving the fair market value for computing capital gain on sale of land at No.150, Dr.Muthulakshmi Salai, Chennai -41, on the mere statement of the assessee without any documentary evidence.

4. The appellant has raised five substantial questions of law before this Court in this appeal. The Revenue's appeal was admitted on the following substantial questions of law :

1.Whether in the facts and circumstances of the case, the Tribunal was right in holding that the omission of the 2nd proviso to Sec.43B is deemed to have retrospective effect?

2.Whether on the facts and circumstances of the case, deduction of payments to provident fund, made belatedly, beyond the time and grace period under that statute be allowed u/s.43B for the assessment year 1998-99?

3.Whether on the facts and circumstances of the case, the Tribunal was right in allowing the claim of the assessee for liquidated damages paid to M/s.Prime Developers Ltd.,?

4. Whether on the facts and circumstances of the case, the Tribunal was right in deleting a sum of Rs.6,16,83,896/- as interest amount disallowed in respect of advances and investments to sister concerns/associates made out of borrowed money?

5. Whether on the facts and circumstances of the case, the Tribunal was right in arriving at the fair market value for computing capital gain on sale of land at No.150, Dr.Muthulakshmi Salai, Chennai-41 on the mere statement of the assessee without any other documentary evidence?"

5. Mr.T.Ravi Kumar, learned senior counsel appearing for the appellant would fairly submit that in so far as question No.1 is concerned, it is squarely covered by the decision of the Hon'ble Supreme Court in **Commissioner of Income Tax Vs. Alom Extrusions Ltd.**, reported in [(2009) 319 ITR 0306], in which the Hon'ble Supreme Court has held that "omission of second proviso to s. 43B and the amendment of first proviso by Finance Act, 2003 bringing about uniformity in payment of tax, duty, cess and fee on one hand and contributions to employees welfare funds on the other are curative in nature and thus effective retrospectively w.e.f. 1st April, 1988 i.e., the date of insertion to first proviso". According question No.1 is answered holding that the omission of the second proviso to Section 43B is effective retrospectively w.e.f. 1st April, 1988

6. The second question is with regard to whether the deductions of payments to provident fund, made belatedly, beyond the time and grace period under the statute will be allowed u/s.43B for the assessment year 1998-99.

a) Before we examine the contentions raised by the learned counsel and take a decision on this question of law, it would be appropriate if we take note of the issue raised by the assessee. As pointed out in the preceding paragraph that the Assessing Officer had disallowed a sum of Rs.2,64,942/-, of which Rs.1,57,239/- was regarding payment made towards PF and Rs.1,07,703/- towards ESI. The reason for disallowance was that the assessee remitted the sum after the due date prescribed under the respective statutes governing such payments. The assessee stated that the contributions were employers contributions and so far as PF remittance is concerned, the due date was on 15.04.1998 and the assessee had paid it on 13.4.1998 i.e., well before the due date. So far as payments towards ESI is concerned, the assessee pointed out that the payments were effected on 25.08.1997 and 16.04.1998, i.e., within the grace period provided under the respective statutes (here the due dates are 20.08.1997 & 24.04.1998). Thus, the assessee preferred an appeal to CIT(A) only with regard to disallowance of payment towards ESI contributions which were made after the due date, but before the grace period prescribed in the statute. The CIT(A) confirmed the finding of the Assessing Officer, challenging which, the assessee preferred an appeal to the Tribunal (ITAT) and the Tribunal had allowed the appeal,

setting aside the disallowance. Thus, the issue before the Tribunal was only pertaining to the remittances made to the ESI Corporation and not to the Provident Fund Organisation. Thus, this question of law as framed is factually incorrect.

b) Be that as it may, Mr.T.Ravi Kumar, the learned counsel for the appellant contending on the said aspect, has placed certain decisions of other High Courts to state that the issue decided by the Hon'ble Supreme Court in **Alom Extrusions case** was not with regard to the effect of Section 2(24)(x) or Section 36(1)(va) of the Income Tax Act. In this regard, the learned counsel referred to the question of law which was framed for consideration by the Hon'ble Supreme Court in **Alom Extrusions case** and submitted that the question was "*whether omission (deletion) of the second proviso to s.43B of the IT Act, 1961, by the Finance Act, 2003, operated w.e.f. 1st April, 2004 or whether it operated retrospectively w.e.f. 1st April, 1988?*". Further, it is submitted that the decision rendered by the Hon'ble Supreme Court should be applied by taking note of question which is framed for consideration. On facts, it is submitted that it is not clear in the instant case as to whether the delay in remittance is with regard to the employees' contribution or employers' contribution. This according to the learned counsel is material and has to be taken into consideration by this Court.

c) Further, by relying upon the decision of the Gujarat High Court in ***Commissioner of Income-Tax V. Gujarat State Road Transport Corporation*** reported in **[(2014) 366 ITR 170 (Guj)]** , it is submitted that deleting the respective disallowances being the employees' contribution to the PF account /ESI account made by the Assessing Officer, as such sums were not credited by the respective assessee to the employees' accounts in the relevant fund or funds on or before the due date, as per the explanation to Section 36(1)(va) of the Act, was not sustainable.

d) Referring to the decision of the High Court of Kerala in ***Commissioner of Income-Tax Vs. Merchem Ltd.***, reported in **[(2015) 378 ITR 443 (Ker)]**, it is submitted that the Kerala High Court took note of the decision in ***Alom Extrusions case*** and pointed out that Section 43B, as it stood prior to the amendment and section 36(1)(va) and the explanation thereto read with section 2(24)(x) are considered together, it is clear that they operate in different fields. So far as the employees' contribution received is concerned, it should have been paid on or before the due date prescribed under the relevant statutes. Further it is pointed out that the Court has held that there is no indication in Section 43B as it stood prior to the amendment and thereafter also to deface section 36(1)(va) and the Explanation thereto from the Income-tax Act. Thus, it means that both provisions are operative and the contributions have to be paid in accordance with the mandate contained under section 36(1)(va) and

the Explanation thereto and under section 43B, respectively. It is submitted that this distinction has to be borne in mind and the question of law as framed, requires to be decided in favour of the Revenue.

e) Reliance was placed on the decision of this Court in **Commissioner of Income-tax Vs. Madras Radiators & Pressings Ltd.**, reported in **[2003] 264 ITR 620 (Madras)**. It may be noted that this decision was rendered prior to the decision of the Hon'ble Supreme Court in in **Alom Extrusions case**. Thus, the endeavour of the learned counsel for the Revenue is to distinguish the case of **Alom Extrusions** largely on the ground that the question of law framed thereunder was only with regard to whether the omission of the second proviso to Section 43B of the Act operated retrospective with effect from 01.04.1998.

The learned counsel appearing for the assessee would submit that substantial question of law No.2 as framed flows out of question No.1 and this question is also covered by the decision of the Hon'ble Supreme Court in **Alom Extrusions**.

7. On facts, both the Assessing Officer as well as CIT(A), disallowed the claim only under Section 43B of the Act and not under Section 36(1)(x) of the Act. Therefore, the question of law framed is incorrect and the

necessity to decide the issues, taking into consideration Section 2(24)(x) or section 36(1)(va) does not arise because on facts the disallowance was under Section 43B.

8. The learned counsel for the Assessee relied on the decision of the High Court of Bombay in **Commissioner of Income-tax Vs. Pamwi Tissues Ltd.**, in [(2008) 215 CTR 150 (Bombay)]. In the said decision, the High Court of Bombay held that the deductions be allowed only on actual payment, prior to the assessment year 2004-05 and employees contribution to PF, if not paid within due date, was disallowable. It is submitted that the decision in **Pamwi Tissues case** was affirmed by the Honble Supreme Court as the Special Leave Petition in SLP 20581 of 2008 was dismissed Vide its order dated 29.08.2008. In this regard, learned counsel produced a copy of the order passed by the Hon'ble Supreme Court and also pointed out in paragraph No.19 in Alom Extrusions case, the dismissal of the Special Leave Petition has been noted.

9. Before we proceed to examine as to whether we are required to decide this question by taking note of Section 2(24)(x) which defines "income" to include any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (or) Section 36(1)(va) which deals with deductions and in particular the explanation under Section 36(1)(va) defines the "due date" which means the

date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise.

10. The counsel for the assessee would submit that the deduction was claimed under Section 43B of the Act which deals with deductions to be only on actual payments. It is the further submission of the learned counsel that on facts, both the Assessing Officer as well as CIT(A) disallowed it under Section 43B.

11. To examine the correctness of the stand taken by the respondent/assessee, we have perused the Assessment Order dated 26.03.2001 and we find that the Assessing Officer has stated that the PF payments made after 01.3.1998 cannot be allowed as deduction, as in terms of Section 43(b)(b) and the same can be claimed only in the year of payment and with regard to ESI payment also, if the payment was made beyond 31.3.1998, it should be claimed only in the Assessment Year 1999-2000 and accordingly, calculated the disallowance under Section 43B at Rs.2,64,942/-. The assessee preferred an appeal to CIT(A) challenging the disallowance both in respect of PF and ESI contributions. The CIT(A) in paragraph No.3 of its order 26.02.2002, under the sub-heading "Disallowance under Section 43-B" has observed that the Assessing Officer has disallowed a sum of Rs.2,64,942/- with a finding that the relevant remittance has been made

after the end of the financial year. In this connection, the CIT(A) took note of the certificate furnished by the Assessee indicating the details of payments and found that since the payment of PF was made before the due dates prescribed by the respective statutes, the disallowance made by the Assessing Officer was deleted except the amount of Rs.50,048/-, which being the remittance to the Employees State Insurance Corporation.

12. The Assessee accepted that there was a delay of five days and accordingly, the disallowance to the tune of Rs.50,048/-, being the contribution to the ESI Corporation was confirmed. This order was taken on appeal by the Assessee before the Tribunal. The Tribunal took note of the decision of the Special Bench of its Tribunal in the case of **M/s.Kwality Milk Foods Ltd., V. The ACIT**, vide its order in ITA.No.856/Mds/06 dated 16.03.2006. It was a case that had arisen under Section 43B of the Act and taking note of the same, the Tribunal has observed that in the assessee's case also, the payment specified under Section 43B has been made before the due date applicable [under the relevant Act] before furnishing return and following the decision of the Special Bench, the issue was decided against the Revenue. Therefore, the assessee is right in contending that the question of law as framed is factually incorrect and there is no belated remittance of PF contributions. The delay was in respect of contributions to the ESI Corporation and that too there was a delay of five days, which was within the grace period provided under the statute. The Revenue, having not preferred any appeal as regards the findings of the CIT(A), allowing the deduction in

respect of PF payments made, it cannot agitate on the said issue in this appeal. Secondly, the question was decided in favour of the assessee by the Tribunal, taking note of two factors viz., (a) the payment was made within the grace period and (b) the payment being made during the financial year. Thus, the question of law as framed does not arise for consideration. Apart from that, even if the Court takes into consideration that the question of law has to be allowed as it is belated payment to ESI Corporation, then also we find that there is no error committed by the Tribunal in taking the decision and allowing the deduction on the ground that it was made within the grace period provided under the statute and before filing the returns under the Income Tax Act.

13. The learned counsel appearing for the Revenue strenuously contended that the power of Section 260A of the Act is very wide and this Court would be entitled to formulate substantial question of law, which was not framed or formulated at the time of admission of the appeal and it may determine a issue that may arise for consideration. In this regard, the learned counsel referred to proviso to sub sections 4,5 and 6 of Section 260A. To support his contention, the learned counsel placed reliance on the decision of the Division Bench of this Court in **Helios and Metheson Information Technology Ltd., Vs. Assistant Commissioner of Income Tax** reported in [(2011) 332 ITR 0403].

14. In our considered view, the necessity to frame a substantial question of law does not arise as we are convinced that the entire issue is only factual. That apart, as regards PF contribution is concerned, the deduction was permitted by CIT(A), which was not challenged by the Revenue before the Tribunal. In such circumstances, if we read Section 260A(2), the Revenue cannot be stated to be aggrieved over the order passed by ITAT on the said aspect, as it was not aggrieved by the order of CIT(A), which allowed the deduction. Furthermore, sub section 6 of Section 260A would have no application, as such, the question was never raised by the Revenue before ITAT, and for this Court to take up the issue for consideration. In other words, unless the question was raised before ITAT and was not determined by ITAT, then this Court exercising its power under 260A(6) of the Act would have power to deal with the substantial question of law. In the instant case, such issue was never raised by ITAT and therefore, the question of invoking proviso to sub-section 4, 5, and 6 of Section 260A does not arise. Thus the substantial question of law as framed is answered in favour of the assessee and against the Revenue. सत्यमेव जयते

15. The third substantial question of law raised is with regard to the liquidated damages paid by the assessee to the developer. The learned counsel for the Revenue contended that what is important to consider is when does the claim for liquidated damages arise and whether entries in Book of Accounts would be sufficient for allowing the same. It is submitted that unless there is a demand an award and quantification, the question of

payment of liquidated damages does not arise. To support his contention, the learned counsel referred to the decisions of ***Asuma Cashew Company V. Commissioner of Income-tax*** reported in [(1990) 182 ITR 0175 (Ker)]; ***Sundareswaran (N.) V. Commissioner of Income-tax*** reported in [(1997) 226 ITR 0142 (Ker)] and ***Commissioner of Income-tax Vs. Seshasayee Industries Ltd.***, reported in [(2000) 242 ITR 0691 (Mad)]. It is contended that admittedly there was no demand and no determination of liability took place and therefore the question of law is to be decided in favour of the Revenue.

16. The learned counsel appearing for the assessee submitted that it is incorrect to state that there was no quantification and this aspect of the matter was taken note of by the Tribunal wherein in paragraph No.17 of its order, the Tribunal has extracted Clauses F,G,H and Clause-4 of the Agreement dated 12.11.2001, which is a supplementary agreement, wherein the owner and the developer had mutually agreed that the owner/assesee shall pay a sum of Rs.421.70 lakhs, made up of Rs.199 lakhs for the period ending 31.3.98 and the balance Rs.221.70 lakhs for the period ending with the date of delivery of vacant possession to the developer in full and final settlement of all claims to compensation made by the developer under various heads. Further to strengthen his submission, the learned counsel referred to the order passed by CIT(A), wherein the appellate authority has agreed that possession was handed over by the assessee/owner only in the year 2001. Further the learned counsel relied upon the Assessment Order

passed in the case of the assessee for the year 2004-2005, wherein also there is a reference to the Memorandum of Understanding (MOU) and the supplementary MOU, whether the quantum of compensation was fixed at Rs.421.70 lakhs.

17. The learned counsel for the assessee placed reliance on the decision of the Hon'ble Supreme Court *in Bharat Earth Movers Vs. Commissioner of Income-tax* reported in **2000 (245) ITR 428**. Reliance was also placed on the decision of High Court of Delhi in *Kaushalya Devi V. Commissioner of Income-tax* reported in **[(2018) 92 Taxmann 335 Delhi]** to buttress the submission that the words "wholly and exclusively" require a mandate that the expenditure should be genuine and the expression "in connection with the transfer" require a mandate that the expenditure should be connected and for the purpose of transfer. Further, by referring to the decision, it is submitted that the authorities, Tribunals and Courts can examine whether the expenditure was wholly and exclusively connected with the transfer, but once the amount was spent and paid, the authorities, Tribunal and Courts cannot decide commercial expediency by putting themselves in the arm chair of the assessee to examine and consider whether they would have or the assessee should have incurred the said expenditure including the quantum having regard to the circumstance. Thus, it is submitted that in the light of the above decision, it has to be held that the High Court of Kerala in the case of *Sundareswaran (N.) V. Commissioner of Income-tax* does not lay down the correct legal

principle.

18. We have perused the order passed by ITAT and as mentioned above, in paragraph No.17 of its order, the Memorandum of Understanding as well as Supplementary MOU have been noted and the relevant clauses have been extracted (Clauses F,G,H & clause 4 of the Agreement):

"F) WHEREAS due to the delay in handing over vacant possession which was actually done on 16.08.2001, the DEVELOPER had been insisting upon payment of compensation for, interalia, parting with liquidity, escalation in cost of construction and user by the Vendor of the Developer's property sold to them by the OWNER.

G) WHEREAS OWNER represented to the DEVELOPER that the delay was occasioned due to the circumstances beyond its control and requested the DEVELOPER to reconsider their request of compensation as it was not seriously considered in all the ramifications at the time of entering into MOU on 1.3.96.

H) WHEREAS disputes arose between OWNER AND DEVELOPER in the matter of fixing the measure of compensation and the quantum of compensation AND WHEREAS after considerable amount of plain speaking between the parties hereto and taking a practical and fair view of the entire situation and with a view to avoiding protracted litigation, the OWNER AND DEVELOPER agreed to enter into this subsidiary agreement modifying the terms and conditions relating to the payment of compensation arising out of the delay in delivering the vacant possession, in the manner and to the extent provided here under"

"4. The Owner and Developer have agreed that the owner shall pay a sum of Rs.421.70 lakhs (Rs. Four hundred and twenty lakhs and seventy thousand only) made upto Rs.199 lakhs for the period ending 31.3.98 and the balance Rs.221.70 lakhs for the period ending with the date of delivery of vacant possession to the Developer in full and final settlement of all claims to compensation made by the Developer under various heads. It is further agreed that the compensation amount of Rs.421.70 lakhs and the sum of Rs.3.5 crores referred to in para A and C referred to hereinabove shall stand discharged by the Owner to the Developer by the DEVELOPER retaining for itself built-up area of 127847 sq.ft. (estimated) out of the total built up area of 157847 sq.ft. (estimated) fixed in the MOU dated 01.03.96 leaving a balance of 27,000 sq.ft. of built up area to be owned and enjoyed absolutely by the owner without any let or hinderance by Developer."

From the relevant clauses of MOU and supplementary MOU, it is clear that the assessee and the developer agreed that the assessee will pay a sum of Rs.421.70 lakhs, made up of Rs.199 lakhs for the period ending 31.3.98 and the balance Rs.221.70 lakhs for the period ending with the date of delivery of vacant possession to the developer. It is not disputed by the Revenue that vacant possession of the property was handed over only in the year 2001. This fact has been noted by CIT(A) in the order passed in the appeal filed by the assessee. Thus, the stand taken by the Revenue that the liquidated damages is uncertain and not quantified and there is no adjudication, is factually incorrect, the liability stood determined as the assessee and the developer have entered into a supplementary MOU. Bearing this in mind

namely the undisputed factual position, if the law as laid by the Hon'ble Supreme Court in **Bharat Earth Movers case** is applied it has to be seen whether the liability has definitely arisen in the accounting year and what is required to be certain is incurring the liability and it should also be capable of remitting with reasonable certainty though the actual quantification may not be possible and if these requirements are satisfied, the liability is not a contingent. The case of the assessee on facts is better couched than the case of **Bharat Earth Movers**, in the sense that the liability has been quantified and the same has been recorded in the supplementary MOU, as noted by the Tribunal. That apart, the fact that the possession of the land in question was not handed over in terms agreed to MOU is evident from the order passed by CIT(A), which has admitted that the possession of the property was handed over sometime in the year 2001. That apart, this fact has also been noted by the Assessing Officer, while completing the assessment for the Assessment Year 2004-2005. Vide order dated 28.12.2006. We respectfully agree with the view of the High Court of Delhi in the case of **Kaushalya Devi V. Commissioner of Income-tax**. We are required to accept the discretion exercised by the assessee, who has incurred the expenditure and if any inference is made by the Court without reference to the factual matrix or on subjective basis, it will lead to absurd results, which are not called for. For the said reasons, we answer question No.3 against the Revenue and in favour of the Assessee.

19. The next question as framed is whether the Tribunal was right in deleting a sum of Rs.6,16,83,896/- as interest amount disallowed in respect of advances and investments to sister concerns/associates made out of borrowed money? Before we go into the aspect as to whether the said question arises for consideration and what is the decision to be taken on the same. We have to examine as to whether this issue arises for consideration, in the light of the stand taken by the learned counsel for the assessee, for which purpose, we have perused the order passed by the CIT(A). The assessee claimed an interest payment of Rs.8,62,35,100/- and the Assessing Officer based upon a formula made an addition of Rs.6,16,83,896/- in respect of advances made to eleven companies as well as advances to two companies for purchase of investments. The details of which are as follows :

Sl. No.	Name of the company	Rs. in lakhs	
1	Super Shock Absorbers Ltd	625.05	(BIFR Directions)
2	Omayal Agro	569.44	(BIFR Directions)
3	Medispan	402.42	Subordinated to Canara Bank
4	Shriram Sales Intl. Ltd.,	75.35	Arrangement with TIIC
5	Shriram Engg. Products Ltd.,	64.11	
6	Rambal Engg. & Invt. Ltd.	238.32	
7	Shriram Auto Com, Ltd	3.61	
8	Rambal Engg. Products Ltd	71.35	
9	Rambal Holdings	0.03	
10.	Shriram Investments Ltd.,	0.05	
11.	Shriram Capital Trust	0.17	
		2049.90	

Advance for purchase of Investments :

1	Shriram Risk Guardians	206.00
2	Super Shock Absorbers	886.85
		1092.85

The assessee preferred an appeal before CIT(A), which allowed certain amounts namely those in Sl.No.1,2,3,8,9,10 & 11 and therefore no appeal was filed before ITAT. Whereas for the amounts which were claimed under Sl.No.4,5,6 & 7, an appeal was filed. On appeal before the Tribunal, the Tribunal considered the factual position and accepted the case of the assessee and allowed the amounts advanced/invested. The Revenue did not prefer any appeal before the Tribunal as against the order passed by CIT(A), which had allowed the advances and investments as claimed by the petitioner and which were disallowed by the Assessing Officer. So far as the claims which were disallowed by the Assessing Officer is concerned, the assessee was able to convince the Tribunal that there was a Board Resolution between two companies and the resolution clearly stated that the respondent-assessee company did not charge interest at the request made by the other companies and the ITAT has recorded a clear factual finding that the availability of funds, free of interest and the assessee is having a capital. That apart, it is also not established that there was a nexus in the disallowance of the interest between the borrowed funds and the interest free funds. Thus, the Revenue cannot rely upon Section 260A(2) of the Act. To advance an argument, the Court should consider the validity of the order passed by ITAT on issues which were not raised by the Revenue before the ITAT and that which were decided by CIT(A) in favour of the assessee. If

such argument of the Revenue has to be accepted then finality can never be achieved and a person who has not challenged the correctness of the order before the Appellate Authority should not be permitted to canvas the correctness of the same before the second Appellate Authority, especially when in the instant case, the second Appellate Authority is the High Court, and appeal will be entertained only upon substantial question of law being framed for consideration. In the instant case when no substantial question of law arises for consideration, and the issue is purely factual. Accordingly, question of law No.4 is answered against the Revenue and in favour of the assessee.

20. The learned counsel for the Revenue relying upon the following decisions would contend that the order passed by the Income-tax Appellate Authority, setting aside the disallowance of interest is erroneous, they are :

- a) ***K.Somasundaram and Brothers V. Commissioner of Income-Tax*** in [238 ITR 939 (mad)]
- b) ***Thukral Regal Shoes V. Commissioner of Income-Tax and Another*** in [(2017) 391 itr 119 (P&H)]
- c) ***A. Murali and Co. P. Ltd. V. Assistant Commissioner of Income-Tax*** in [(2013) 357 ITR 580 (Mad)].
- d) ***Elmer Havell Electrics and Others V. Commissioner of Income-Tax and Another*** in [(2005) 277 ITR 549 (Del)].
- e) ***Commissioner of Income Tax V. Mission Viejo Agro P. Ltd.,*** in [(2008) 300 ITR 428 (Delhi)]

f) ***Additional Commissioner of Income Tax V. Tulip Star Hotels Ltd.,*** [Order of the Supreme Court dated 30.04.2012 in SLA (Civil)/2012 (CC 7138-7140/2012)]

After referring to the above decisions, the learned counsel has contended that the business of the assessee is manufacturing and not money lending and hence, no deduction is permissible.

20. The counsel for the assessee referred to the decision of the Hon'ble Supreme Court in ***Hero Cycles (P) Ltd Vs. Commissioner of Income Tax*** reported in **[(2015) 379 ITR 0347 (SC)]** and submitted that the income tax authority must put themselves in shoes of the assessee and see how prudent businessman would act and they should not look at the matter from their own view point, but that of a prudent businessman. In the said case, an advance was made by the assessee to a sister concern and it was held that it became an imperative as business expediency in view of the undertaking given to the financial institutions by the assessee to meet the working capital of the sister concern for improving any cash losses. Further it is contended that unless there is a nexus between borrowal and investment, the question of accepting interpretation as done by the Revenue arises. In this regard, the learned counsel also referred to the finding recorded by the Assessing Officer itself in paragraph No.3.6 of the Assessment order and paragraph No.8 onwards wherein the Assessing Officer himself has accepted the investments/advances except in respect of four companies, largely on the ground that it was backed only by the

resolution of the Board and not by any scheme of BIFR, even otherwise it is pointed out that CIT(A) though granted relief for other investments and advances, ultimately remanded the matter to the Assessing Officer, directing the Assessing Officer that before giving effect to his order, has to obtain certain details and after verification of the details alone, disallowance of interest may be worked out. This observation is contained in 14.4 of the order passed by CIT(A). The learned counsel for the assessee also brought to the notice of the Court that the Assessing Officer has given effect to the order passed by CIT(A) with regard to interest disallowance by order dated 27.06.2002 and after due verification of the records as directed by CIT(A), the order has been given effect to.

21. The last and final question of law No.5 framed is with regard to arriving of fair market value. The learned counsel for the assessee raised a primary objection with regard to question No.5 and contended that the question as framed is incorrect and as such it does not arise and the appeal to ITAT was only on the exclusion of the sale consideration relating to the building and no issue regarding fair market value has arisen. It is further submitted that sale had not taken place and issue relating to capital gain does not arise.

22. The learned counsel appearing for the Revenue submitted that the Tribunal has not assigned any reason on this issue except to state that the value adopted by the assessee and the value adopted as per the guideline value, there is not much of difference and therefore, the assessee is not

entitled to succeed. It is submitted that the order passed by the Tribunal is completely devoid of any reasons and therefore the matter has to be remanded to the Tribunal for fresh consideration. Further, relying upon the decision of **R.Sai Bharathi Vs. J.Jayalalitha & Others** reported in [(2004) 2 SCC 9], it is submitted that the guideline value is one of the recognised method for ascertaining the value of the property.

23. On a perusal of the order passed by the Assessing Officer, we find that the Assessing Officer has taken the value of the land at Rs.3,03,433/- as on 01.4.1981. The Revenue determined the value of the land at Rs.3,79,433/-. The Commissioner of CIT(A) while deciding the question in paragraph No.16.1 of its order, took note of the fact that the building has not been demolished and vacant possession of the land was given to the developer only during 2001 and the amount realised through sale of the building structure would be taken as income. Further, CIT(A) noted that a letter was filed in this regard and since the sale agreement requires only handing over the possession of the vacant land and the building structure has not yet been demolished, the question of sale proceeds and capital gain does not arise. The CIT(A) upon consideration, has pointed out that Schedule A of the sale deed is in conformity with the submission made by the assessee and also the fact that demolition has not taken place during the relevant previous year, the vacant possession was handed over only during 2001. The Assessing Officer was directed to exclude the sale consideration relating to the building while computing the capital gain. As against this portion of the order where

CIT(A) had directed the exclusion of sale consideration related to the building, while computing the capital gains, the assessee went on appeal before ITAT. Therefore, no question arise much less the substantial question of law with regard to the fair market value for computing the market value on sale of land. Thus, this question of law does not arise for consideration in the facts and circumstances of the case and accordingly requires to be decided against the Revenue and in favour of the Assessee.

24. In view of the above reasons, this appeal is dismissed and the question of law framed are answered on the terms stated above. No costs.

[T.S.S.J.,] [N.S.S.J.,]

13.06.2018

ds

Index : Yes / No

Speaking Order / Non-speaking Order

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T.S.SIVAGNANAM,J.,

and

N.SESHASAYEE,J.,

ds



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