



**HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT
JAIPUR**

D.B. Income Tax Appeal No. 36 / 2012

Commissioner of Income Tax-central, New Central Revenue
Building, Statue Circle Jaipur Raj.

----Appellant

Versus

M/s-Guman Furniture & Service (P) Ltd. A-2, Rana Pratap Nagar,
Jhotwara, Jaipur

----Respondent



For Appellant(s) : Mr. Sameer Sharma with Mr. Gaurav Gaur for
Mr. Anil Mehta

For Respondent(s) : Mr. Mahendra Gargieya

HON'BLE MR. JUSTICE K.S. JHAVERI

HON'BLE MR. JUSTICE INDERJEET SINGH

01/12/2017

1. By way of this appeal, the appellant has assailed the judgment and order of the tribunal whereby tribunal has dismissed the appeal of the department and partly allowed the appeal of the assessee.

2. Earlier vide order dt. 29.5.2017, the appeal was disposed of being covered by circular no.21/2015 issued by CBDT however, the same was revived after the application preferred by the appellant and today the matter is kept.

3. This court while admitting the appeal on 14.8.2014 framed following substantial question of law:-



“(1) Whether the Tribunal was justified in deleting the addition of Rs.10,00,000/- made by the Assessing Officer on account of unexplained cash merely on the ground that the addition cannot be made merely on surrender made by the assessee under Section 132(4) of the Act, ignoring that the said statement were voluntary in nature and no retraction of the same was filed by the assessee?

(2) Whether the Tribunal was justified in deleting the addition of Rs.32,02,670/- made by the Assessing Officer on account of diversion of interest bearing funds by advancing interest free loans to Directors and their relatives and on the other hand paying interest to bank on the said funds?

(3) Whether the Tribunal was justified in deleting the addition of Rs.42,90,000/- made by the Assessing Officer under Section 68 of the Act being unexplained cash credit as the assessee failed to explain the identity, creditworthiness and genuineness of the transaction which are sine qua non for the sanctity of the said transaction?”



4. The facts of the case are that the assessee is a company and derives income from business. A search and seizure operation u/s 132(1) of the Act was carried on 16.11.2007 at the assessee's premises, during which huge incriminating documents and undisclosed income and assets were found and seized.

4.1 During the course of assessment proceeding assessee miserably failed to explain the documents found and transactions revealed during search and also failed to submit any satisfactory reply with respect to undisclosed income unearthed during search also no cooperation was ever extended by the assessee.

5. Now question no.1 & 2 are covered by the decision of this court in ITA No.35/2012 (CIT vs. Shri Tikam Khandelwal) decided



on 20.9.2017 where question no.6 is identical to question no.1 of this appeal and question no.2 is similar to question no.4 and the same were decided in favour of the assessee holding as under:-

"Counsel for the respondent Mr. Gargieya has contended that each issue is appreciation of facts and no substantial question of law has been raised, however he has relied upon following decisions of each of the issues:-

"On Sec. 68 Cash Credit:

CIT v/s Orissa Credit Corp. Ltd. 159 ITR 78 (SC) Aravali Trading Co. v/s ITO 8 DTR 199 (Raj) CIT v/s First Point Finance Ltd 286 ITR 477 (Raj)

What is a Substantial Question of Law?

Santosh Hazari v/s Purushottam Tiwari (Dead) By LRs (2001) 170 CTR 160 (SC)
M. Janardhana Rao v/s Joint Commissioner of Income Tax (2005) 273 ITR 50 (SC) DCIT v/s Marudhar Hotels (P) Ltd. (1999) 155 CTR (Raj) 437

On admission of additional evidences:

Smt. Prabhavati S. Shah v/s CIT (1998) 148 CTR (Bom) 192"

Taking into consideration the issue and the facts we have gone through the order of the Tribunal the Tribunal while considering gross profit of the assessee for the previous year has rightly estimated 1% of the total turnover. In that view of the matter, the view taken by the Tribunal is required to be affirmed."

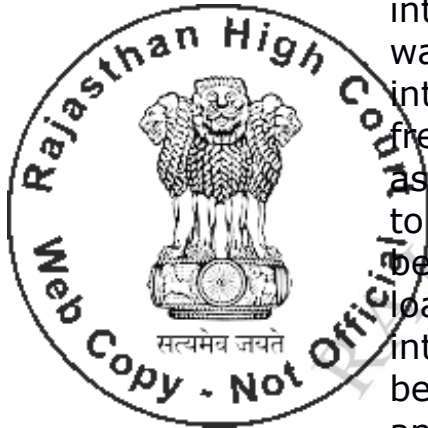
6. Regarding question no.3 the same is covered by the following decision:-

6.1 In CIT vs. Ram Kishan Verma reported in (2016) 132 Taxman 107 (Raj.), it has been held as under:-



13. Taking into consideration the fact as noticed hereinabove, in our view as well, when there was no agreement to charge interest from the persons, to whom the assessee advanced short term loan/advance, the AO could not disallow part of the interest. It is also an admitted fact, as observed by the Tribunal, that the AO .was not able to pin pointedly come to a definite conclusion that how interest bearing loans had been diverted towards interest free advances and since the AO was not able to prove nexus between interest bearing loans vis-a-vis interest free loans/advances, therefore, in our view as well, once the AO was not able to come to a definite conclusion as to nexus having been established about interest bearing loans having been diverted towards interest free loans/advances, and such being a finding of fact based on appreciation of evidence, in our view no substantial question of law arise on this question as well. It can be observed that this court in similar circumstances and on identical facts, when the capital of the partners/proprietor being more than the interest free short term advances, has in the case of CIT v. Vijay Solvex Ltd. [2015] 59 taxmann.com 294 (Raj.) while relying on the judgment rendered in (a) S.A. Builders Ltd. v. CIT (Appeals) [2007] 288 ITR 1/158 Taxman 74 (SC); (b), Munjal Sales Corpn. v. CIT [2008] 298 ITR 298/168 Taxman 43 (SC); (c), CIT v. Radico Khaitan Ltd. [2005] 274 ITR 354/142 Taxman 681 (All.); (d), CIT v. Dalmia Cement (P.) Ltd. [2002] 254 ITR 377/121 Taxman 706 (Delhi); (e), CIT v. Britannia Industries Ltd. [2006] 280 ITR 525/[2005] 148 Taxman 654 (Cal.) and (f) CIT v. Motor Sales Ltd. [2008] 304 ITR 123 (All.), held as under:—

"16. In view of the authoritative pronouncement of the Apex Court and other judgments referred supra, in our view, the assessee admittedly had its own funds, as referred to earlier, and admittedly such funds/reserves being substantially higher than, even otherwise, the advances to the debtors, no notional interest or hypothetical interest could have been disallowed on such facts. The revenue has





failed to prove nexus. In our view, the ITAT has correctly appreciated the facts and law."

6.2 In CIT vs. Vijay Solvex Ltd. (2015) 274 CTR 384 (Raj.), it has been held as under:-



9. It may be that the assessee on account of business expediency advanced money to sister concerns or other concerns at a lower rate of interest or did not charge interest that by itself does not prove that the assessee diverted interest-bearing loans to the said firms. An assessee is required to run business looking to the commercial expediency and several other factors.

15. The Allahabad High Court in the case of CIT vs. Motor Sales Ltd. : (2008) 304 ITR 123 (All) has held that it was finding of fact as found in the case that respondent-assessee had capital/reserve/surplus of Rs. 6.10 crores on which no interest was being paid and therefore interest free advances made by it are covered and ultimately held that there is no question of any disallowance of notional interest on loan taken by it. It was further held that the Tribunal had also recorded a finding that the assessee had not diverted any borrowed fund on which interest was paid for non-commercial purposes and therefore, there is no question of disallowance of interest out of the interest paid by the assessee.

15. In view of the authoritative pronouncement of the apex Court and other judgments referred supra, in our view, the assessee admittedly had its own funds, as referred to earlier, and admittedly such funds/reserves being substantially higher than, even otherwise, the advances to the debtors, no notional interest or hypothetical interest could have been disallowed on such facts. The Revenue has failed to prove nexus. In our view, the Tribunal has correctly appreciated the facts and law.

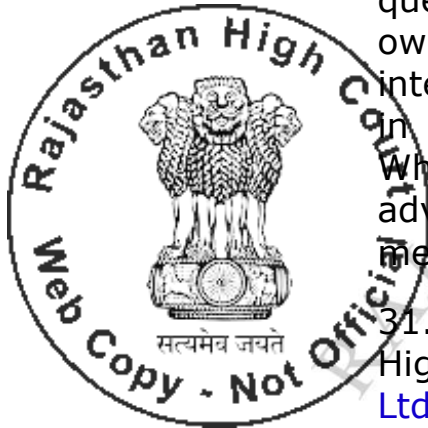
17. In view of our observations hereinabove, the Tribunal was correct in deleting the notional interest, disallowed by the AO at Rs. 5,80,215 and accordingly, the appeal is



decided against the Revenue and in favour of the assessee. No costs.

6.3 In S.A. Builders Ltd. Vs. CIT (Appeals) & Anr. (2007) 288 ITR

1, it has been held as under:-



28. It is true that the borrowed amount in question was not utilized by the assessee in its own business, but had been advanced as interest free loan to its sister concern. However, in our opinion, that fact is not really relevant. What is relevant is whether the assessee advanced such amount to its sister concern as a measure of commercial expediency.

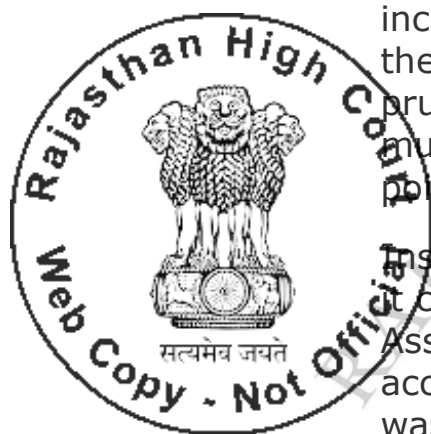
31. We agree with the view taken by the Delhi High Court in [CIT vs. Dalmia Cement \(Bhart\) Ltd.](#) (2002) 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue 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. No businessman can be compelled to maximize its profit. 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. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits.

6.4 In Hero Cycles (P) Ltd. vs. CIT (2015) 379 ITR 347 (SC), it has been held as under:-

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.



Insofar as the loans to Directors are concerned, it could not be disputed by the Revenue that the Assessee had a credit balance in the Bank account when the said advance of Rs. 34 lakhs was given. Remarkably, as observed by the CIT (Appeal) in his order, the company had reserve/surplus to the tune of almost 15 crores and, therefore, the Assessee company could in any case, utilise those funds for giving advance to its Directors.

6.5 He also relied upon the decision of this court in ITA No.144/2016 (Pr. Commissioner of Income Tax-I vs. M/s. Om Metals Infra Projects Ltd.) decided on 22.8.2017 wherein it has been held as under:-

3. Both the issues are now governed by the decision of Supreme Court the case of Godrej & Boyce Manufacturing Company Limited vs. Deputy Commissioner of Income Tax, Mumbai & Anr. reported in 394 ITR 449 wherein it has been held as under:-

"36. Section 14A as originally enacted by the Finance Act of 2001 with effect from 1.4.1962 is in the same form and language as currently appearing in Sub-section (1) of Section 14A of the Act. Sections 14A (2) and (3) of the Act were introduced by the Finance Act of 2006 with effect from 1.4.2007. The finding of the Bombay High Court in the impugned order that Sub-



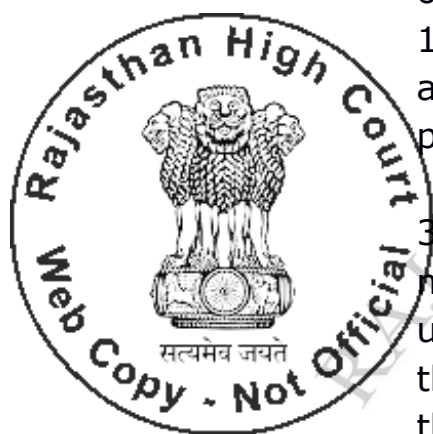
sections (2) and (3) of Section 14A is retrospective has been challenged by the Revenue in another appeal which is presently pending before this Court. The said question, therefore, need not and cannot be gone into. Nevertheless, irrespective of the aforesaid question, what cannot be denied is that the requirement for attracting the provisions of Section 14A(1) of the Act is proof of the fact that the expenditure sought to be disallowed/deducted had actually been incurred in earning the dividend income. Insofar as the Appellant-Assessee is concerned, the issues stand concluded in its favour in respect of the Assessment Years 1998-1999, 1999-2000 and 2001-2002. Earlier to the introduction of Sub-sections (2) and (3) of Section 14A of the Act, such a determination was required to be made by the Assessing Officer in his best judgment. In all the aforesaid assessment years referred to above it was held that the Revenue had failed to establish any nexus between the expenditure disallowed and the earning of the dividend income in question. In the appeals arising out of the assessments made for some of the assessment years the aforesaid question was specifically looked into from the standpoint of the requirements of the provisions of Sub-sections (2) and (3) of Section 14A of the Act which had by then been brought into force. It is on such consideration that findings have been recorded that the expenditure in question bore no relation to the earning of the dividend income and hence the Assessee was entitled to the benefit of full exemption claimed on account of dividend income.

37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the Assessee. Whether





such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the Assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the Assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable.



38. In the present case, we do not find any mention of the reasons which had prevailed upon the Assessing Officer, while dealing with the Assessment Year 2002-2003, to hold that the claims of the Assessee that no expenditure was incurred to earn the dividend income cannot be accepted and why the orders of the Tribunal for the earlier Assessment Years were not acceptable to the Assessing Officer, particularly, in the absence of any new fact or change of circumstances. Neither any basis has been disclosed establishing a reasonable nexus between the expenditure disallowed and the dividend income received. That any part of the borrowings of the Assessee had been diverted to earn tax free income despite the availability of surplus or interest free funds available (Rs. 270.51 crores as on 1.4.2001 and Rs. 280.64 crores as on 31.3.2002) remains unproved by any material whatsoever. 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. Commissioner of Income Tax* (1992) 193 ITR (SC) 321 [At Page 329].

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.”



Therefore, all the issues are answered in favour of the assessee and against the department.

8. The appeal stands dismissed.

(INDERJEET SINGH) J.

(K.S. JHAVERI)J.

Brijesh 84.



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