

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री भागचंद, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 696/JP/2017
निर्धारण वर्ष / Assessment Year : 2013-14

Pratik Goyal, 95/1, Navgarh Colony, Pushkar Road, Ajmer.	बनाम Vs.	Income Tax Officer, Ward 1(3), Ajmer.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AGHPG 1358 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Mahendra Gargieya (Adv)
राजस्व की ओर से / Revenue by : Shri P.P. Meena (JCIT)

सुनवाई की तारीख / Date of Hearing : 19/07/2018
उदघोषणा की तारीख / Date of Pronouncement : 24/07/2018

आदेश / ORDER

PER: BHAGCHAND, A.M.

The appeal filed by the assessee emanates from the order of the
Id. CIT(A), Ajmer dated 22/06/2017 for the A.Y. 2013-14.

2. The assessee is individual, the return of income was electronically
filed on 30/09/2013 declaring total income of Rs. 4,66,990/-. The case
was selected for scrutiny and notice U/s 143(2) of the Income Tax Act,
1961 (in short the Act) was issued on 03/09/2014. The Assessing Officer
finalized the assessment U/s 143(3) of the Act by assessing total income

of assessee at Rs. 30,63,685/- and the same has been sustained by the Id. CIT(A).

3. Now the assessee is in appeal before the ITAT by taking following grounds of appeal:

- “1. The impugned additions and disallowances made in the order u/s 143(3) of the Act dated 21.03.2016 are bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly be deleted.*
- 2. **Rs.20,22,110/-:** The Id. CIT(A) erred in law as well as on the facts of the case in confirming the disallowance made by the AO of the interest paid on the borrowed capital used for business purposes and rightly claimed u/s 36(1)(iii) of the Act. The disallowance so made by the AO and confirmed by the Id. CIT(A), being contrary to the provisions of law and facts, kindly be deleted in full.*
- 3. **Rs.5,74,585/-:** The Id. CIT(A) erred in law as well as on the facts of the case in confirming the denial of the benefit of the set off of the unabsorbed business losses of Rs.5,74,585/- carried forward from A.Y.2012-13. The unabsorbed business losses so not permitted to be set off, being contrary to the provisions of law and facts, the AO kindly be directed to allow the benefit of the set off as claimed.*
- 4. The Id. AO further erred in law as well as on the facts of the case in charging interest u/s 234B of the Act. The appellant totally denies its liability of charging of any such interest. The interest so charged, being contrary to the provisions of law and facts, kindly be deleted in full.*
- 5. The appellant prays your honour indulgences to add, amend or alter of or any of the grounds of the appeal on or before the date of hearing.”*

4. Grounds No. 1 and 5 of the appeal are general in nature and do not require any adjudication.

5. Ground No. 3 of the appeal was not pressed at the time of hearing, therefore, the same is dismissed as not pressed.

6. In the ground No. 2 of the appeal, the assessee has challenged the sustaining the addition of Rs. 20,22,110/-, which was interest paid on a borrowed capital. The assessee claimed this as business expenditure and allowable expenses as per provisions of Section 36(1)(iii) of the Act. The Id AR pleaded that the assessee has set up the business during the F.Y. 2012-13 and the assessee made payment of interest of Rs. 7.00 lacs on borrowed capital, which has been allowed. He has also claimed that the payment of interest on borrowed fund has also allowed in the A.Y. 2015-16 in support of it, he has filed the copy of order U/s 143(3) of the Act dated 29/12/2017. He has also placed reliance on the various case laws. The Id AR has also filed written submissions, the contents of the same are reproduced as under:

1. At the outset, we strongly rely upon our detailed written submission filed before CIT(A) dated 28.03.2017 (**PB 39-43**), dated 17.04.2017 (**PB 44**), dated 24.04.2017 (**PB 51-52 & PB 53**) (reproduced in the order of CIT(A) also) and the counter comments submitted vide letter dated 13.06.2017 (**PB 54-56**) (reproduced at order of CIT(A) pg 22) as also the written submission filed before the AO (reproduced at pg 3 of AO).

2. Business already set up:

2.1 The only issue which appears to be involved in the present case is whether the expenditure incurred by the assessee in the shape of interest on borrowed capital which was utilized for the purchase of the land, could be allowed as a business expenditure or not. For that purpose the authorities below have made the disallowance mainly on the reason that such expenditure was incurred prior to the commencement of business and therefore should have been capitalized.

However, the authorities below have proceeded on a misconception and ignored a well settled law that there is a difference between the *setting up* and the *commencement of business*. Any expenditure which has been incurred after the setting up of business though it may be before/after the commencement of the business even then, is fully allowable as an expenditure incurred *for the purpose of the business* u/s 36(1)(iii) and/or 37(1).

2.2 In the present case, there are **several indications**, which go to show that the assessee had **not only set up the business of real estate but even commenced such business** as evidenced from the chronology of the following events (at a glance table is also enclosed with the WS):

- The appellant purchased the agricultural land at Foyasagar Road, Ajmer on 14.12.2011 & 30.01.2012 i.e. in A.Y. 2012-13 (Admitted by AO at page 2 **PB 9**).
- The assessee started the process of getting the said land converted (from agriculture to residential) u/s 90A of Rajasthan Land Revenue Act, 1956 (**PB 16**).
- Rs.2 Lakh were deposited towards security amount (**अमानत**) for said conversion u/s 90A of Rajasthan Land Revenue Act, 1956 on dated 15.02.2013 (**PB 11 & 64**).

- Further deposit of Rs.50,000/- made to the UIT towards the approval of the layout plan on dated 05.03.2013.**(PB 64)**
- The site plan submitted by the assessee was approved by Ajmer Development Authority (ADA) on 15.03.13 **(PB 12)** [A.Y.2013-14] i.e. **during the year under consideration [CIT(A) pag 25 top]**. (However, the AO has wrongly mentioned the said approval date to be 18.06.15 [A.Y.2016-17] which, in fact, is not the approval date but rather the date on which demand notice **(PB 16-17)** was issued by ADA after settlement of dispute of title of land in our favor by SDM court. There may also be a gap between the setting up and the first step due to variety of reasons being the possible disputes, litigations, delay in getting permission and so on. Here also the delay in sale occurred because of the civil litigation.
- Dispute arose in land and pending before SDO for A.Y. 2014-15 for Rs. 20,62,059/- (appeal pending).
- Copy of proceedings before SDM, Ajmer on 21.05.2014 **(PB 15)** settling the dispute between the parties, who were objecting transfer to Shri Goyal.
- The final mutation in the name of assessee was done on 10.10.2014.
- Order dated 15.12.2014 passed by ADA converting the land u/s 90A for agricultural to non-agricultural use. **(PB 13-14)**
- Copy of demand raised by ADA vide its letter no.1651 dated 18.06.2015 **(PB 16)**.Such expenditure were debited in the land A/c dated on 23.06.2015 & 24.06.2015 when deposited.
- Receipt of patta on dated 15.07.2015 for A.Y. 2016-17
- Thereafter, in later years, the assessee incurred further expenses (viz. road constructions, boundary and gate, drainage, light & Pole etc.) of Rs. 60 Lacs approx. on the development/development charges.
- Although the first sale of the plot could be in A.Y. 2016-17 yet however, that did not mean that the business was not in existence in the subjected year AY 2013-14 because **it was already set up in A.Y.2012-13**, as aforesaid.
- The second full year sale for A.Y. 2017-18 for Rs. 7,91,806/-.

- The assessee declared a huge gross profit of Rs.39,68,069/- (**PB 34**) in A.Y.2016-17 and Rs.20,59,727/- in A.Y.2017-18 which, has proved the fact that the real estate business which was set up in A.Y.2012-13 was going on in full swings.

2.3 In the business of real estate, there are **three stages** viz first is the acquisition of land; second is the process of construction of building and the third is the actual distribution or sale of the building. The first step in time lays foundation for second step and completion of second step lays the foundation for third activity. **All three activities are essential for running a business and thus, expenditure at each entry point is an expense in relation to whole business.** The assessee, therefore, rightly undertook the first step of real estate business by acquiring the subjected land (which was used as stock-in-trade and developed as per business planning), during the year under consideration and laid down the foundation of real estate business.

2.4 In the facts of the present case therefore, it cannot be disputed that the assessee had already set up its business in A.Y.2012-13 only by taking so many steps as narrated hereinabove. Notably, the lower authorities also have not raised any dispute on this aspect.

3. Distinction between setting up and commencement of business:

The only objection of AO was that subjected expenditure was incurred prior to the commencement of business. But the settled law is that there is a difference between the setting up of business and commencement of business. An expenditure is fully allowable u/s 36(1)(iii) and/or 37(1), if the business is found set up without waiting for the very commencement of the same.

4. Supporting Case Laws: This proposition is supported by various case laws as cited below.

4.1 There is a distinction between "setting up of business" and "commencement of business" and all expenditure after "setting up" is deductible business expenditure even if the business has not commenced as held in **CIT v/s Axis Pvt. Equity Ltd. (2017) 98 CCH 38 (Mum)(DPB 1-5)**. In this case, the AO disallowed the claim of business loss of Rs.1.17 Cr by alleging that such expenditure/loss was claimed by the assessee before the commencement of business and was not allowable, which was even confirmed by the CIT(A). However, the Id. Tribunal allowed the claimed loss saying that the business had already been set up hence the expenditure even though incurred prior to the commencement of business, was fully allowable. The ITAT followed the HSBC Securities India Holdings Pvt. Ltd. decided in ITA No.3181/M/1999 decided on 28th November, 2001 and Western India Vegetable Products Ltd. vs. CIT (1954) 26 ITR 151 which was rendered on similar facts. In further appeal by the revenue, the hon'ble high court also affirmed the view taken by the tribunal.

4.2 Kindly refer **CIT v/s Dhoomketu Builders & Development Pvt. Ltd(2013) 87 DTR 0249 (Del)(DPB 6-13)** wherein, it was held that:

"Loss—Business set-up—Commencement of business—Distinction—Carry forward of loss—Determination—Assessee was to carry on business of real estate development, including purchase & sale of land—Assessee had taken a loan to participate in tender to buy land—However failed to buy land—Interest was received on earnest money submitted for tender—Assessee filed its return declaring loss under head business which represented difference between interest received on earnest money and interest paid on loan obtained—AO opined that assessee was not successful in acquiring land, it cannot be said that business was set-up in relevant A.Y.—He assessed interest income under head income from other sources & did not allow interest paid by assessee against interest income—Carry forward of loss was not permitted—CIT (A) allowed deduction of interest paid while computing income under residual head but carry forward was not allowed—Tribunal allowed assessee's appeal holding that business of assessee was set up in A.Y.

Held**, decision of Tribunal was based on relevant tests that had been handed down judicially for purpose ascertaining as to when a business can be said to have been set-up—In case of Precision Electricals vs Commissioner Of Income-Tax (1989) 176 ITR 453 it was held that question as to when business of assessee had commenced is a question of fact & if Tribunal as, after appreciating entire material on record, found that business of assessee was set-up on a particular date, it would be a finding of fact from which no question of law can be said to arise—Attempt, therefore, should be to see as to whether Tribunal had taken note of appropriate circumstances & applied proper tests in arriving at conclusion which it did—Tribunal had observed that having regard to business of assessee, **participation in tender** represented commencement of one activity which would enable assessee to acquire land for development—If assessee was in a position to commence business that **means business has been set-up**—Acts of applying for participation in tender, **borrowing** of monies for interest, deposit of borrowed monies on same day as **earnest money** were all acts which clearly established that business had been set-up—Commencement of real estate business normally starts with acquisition of land or immoveable property—**When an assessee whose business it is to develop real estates, is in a position to perform certain acts towards acquisition of land, that would clearly show that it is ready to commence business and, as a corollary, that it has already been set-up—Actual acquisition of land may be a first step in commencement of business, but section 3 does not speak of commencement of business, it speaks only of setting-up of business—Finding of Tribunal was a finding of fact & it could not be said that finding was without any basis or material—Tribunal did take note of distinction between commencement of a business & setting-up of a business—Revenue’s appeal dismissed”

Application: The above case directly applies on the facts of the present case in as much as here also, the assessee borrowed money, took step for the conversion of the land then took steps for necessary approvals, as stated.

4.3 In Tetron Commercial Ltd. v/s CIT (2003) 182 CTR 0124 (Kol) (DPB 14-23), it was held that:

*“If it is found that the **capital was borrowed** for the purpose of the business of the assessee, the interest payable thereon is admissible*

under s. 36(1)(iii). It is immaterial whether the same is in the nature of capital expenditure or revenue expenditure. If the expenditure is a business expenditure relates to any of the stage of the business activity carried on by the assessee, whether isolated transaction or not, is admissible for deduction under the said section. **A business commences with the activities undertaken even at the preparatory stage for setting up of the business. Acquisition of immovable property for being used in the business by borrowed capital entitles the assessee to claim benefit of the section on the interest paid thereon, even if the asset acquired is not utilized for the purpose of business in the relevant previous year. In the business of real estate, there are three stages : one is the acquisition of land and other is the process of construction of building and the third is the actual distribution or sale of the building. Similarly, in other business also there are three stages. Here at the first stage, it has been acquired and works were in progress. It is not necessary to show that the work is in progress. It is the nature of the expenses that would determine the character in whatever manner it might be shown in the accounts of the assessee. In this case the question was at the second stage and as such the business shall be deemed to have been commenced. 'Business' in an adventure or undertaking to gain profit out of the transaction. Even if it is one transaction, still then it is an adventure and a business. If someone starts a business and then leaves it after one transaction, even then it would be a business. As such a sporadic action cannot be singled out to discard that it is not part of the business.—Edwards (H.M. Inspector of Taxes) vs. Bairstow & Harrison 36 Tax Cases 207 (HL) **applied****

4.4 Also in **CIT v/s Saurashtra Cement & Chemical Industries Ltd (1973) 91 ITR 0170 (Guj) (DPB 24-35)**, it was held that:

*“Business income—Commencement of business—Business is nothing more than a continuous course of activities—**All activities which go to make up business need not be started simultaneously in order that business may commence—Business would commence when activity which is first in point of time** and which must necessarily precede the other activities is started—Business of the assessee manufacturing cement consisted of three categories of activities, namely (i) extracting limestone from leased land (ii) manufacture of cement by user of plant and machinery (iii) selling manufactured cement—These activities combined together constituted business—Hence business commenced when the first category of activities, namely extraction of limestone commenced”*

4.5 Also in **CIT v/s Arcane Developers Pvt. Ltd (2013) 95 DTR 49 (Del) (DPB 36-41)**, it was observed that:

*“7.....**Setting up of business takes place when the business is ready and first steps are taken.** In case of real estate business, the said setting up of business was complete when first steps were taken by the respondent-assessee to look around and negotiate with parties. **There can be a gap between setting up and when first steps were taken** by the respondent and finalisation of the first written agreement. Business activities of the respondent did not require construction of a factory, machinery etc. Negotiations are required to enter into a written understanding and it is obvious that the loan was taken for business and to proceed further and conclude the deal. The aforesaid facts have been examined and highlighted by the first appellate authority. The said findings of fact have been affirmed by the tribunal. A pragmatic and a practical view has to be taken.”*

4.6 In **CIT v/s Samsung India Electronics Ltd. (2013) 356 ITR 354 (Del)** had held as under:

*“7. The aforesaid distinction is relevant when we examine and refers to the definition of ‘previous year’. Following the said judgment, in the case of **CIT v. L.G. Electronic (India) Ltd. [2006] 282 ITR 545 (Delhi)**, it has been observed that the date of setting up of business and date of commencement of business may be two separate dates. This decision in the case of **L.G. Electronics (supra)** has been followed in **CIT v. ESPN Software India P. Ltd., [2008] 301 ITR 368 (Delhi)** **wherein it has been held that a business will “commence” with the first purchase of stock-in-trade and the date on which the first sale is made is immaterial.** Similarly, for manufacturing, several activities in order to bring or produce finished products have to be undertaken, but business commences when the first of such activities is taken.”*

4.7 In **CIT v/s ESPN Software India (P) Ltd(2008) 218 CTR 0427 (Del)**, it was held that

*“Business expenditure—Allowability—Setting up or commencement of business —What is relevant for purposes of IT Act is setting up of business and not commencement of business—CIT(A) and Tribunal having given a finding of fact **that assessee had set up its business on***

15th Aug., 1995, the day on which it obtained license to distribute ESPN Channel services and was entitled to claim expenditure incurred on or after that date as revenue expenditure, no substantial question of law arose”

4.8 CIT vs. IBC Knowledge Park P. LTd. (2016) 136 DTR 65/287 ITR 261 (Kar) (DPB 51-55)

The ratio so laid in the above cases squarely apply on the facts of the present case where the revenue has not disputed the fact of setting up of business but as a misconception of law, ignored the same and therefore, such expenditure are allowable. The AO [in remand report – CIT(A) page 7] has vaguely alleged that the notice of demand from ADA was raised on dated 18.06.2015 falling in A.Y.2016-17 hence, there was no commencement in this year but ignored the other steps which were admittedly taken by the assessee and supporting evidences of which were already available on record showing that business has already set up but the civil litigation, delayed permission.

5. The observation & conclusion of the AO that the assessee purchased the land for the purpose of *investment* and not for *business*, is completely unfounded. The controversy involved is not new. The question whether a particular assessee is a trader or an investor and has been holding the land/s (or shares) as its stock in trade or as a capital assets, has often given rise to dispute and litigation. Over the year, the Hon'ble Courts have laid down certain parameters to be taken into accounts in determining this question. Even the Central Board of Direct Taxes (for short "*CBDT*") has taken note of those parameters and with a view to avoid/to reduce litigation and the uncertainty in the matter, instructed their assessing officers time to time to be taken into account. These parameters mainly are volume, frequency, continuity & regularity of transactions, treatment in the accounts, nature and quantity & commodity dealt with, intention of the owner etc. Applying the above principles, in the instant case, it is an established fact apparent from the face of record admittedly available with the AO.

6. Further the title of **column 51** is "**NO ACCOUNT CASE**" of the ITR Form (**PB 7**), wherein the assessee is supposed to give the details of **such business for whose accounts are not being maintained**. In such column, the assessee has shown the profit which arose on account of the conversion of the silver hitherto kept by the assessee as its capital asset which was now converted into stock-in-trade as also the commission

income of Rs.1.66 lakhs earned in connection with commission agency business and has also claimed the subjected interest of Rs.20,22,110/-. **The very fact of showing such receipt and expenditure in column 51 of the ITR Form goes to show that such transaction were related to a business** (though account were not maintained) hence it was the business income only from the two other business namely commission agency & real estate. Had it been shown by the assessee himself in the ITR in the column relating to other sources or capital gain of the ITR then position might have been different. **This fact has been admitted by the AO also.**

Similar was the position in AY 2012-13 also (Kindly refer column 51 at PB-61) i.e. the first year when the land was purchased and some interest was paid, however, **the interest so claimed was not disallowed therein.**

7. Nature of transaction is material and not its description:

7.1 The repetitive allegation by the AO that the interest was claimed in the capital A/c and the land was shown as investment in its personal balance sheet is a misconception of facts and law which wrongly prevailed over him.

7.2.1 Firstly, the law is well settled that the accounting entries are not decisive of true character of the transaction as held in **Kedarnath Jute Mfg. Co. Ltd. v/s CIT (1971) 82 ITR 363 (SC)**. Moreover, such presentation in balance sheet is also **irrelevant** in as much as a taxpayer is free to employ, for the purpose of his trade, his own method of keeping accounts as held in **Investment Ltd. v/s CIT (1970) 77 ITR 533 (SC)**. Also, the entries made by an assessee in his books of account are not determinative. What is necessary to be considered is the nature of the transaction as held in **Sutlej Cotton Mills Ltd.v/s CIT (1979) 116 ITR 1 (SC)**.

7.2.2 Secondly, with regard to the repeated allegation of the AO that such transaction were debited in the personal set of accounts, it may firstly be clarified that the assessee was running three different businesses in its different proprietary namely M/s Sanwaliya Seth Jewellers relating to trading of silver, second was the real estate business in its proprietary namely M/s Shree Ji Vihar (earlier known as M/s Sanwaliya Seth Builders) and third was the commission agency business (without giving any name to it). Whereas, the assessee was having separate books of account for

M/s Sanwaliya Seth Jewellers, because of voluminous transaction and due to the requirement of tax audit, however at the same time, in the initial years due to the smallness of transactions relating to real estate business in M/s Shree Ji Vihar, as a matter of convenience, no separate books were maintained and the transactions were entered in the existing set of accounts only of the assessee which has been named by the AO as personal set of accounts. Therefore, in the initial year of real estate business, when the assessee was in process of purchase of the land, conversion of agricultural to residential and so on, the related expenditure i.e. interest and other related expenses being Rs.20,22,110/- were debited in capital A/c and the Balance Sheet. Similarly, the commission income (relating to the commission business of gold and silver) of Rs.1,66,000/- was also credited to same very (personal) Capital A/c. Further, the profit of the other proprietary namely Sanwaliya Seth Jewellers of Rs.22,84,225/- was also credited to the same Capital A/c. If the AO was correct why he should have taxed commission income. If the AO was correct why he should have taxed commission income.

However, in the later years, when the real estate business picked up the momentum and the assessee was able to sell plot and volume of activities increased, the receipts crossed the prescribed limit for getting the accounts tax audited u/s 44AB (i.e. from A.Y. 2016-17) and the assessee prepared separate accounts for M/s Shree Ji Vihar.

The law does not require the assessee to always maintain separate accounts however, if with the help of the existing account itself one is able to ascertain and compute the income of the claimed business, merely presentation and accounting entries made by the assessee in its own manner, is not decisive of the true nature of the transaction. After all the substance always prevail over the form, as aforesaid.

8.1 Interest on borrowed capital allowable even if utilized for capital asset: Alternatively and without prejudice to above contention, it is submitted that in this case, a business was already in existence, for the purpose of which borrowing were made and interest was paid and claimed u/s 36(1)(iii) and/or 37(1) of the Act. However, even assuming for a moment that the borrowings were utilized towards the investment in land and therefore, interest expenditure was i.r.t. a capital asset even then, so long as S.36(1)(iii) is concerned, it is fully allowable in as much as the said provision do not make any distinction between the nature of utilization of borrowed funds viz whether it is utilized towards the acquisition of the

revenue asset or a capital asset. Hence, also the claimed interest was fully allowable. There are various decision to support this contention.

8.2.1 Kindly refer **CIT v/s Rajeeva Lochan Kanoria (1994) 121 CTR 0342 (Kol) (DPB 42-48)**, wherein it was held that *“the enquiry that is to be made is whether the payment of interest was in respect of the capital borrowed for the purpose of the assessee's business. **The amount borrowed may be utilised for the purpose of acquisition of stock-in-trade or for the purpose of acquisition of capital assets. So long the money is utilised for business purposes, the interest is allowable as deduction.** It is well settled that business expenditure is not confined to expenses incurred on revenue account. Capital expenditure may not be allowed as a deduction under section 37 because the section specifically bars any deduction of expenditure of capital nature. But section 36 is differently worded. There is no bar in section 36(1)(iii) to allowance of interest paid in respect of capital borrowed, which has been utilised for purchase of capital assets.”*

8.2.2 Also kindly refer **CIT v/s Associated Fiber & Rubber Industries (P.) Ltd. [1999] 236 ITR 471/102 Taxman 700 (SC)**, wherein it was held that *“where the machinery acquired through borrowed capital had not been actually used in the business at the time when the assessment was made, even then the same were to be treated as business assets having been purchased for the purpose of the business only. Therefore, the interest paid on the amount borrowed for the purchase of such machinery is an amount deductible, once the other ingredients are fulfilled. It is shown in the balance sheet under the capital and asset heading as an asset but not a stock-in-trade. The description in the books of account would be immaterial. If it is a stock-in-trade, in that event, the amount invested would be a revenue expenditure and not a capital expenditure. [Para 8]”*

8.2.3 Also refer **CIT vs Axis Pvt. Equity Ltd. (2017) 98 CCH 38 (Mum HC)(DPB 1-5 Pr. 7 & 8)**.

9. After effects of the implication if AO's stand is accepted: Further alternatively also, the implication flowing from the stand of the revenue, if assuming, is accepted shall be resulting into a loss in as much as if the subjected asset is treated as a capital asset, the resultant gain **would attract tax @ 20% only and the benefit of the indexation in addition thereto, whereas the assessee had already been paying tax @ 30%**

(when it has already offered a huge amount of gross profits of Rs.39,68,069/- in A.Y. 2016-17 (**PB 34**) and Rs.20,59,727/- in A.Y.2017-18 in the real estate business). Thus, there is a **direct loss of revenue**.

10.1 Past history: Similarly, in A.Y.2012-13 also i.e. the first year when the land was purchased and interest of Rs.7,49,158/- was similarly claimed yet however, **the interest so claimed was not disallowed therein**. There being no change in the facts and circumstances there was no reason yet to make a disallowance therein. Kindly refer **Godrej Boyce Mfg. Co. v/s DCIT (2017) 151 DTR 89 (SC)**, wherein it was held that:

"38. x x x x x While it is true that the principle of res judicata would not apply to assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case. In this regard we may remind ourselves of what has been observed by this Court in Radhasoami Satsang v. CIT [1992] 193 ITR 321/60 Taxman 248 (SC).

"We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

10.2 Later Years: Notably, even in the later years i.e. A.Y.2015-16 (except AY 14-15) also, even though the assessee did not sale any plot, the claim of interest of Rs.17,28,861/-, similarly made has been allowed vide the scrutiny assessment order dated 29.12.2017 u/s 143(3) (**PB 62-63**).

11. Cases cited by Revenue are completely distinguishable: 11.1 The AO relied upon certain decisions. However, all those cases were based on the peculiar facts available in those cases only which are not obtaining in the present case. They were rendered in different legal factual context and therefore hence are not at all applicable being completely distinguishable and hence, kindly be ignored.

11.2In the case of CIT vs. Vardhman Polytex Ltd. (2008) 214 CTR 0561 (P&H) also, a view was taken that the interest payable on the loan raised for the purchase of new asset for the period prior to the setting up of a new unit should be capitalized and is not allowable u/s 36(1)(iii). However the Hon'ble Supreme Court has reversed the said decision in the case of Vardhman Polytex Ltd. vs. CIT (2012) 349 ITR 0690/(2012) 254 CTR 0102 (SC) (**DPB 49-50**) following their earlier decision in the case of Core Health Care Limited (2008) 298 ITR 194/3 DTR 49 (SC).

12. However, despite these detailed submissions filed before the Id. CIT(A) and the various decisions cited, the Id. CIT(A) has very summarily rejected the grounds by merely repeating what the AO held. His **first ground** of rejection that borrowed funds were not utilized in running the business of wholesale trading of jewellery, is nothing but a purported misconception assumed by him, without appreciating that real estate business had already been set up. His **second ground** that transactions were entered into the personal set/capital a/c is again ignoring the settled law that substance always prevails over the form. So would be the reply to the **third ground** that no real estate business or land development was carried out by the appellant.

7. On the other hand, the Id DR has relied on the orders of the authorities below.

8. We have heard both the sides on this issue. The Assessing Officer has disallowed the interest paid on the borrowed capital for the reason that this was the interest paid by the assessee before commencement of the business and it should be capitalized and the borrowed money was not utilized for business purposes. From the facts on record, we find that the assessee has purchased agricultural land on 14/12/2011 and 30/01/2012 during the period relevant to assessment year 2012-13. The assessee has also started the process of getting the land converted from

agriculture to residential by applying for conversion of Section 90A of Rajasthan Land Revenue Act, 1956. The assessee has also produced evidence of payment of Rs. 2.00 lacs towards the security for conversion U/s 90A of Rajasthan Land Revenue Act, 1956 on 15/2/2013. The assessee has further deposited Rs. 50,000/- to the UIT towards the approval layout plan on 05/3/2013. The assessee has also submitted site plan approved by the Ajmer Development Authority on 15/3/2013. Due to some dispute arose in respect of land, the construction was delayed. Thus, the acts of the assessee shows that he was pursuing the business of real estate during the relevant period. The land was purchased for the purpose of doing the business of real estate by developing the plots etc. Reflecting the land as investment in books does not reflect the true nature of the transaction. In fact the purchase of land, immediately applying for the conversion of land to residential and also getting the site plan approved establishes that the assessee was very much in the business of real estate during the relevant period and he had set up such business. The process of conversion of the land and then getting the approval of the site plan establishes that the assessee has already set up its business during the financial year relevant to assessment year 2012-13. The interest paid on the borrowed capital for acquiring land has been allowed to the assessee as business expenditure. In such a

situation, we direct to delete the addition confirmed by the Id. CIT(A). This view is also gets support from various case laws relied upon by the assessee (supra).

9. Issue involved in round No. 4 of the appeal is charging interest U/s 234B of the Act. Since we delete the addition confirmed by the Id. CIT(A) with regard to interest paid on borrowed capital, therefore, this is consequential in nature and does not require any adjudication.

10. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 24/07/2018.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Sd/-
(भागचंद)
(BHAGCHAND)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 24th July, 2018

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Pratik Goyal, Ajmer.
2. प्रत्यर्थी / The Respondent- The ITO, Ward 1(3), Ajmer.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 696/JP/2017)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar