

\$~2

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **INCOME TAX APPEAL NO.1012/2018**

Date of decision: 28th September, 2018

THE PR. COMMISSIONER OF INCOME TAX -3 Appellant

Through: Ms. Vibhooti, Advocate.

versus

DLF HOTEL HOLDING LTD. Respondent

Through

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

This appeal by the Revenue in the case of DLF Hotel Holding Limited ('respondent-assessee' for short) arises from the order dated 9th April, 2018 of the Income Tax Appellate Tribunal in ITA No. 1750/DEL/2015 and pertains to the Assessment Year 2010-11.

2. The facts in brief are that during the period relating to the Assessment Year 2010-11 an addition of Rs.83,63,03,480/- was made to the opening balance of the paid up share capital of the respondent-assessee, enhancing the same to Rs.1259,68,00,000/-. The respondent-assessee had invested Rs.1165,23,06,015/- in shares of group companies. The respondent-assessee had also taken unsecured loans of Rs. 223,10,02,165/- on which interest of Rs. 12,83,76,153/- was paid and claimed as a deduction under Section 36(1)(iii) of the Income Tax Act, 1961 (the Act, for short). The respondent-assessee had also given unsecured loans of Rs. 205,20,21,046/- to subsidiary companies. The respondent-assessee had received Rs. 12,83,76,153/- as interest on unsecured loans given to the subsidiary companies and others, which was shown as income.

3. The Assessing Officer in the Assessment Order dated 23rd March, 2013 observed and held that the respondent-assessee had maintained common account for both borrowed funds and capital funds, out of which investment in shares of the group companies was made. The Assessing Officer made an addition of Rs. 5,33,01,263/- on the following working:-

S. No.	Particulars	Amount (in Lacks)
A.	Total interest paid	1,962.04
B.	Total interest income	1,283.76
C.	Net Interest paid (A-B)	678.28
D.	Average investments	1,16,523.06
E.	Total funds as per Books i.e. total of Balance	1,48,282.00
F.	Net Interest allocated to average investment (C*D/E) i.e. addition for (sic)	533.01

4. Before the Commissioner of Income Tax (Appeals) it was pointed out by the respondent-assessee that one of the main objects for which the respondent-assessee was established was to purchase, acquire, hold, trade and further to dispose of any right, stake or controlling interest in shares, stocks, debentures etc. Thus making investment was a part of respondent-assessee's business. Further, the respondent-assessee was engaged in the business of hospitality, hotel management services and investment in companies dealing with retail business. The respondent-assessee was entitled to borrow capital for purpose of business and interest paid on

borrowed capital has to be allowed as a deduction under Section 36(1)(iii) of the Act. The respondent-assessee had made investments in fixed capital net of depreciation of Rs.2,48,64,604/- and they had made investment of Rs.257,56,99,484/- by way of current asset, advances and loans including unsecured loans to subsidiaries of Rs.205,20,21,046/-.

5. Agreeing with the respondent-assessee, the Commissioner of Income Tax (Appeals) vide order dated 7th January, 2015 held that the Assessing Officer had not taken into account crucial evidence in the form the loans extended by the respondent-assessee to subsidiary companies and the interest received/earned on the said loans. The Commissioner of Income Tax (Appeals) had reproduced the following table:-

“

S. No.	Name of the Subsidiary Companies	Balance as on 31.03.2010	Gross Interest
1	Bedelia Builders & construction Pvt. Ltd.	37,948,027	2,452,596
2	DLF Aspinwal Hotels Pvt. Ltd.	401,690,735	26,002,425
3	Eila Builders & Developers Pvt. Ltd.	157,558,675	9,348,803
4	DLF Cochin Hotels Pvt. Ltd.	202,659,463	13,121,097
5	DLF Hospitality & Recreational Ltd.	370,210,816	18,188,789
(sic)	DLF Sikkim Hotels Pvt. Ltd.	-	1,151,697
6	DLF Comfort Hotels Pvt. Ltd.	136,890,561	8,856,794
(sic)	Monroe Builders & developers Pvt. Ltd.		46,893
7	DLF Hotel & Apartment Pvt.	5,906,250	706,355

	Ltd.		
8	DLF Pleasure Hotels Pvt. Ltd.	5,821,187	630,800
9	Saket Courtyard Hospitality Pvt. Ltd.	35,800,000	2,287,247
10	Guardian International Pvt. Ltd.	5,000,000	231,781
11	Heritage Resorts Pvt. Ltd.	10,000,000	463,562
12	Lodhi Property Co. Ltd.	680,000,000	42,706,575
13	DLF Recreational Foundation (Debtors)	2,535,332	-
		2,052,021,046	28,00,29,158

”

He observed that this irrefutable evidence was ignored and not dealt with by the Assessing Officer.

6. The Tribunal vide order dated 9th April, 2018 has affirmed findings of the Commissioner of Income Tax (Appeals) deleting addition of Rs. 5,33,01,263/- made by the Assessing Officer as being contrary to law and in particular Section 36(1)(iii) of the Act. The Tribunal observed that investment in subsidiaries/ joint venture companies was one of the main objects of the respondent-assessee and hence expenditure in the nature of interest incurred for the purpose of making investments cannot be disallowed under Section 36(1)(iii) of the Act.

7. Apart from the incongruities in the reasoning and calculations made by the Assessing Officer referred to in the order of the Commissioner of Income Tax (Appeals), which have been accepted by the Tribunal, the issue raised is covered against the Revenue by the decision of the Supreme Court

in *S.A. Builders Limited versus Commissioner of Income Tax and Another*, (2007) 288 ITR 1 (SC) and in *Munjial Sales Corporation versus Commissioner of Income Tax*, (2008) 298 ITR 298 (SC). The Supreme Court in *S.A. Builders Limited (supra)* held as follows:-

“24. In our opinion, the decisions relating to Section 37 of the Act will also be applicable to Section 36(1)(iii) because in Section 37 also the expression used is “for the purpose of business”. It has been consistently held in decisions relating to Section 37 that the expression “for the purpose of business” includes expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits thereby.

25. Thus in *Atherton v. British Insulated & Helsby Cables Ltd.* [(1925) 10 TC 155 : 1 KB 421 : 132 LT 288 (CA)] it was held by the House of Lords that in order to claim a deduction, it is enough to show that the money is expended, not of necessity and with a view to direct and immediate benefit, but voluntarily and on grounds of commercial expediency and in order to indirectly facilitate the carrying on of the business. The above test in *Atherton case* [(1925) 10 TC 155 : 1 KB 421 : 132 LT 288 (CA)] has been approved by this Court in several decisions e.g. *Eastern Investments Ltd. v. CIT* [(1951) 20 ITR 1 : AIR 1951 SC 278] , *CIT v. Chandulal Keshavlal & Co.* [(1960) 38 ITR 601 : AIR 1960 SC 738] , etc.

26. In our opinion, the High Court as well as the Tribunal and other Income Tax Authorities should have approached the question of allowability of interest on the borrowed funds from the above angle. In other words, the High Court and other authorities should have enquired as to whether the interest-free loan was given to the sister company (which is a subsidiary of the assessee) as a measure of commercial expediency, and if it was, it should have been allowed.

27. 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.

XXX

37. We wish to make it clear that it is not our opinion that in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case. For instance, if the Directors of the sister concern utilise the amount advanced to it by the assessee for their personal benefit, obviously it cannot be said that such money was advanced as a measure of commercial expediency. However, money can be said to be advanced to a sister concern for commercial expediency in many other circumstances (which need not be enumerated here). However, it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans.”

The Assessing Officer had referred and followed some of the judgments in *Commissioner of Income Tax versus Abhishek Industries Limited*, (2006) 286 ITR 1 (P&H) and others, which have been overruled by the Supreme Court in *S.A. Builders Limited (supra)*.

8. As the issue is completely covered by the aforesaid two decisions of the Supreme Court, no substantial question of law arises for consideration and accordingly the appeal is dismissed.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

SEPTEMBER 28, 2018
MR