

**IN THE INCOME TAX APPELLATE TRIBUNAL
"G" Bench, Mumbai**

**Before Shri B. Ramakotaiah, Accountant Member
and Shri V. Durga Rao, Judicial Member**

ITA No. 933/Mum/2006 & ITA No.1912/Mum/2008
(Assessment Years: 1999-2000 & 2004-05)

Churu Trading Co. (P) Ltd
135 Continental Building
Dr.A.B. Road, Worli
Mumbai 400 018
PAN – AAACC 4853 G

Income Tax Officer
Ward 6(2)-1
Aayakar Bhavan
Vs Mumbai 400020

Appellant

Respondent

**ITA No. 1494/Mum/2005 &
ITA No.4682/Mum/2007**
(Assessment Years: 2001-02 & 2003-04)

Churu Trading Co. (P) Ltd
135 Continental Building
Dr.A.B. Road, Worli
Mumbai 400 018
PAN – AAACC 4853 G

Dy.CIT Cir 6(2)
Aayakar Bhavan
Mumbai 400020
Vs

Appellant

Respondent

Appellant by: Shri Firoze B Andhyarujina &
Shri B.S. Sharma

Respondent by: Shri A.K. Nayak, DR

Date of Hearing: 31/01/2012

Date of Pronouncement: 24/02/2012

ORDER

Per Bench:

These are appeals by assessee against the orders of the CIT (A) in respect of various assessment years. We were informed that there are no cross appeals by Revenue and accordingly we proceed to decide these appeals by this common order for the sake of convenience. We have heard the learned Counsel Shri Firoze B Andhyarujina and the learned Departmental Representative Shri A.K. Nayak.

2. We shall first take up the appeal by assessee in ITA No.933/Mum/2006.

ITA No.933/Mum/2006 – AY 1999-2000.

In this appeal assessee has raised three grounds, the first being the reopening of assessment under section 147 and second and third on various disallowances.

3. Ground No.1 – Reopening of assessment under section 147: On this issue assessee contended in the ground that the Assessing Officer has erred in reopening the assessment mainly to disallow under section 14A of the Income Tax Act and took shelter under section 36(1)(iii) to avoid provisions of Section 14A which are not applicable for reopening assessments prior to 1.4.2001. It was noted that the return of income was filed on 29.12.2000 which was processed under section 143(1) on 3.11.1998. There was no scrutiny under section 143(3) and the processing has become final. Consequent to the Assessing Officer's examination of return for the AY 2001-02, the assessment in this year was reopened. The reasons recorded by the Assessing Officer was that assessee company diverted its interest bearing funds to its group concerns and other several individuals on which no interest was claimed, nor income derived, whereas interest was paid on borrowed funds. AO has also stated the total figure of investment at ₹.1284.2 crores and the disallowance to be worked out at 18% at ₹.231.15lakhs. It was also recorded that some of the items pertains to share application money as well as interest on advances for the purposes of shares which require examination. After the reassessment, assessee took up the ground before the CIT (A) which the CIT (A) considered and rejected as stated in Para 3.3 as under:

“3.3 Therefore after going through the reasons recorded it may be noted that as per balance sheet various loans and advances occurring in the balance sheet of the appellant company is 12.84 crores. The details of above are on the record, which also included advance share

application of ₹.6.57 crores, advanced during the year. The Assessing Officer has also passed the order for AY 2001-02 under 143(3) wherein the above advance of money as share application has been considered by him as an amount diverted for non-business purposes and interest in respect of above advance has been disallowed under section 36(1)(iii) of the I.T. Act. Thus, it can be clearly seen that in view of specific findings given by the Assessing Officer for AY 2001-02, wherein the amount advanced as share application to ASC Enterprises Ltd has been considered as diversion of interest bearing funds which requires disallowance out of interest admissible under section 36(1)(iii), the action of the Assessing Officer in taking recourse to section 147 for AY 1999-2000 cannot be disturbed as he is of the opinion based on the enquiry made during the AY 2001-02 that excess allowance of interest has been claimed and given in section 36(1)(iii) and as such there is escapement of income within the meaning of section 147 of the I.T. Act. So far as appellant's contention that this is change of opinion, it may be noted that while processing the return under section 143(1) no opinion has been formed by the Assessing Officer and as such, it cannot be said that there is change of opinion in reopening the assessment. Although the Assessing Officer has mentioned that figure of investment is ₹.12.84 crores, in fact the above is loans and advance and investment is 3.13 crores only. In view of the above factual position and findings given by the Assessing Officer in AY 2001-02, I am of the opinion that appellant's case for AY 1999-2000 has been validly reopened under section 147 by issue of notice under section 148 and it cannot be said that same has been done on the ground of disallowance of section 14A. In fact, it may be noted that Assessing Officer has also disallowed an amount of ₹.42,44,729/- as disallowance under section 14A in respect of which the appellant is also in appeal and accordingly, I am of the view that there is no material in support of the appellant that reopening has been undertaken to disallow expenditure under section 14A in the garb of alleged disallowance stated on account of diversion of interest bearing fund. This ground of appeal is dismissed”.

3.1 It was the learned Counsel's submission that the Assessing Officer has taken the amount of investments wrongly and referred to the correct amount. As per the balance sheet, there was only an

investment of ₹.313.85 lakhs, whereas the loans and advances were to the above amount. It was further submitted that the Assessing Officer cannot reopen the assessment in the case of disallowances under section 14A as it prohibits the Assessing Officer in reopening years prior to 01-042001 and this action of the Assessing Officer is clearly in violation of provisions of section 14A. It was further submitted that relying on the wrong facts indicate that there is no application of mind and therefore, reopening is bad in law. The learned Counsel relied on various decisions including the decision of the Hon'ble Bombay High Court in the case of Prashant Joshi vs. ITO (320 ITR 154) applying the analogy to the facts of the case.

3.2 It was the submission of the learned Departmental Representative that the assessment was completed under section 143 (1) and there is no prima facie belief to form that no disallowance under section 36(1)(iii) was required. Moreover, as the facts have come to the notice of the Assessing Officer in AY 2001-02, the appeal of which was also pending, the Assessing Officer has 'reason to believe' that assessee claimed excess deduction of interest when borrowed funds were diverted for non-business purposes. Incidentally the disallowance made under section 14A by the Assessing Officer while completing the assessment was deleted by the CIT (A), and it seems the Revenue has accepted. Therefore, the issue is only with reference to the disallowance under section 36(1)(iii) and accordingly the case law relied by the learned Counsel does not apply to the facts of the case. He relied on the Supreme Court judgment in the case of ACIT Vs Rajesh Jhaveri Stock Brokers (P) Ltd. (SC) 291 ITR 500 for reopening of the assessment which were accepted under section 143(1).

3.3 We have considered the issue. As rightly considered by the CIT (A), the issue for reopening was on the basis of specific findings given by the Assessing Officer in AY 2001-02 wherein the amount of advances as share application money were considered as diversion

of the interest bearing funds. Since the action of the Assessing Officer is consequent to the finding in AY 2001-02, we can assume that the Assessing Officer has prima facie belief that the funds have been diverted and the excess interest claim was made. Even though while noting the figures, he has taken the amount of loans and advances, in our view that does not affect prima facie belief that excess claim was made. Be that as it may, there is no change of opinion as the provisions under section 147 do not prevent the Assessing Officer in reopening the assessment under section 147 as it was only processing that was done under section 143(1). This principle was already upheld by the Hon'ble Supreme Court in the case of ACIT Vs Rajesh Jhaveri Stock Brokers (P) Ltd. (SC) 291 ITR 500. Therefore, since no scrutiny assessment was done under section 143(3) earlier in this case, reopening under section 147 is valid. Assessee has raised the contention mainly that the Assessing Officer took recourse to section 36(1)(iii) so as to disallow the amounts under section 14A which bars reopening of the assessment prior to 1.4.2001. This ground per se should fail as the main disallowance was made by the Assessing Officer under section 36(1)(iii) on diversion of borrowed funds and claiming interest on them. Incidentally, disallowance under section 14A was not upheld by the CIT (A) and there is no cross appeal by the Revenue on that issue. Moreover, the Hon'ble Supreme Court in the case of Honda Seil Power Products Limited vs. DCIT in SLP 19085/2011 has upheld the Hon'ble Delhi High Court judgment in the same case (197 TM 415), wherein it was held that the provisions of section 14A bars reassessment but not original assessment. It was further held that the object and purpose of provisions is to ensure that the retrospective amendment is not made as a tool to reopen the past cases which have attained finality. This principle established by the Hon'ble Delhi High Court was upheld by the Hon'ble Supreme Court which dismissed the SLP. It is further noticed that in the

above referred case the Assessing Officer had made an assessment for AY 2000-01 under section 143(3) and after expiry of 4 years reopened the assessment to make disallowances under section 14A. Under those facts, the Hon'ble High Court as well as Supreme Court upheld the reopening. In the present case, it is only a processing under section 143(1) which was done earlier and the reopening was made within 4 years from the end of the assessment year. Therefore, the Assessing Officer's case is on a stronger footing. Considering the above principles laid down in various cases, we uphold the action of the Assessing Officer in reopening the assessment under section 147. The ground is accordingly dismissed.

4. Ground No.2. This ground pertains to the disallowance of ₹.72,000/- being interest free loan given to Shri Rishi Kumar Chakrapani which was given out of interest bearing funds. The Assessing Officer noticed that assessee has given funds to one Mr.Rishi Kumar Chakrapani out of the borrowed funds and disallowed an amount of ₹.72,000/- under section 36(1)(iii). The CIT (A) following his order for the AY 2001-02 wherein he examined and upheld the contention that the amount advanced is not on account of any business consideration has upheld the disallowance. It was submitted by the learned Counsel that this issue was remanded to the Assessing Officer by the ITAT in 2000-01 whereas the learned Departmental Representative submitted that the matter was restored to the Assessing Officer in that year on the reason that there is no finding whether there was any diversion of funds. He referred to the findings of the Assessing Officer and the CIT (A) that the amounts were advanced for non-business purposes and referred the orders in this assessment year as well as in AY 2001-02.

4.1 We have considered the issue. There was a finding on record in these years that the amounts advanced are for the purpose of non business consideration, therefore, prima facie, the amount

requires to be disallowed. This year being the first year of disallowance on this issue, there is a finding by the Assessing Officer that the loan given to Shri Rishi Kumar Chakrapani was not a business loan or credit loan having nexus with the business of assessee company, but are purely in the form of obligations to the individual. It was further given as a finding in Para 6.3 that assessee company has not been able to give proof of any business dealings in the past, present or future with Shri Chakrapani. Therefore, the Assessing Officer considered that the advances given to Shri Rishi Kumar Chakrapani have to be treated as loan/advance given for non business purpose. Before us, no evidence was filed to counter the findings of the Assessing Officer. The learned CIT (A) also upheld the above findings. In view of this we are of the opinion that the disallowance of interest of ₹.72,000/- requires to be upheld. Ground No.2 is accordingly rejected.

5. In Ground No.3 it was contended that CIT(A) erred in upholding the disallowance of interest of ₹43,70,388/- relating to share application money under section 36(1)(iii), although this would be covered under section 14A of the Income Tax Act being the interest on investment in shares. This issue was discussed by the Assessing Officer vide Para 7 of the assessment order. He has examined the purchase of shares/ controlling interest in M/s ASC Enterprises while advancing funds and noted that assessee made investment in share application money to M/s ASC Enterprises out of loans taken on which interest was paid. The Assessing Officer's opinion was that giving advances or making the investments in equity shares of other concerns for having controlling interest or otherwise is not business activity of assessee company. Therefore amount of interest paid on diversion of interest bearing funds for non business purpose was not to be allowed. Accordingly, he arrived at the disallowances calculated as per Table in Para 7.1 of the order at ₹43,70,388/-.

5.1 It was the submission of the learned Counsel that assessee was in the business of making investments in equities with intention and purpose of gaining capital appreciation and also assessee trades in stock of equity shares to earn profit, though by virtue of holding of such equity shares it may incidentally may earn dividend. The learned Counsel explained what it constitute “business” under section 2(13) of the Income Tax Act and submitted that assessee is an investor and a dealer in shares can also advance interest bearing loans, the incomes of which were shown in the Profit & Loss A/c. It was further submitted that as assessee business mainly consists of advancing loans and advances, trade and investment in equity shares, the RBI has registered the company as non-banking finance company w.e.f. 8.3.2001. It was submitted that the investments are to the tune of ₹.3.12 crores which is about 15% of the assets of assessee whereas loans and advances are to the tune of 60% of assessee’s application of funds and investments in equity shares are also to the extent of 47%. It was submitted that by way of Annexure-I to the submissions that borrowed funds are utilized in the business and that assessee has not diverted the funds and so, the entire amount is allowable as deduction. The learned Counsel relied on the principles laid down by the following cases to submit that the amount is allowable:

- i) Core Health Care Ltd. [2008] 298 ITR 194 (SC).
- ii) Phil Corporation Ltd 244 CTR 226 (Bom.)
- iii) SA Builders Ltd – 288 ITR 1 (SC)

It was further submitted that the entire borrowings on investments are for the purpose of business only and accordingly the amounts are to be allowed. Further it was submitted that if the investment is made, the disallowance of interest would come under section 14A, on which the CIT (A) deleted the amount and Revenue has not come

in appeal. Therefore, this amount should be allowed as for investment in shares.

5.2 The learned Departmental Representative supported the order of the Assessing Officer and the CIT (A) on facts.

5.3 We have considered the issue and examined the facts on record. In the year under consideration assessee has both investments and share trading and as seen from the balance sheet and Profit & Loss A/c the investment at the end of the year as per the Schedule-VI was to the tune of ₹.3.13 crores, whereas the stock in trade was to the tune of ₹.10.05 crores. Assessee had profit on sale of equity shares at ₹.2.37 crores and also profit on trading shares at ₹.1.64 crores vide schedule-12 of the accounts. It has shown profit on sale of investments at ₹.2.87 crores in Profit & Loss A/c which were excluded from the 'income from business' and shown under the head "Income from Capital Gain". While working out the disallowance under section 14A at the time of filing the revised return, assessee has given a working of interest applicable to profit on sale of investment in the ratio of 0.7% at ₹.2,69,98,200/- and interest applicable to dividend income at ₹.1.03 crores, admittedly there are amounts diverted for investment which should have been set off in the computation of long term capital gain. As seen from the order of the Assessing Officer and the CIT (A), the amounts considered for disallowance under section 36(1)(iii) only the amount advanced as share application money to ASC Enterprises at ₹.6.57 crores. This amount is not figuring either in investment account or in trading account but shown separately under the head "Loans and Advances" in Schedule-9. Therefore, the contention that advancing/ investing monies in shares either for investment or for trading should fail as it was not supported by facts. As the amount advanced was not for either of the above purposes, disallowance of interest per se is to be upheld. With reference to the amount of disallowance the Assessing Officer

had examined the source of funds elaborately in Para 7.1 and calculated the interest only on the amounts diverted from interest bearing funds. This indicates that disallowances at ₹43,70,388/- is based on a nexus between diverted funds and borrowed amounts. There was further finding by the CIT (A) that amounts advanced to ASC Enterprises from the year 1989 onwards has increased to ₹.6.57 crores as on 31.3.2000, to ₹.7.90 crores till 31.3.2001 and the entire amount was received back by 21.5.2001 with out any purchase or allotment of shares. The Assessing Officer elaborately examined and extracted the table on the basis of the statement given by assessee company about the opening balance of ₹.1.92 crores and the sources of advances given to M/s ASC Enterprises and disallowed the amount only on the basis of the finding that the borrowed funds were advanced, interest free in the guise of share application money to M/s ASC Enterprises which was recovered back without any allotment of shares or receipt of interest. Therefore, we are of the opinion that the interest disallowed under section 36(1)(iii) on specific amount of diversion of funds to M/s ASC Enterprises, which does not fall in either category of shares purchased for investment or shares purchased for trading, is to be upheld. Accordingly the ground is rejected.

6. In the result the appeal No. ITA No.933/Mum/2006 is dismissed.

ITA No. 1494/Mum/2005- AY 2001-02.

7. This is assessee appeal against the order of the CIT (A)-VI, Mumbai dated 04.01.2005. Assessee in this appeal has raised two grounds with reference to three issues. The grounds of which are as under:

“1. The learned Commissioner of Income Tax (Appeals) VI, Mumbai has erred in enhancing the disallowance of interest under section 14A to ₹.153.01 lakhs as against disallowance of ₹.16,25,921/- made by the Assessing Officer. The appellant submits that the CIT (A) should

have deleted the whole of addition made by the Assessing Officer instead of enhancing the addition made by the Assessing Officer.

2. The learned CIT (A) also erred in confirming the disallowance of interest paid under section 36(1)(iii) to the extent of ₹.263.83 lakhs as against the disallowance made by the Assessing Officer to ₹.324.58 lakhs as non-business expense. The appellant submits that there was no justification for making any disallowance on the above ground. The learned CIT (A) also erred in confirming the disallowance of interest in respect of advance given to ₹.11.90 lakhs against ₹.15.60 lakhs disallowed by the Assessing Officer”.

7.1 Ground No.1 pertains to the issue of disallowance under section 14A. The Assessing Officer noticed that assessee has earned a dividend of ₹.42,18,500/- on an investment of ₹.1,08,39,473/- in Zee Tele Films Ltd. After considering assessee's arguments and considering the facts that assessee's share capital and own funds having been wiped out due to losses, invoked the provisions of section 14A for disallowance of interest on the above investment amount at 15% (₹.16,25,921/-) and also 5% of dividend of ₹.42,18,500/- i.e. ₹.2,10,925/- as administrative expenses under section 14A. Assessee contested the same. The CIT (A) while considering the issue of section 14A along with other issues under section 36(1)(iii) enhanced the disallowance under section 14A to ₹.153.05 lakhs as against ₹.16,25,921/- made by the Assessing Officer. There is no dispute about disallowance with reference to 2% of administrative expenses on the dividend earned as it is not contested either by assessee or by the Revenue. Assessee in the grounds contests only the disallowance of interest under section 14A on the investments made.

7.2 The issue in Ground No.2 is with reference to the disallowance under section 36(1)(iii) on various advances given for investments in share application money etc., The Assessing Officer

considered the disallowance on two different amounts; one on advances given interest free to Shri Rishi Kumar Chakrapani (₹.4 lakhs), Maharashtra Pradesh Congress Committee (₹.1 crore) and Mr. Deepak Shourie (₹.3,75,000/-). The interest at 15% on the above amounts was disallowed by the Assessing Officer under section 36(1)(iii). Out of this, the CIT (A) confirmed the disallowance of interest on amount advanced to Shri R.K. Chakrapani (₹.60,000) and the amount of ₹15 lakhs advanced to MPCC considering that they have been given for non business purposes. He deleted the amount with reference to advance to Mr. Deepak Shourie which was held to be for business purposes. In addition to the above, the Assessing Officer also considered investments and disallowed interest under section 36(1)(iii) out of the share application money given and advances for purchase of shares totaling to ₹.3,45,80,955/-. The details of the amounts advanced are stated in Para 3.1 and the disallowances were worked out in Para 3.6 of the order. In appeal, the CIT (A) examined the issue and came to the following conclusions while confirming the amount at Para 2.8 which are as under:

“2.8 I have considered the submission of the appellant, however, I do not agree with the contention of the appellant as assessee’s own fund has been exhausted in view of substantial losses in the business and the majority of the investment in the shares have been made during the year and accordingly, the disallowance is required to be reworked out. The appellant was asked to give actual interest pertaining to all the activity of the appellant company considering the period of utilization of the borrowed fund. The appellant has given the working and he has agreed during the course of hearing that the money invested into the shares and the amount advanced for acquisition of shares which has been considered by the Assessing Officer in Para 2 & 3 of his order is out of borrowed interest bearing fund. As per the working given by the appellant, the interests allocable to the various activities are as under:

S.No	Particulars	Amount
1	Interest on funds utilized for trading operations	697.23 lakhs
2	Interest on funds in equity shares held as investment	200.54 lakhs
3	Interest in respect of amount advanced for acquisition of shares	345.80 lakhs
4	Interest required to be disallowed on interest free advance to MPCC & Mr.Rishikumar Chakrapani	15.60 lakhs

2.9 Against the above working, the appellant has debited gross interest in its books of account at 14.49 crore and has also received interest on loan which was credited to Profit & Loss A/c at 4.89 crore and accordingly, net interest paid which is required to be considered as cost of borrowing is 9.60 crore. Taking the same ratio of 12.59 crore as actual utilization worked out by the appellant with the net interest debit of 9.60 crore as worked out above, the various disallowance comes as under:-

Disallowance on account of equity shares held as investment	153.01 lakhs
Interest in respect of interest free advance given	11.90 lakhs
Amount advanced for non business purposes as per Para-3 of the Assessing Officer's order	263.86 lakhs

2.10 Accordingly, the total disallowance under 14A is enhanced to 153.01 lakhs against 16.25 lakhs worked out by the Assessing Officer. Similarly, disallowance under section 36(1)(iii) in respect of advance given to Rishikumar Chakrapani & MPCC Committee is scaled down to 11.90 against 15.60 worked out by the Assessing Officer. Similarly, disallowance under section 36(1)(iii) in respect of advance given on acquisition of shares is computed at ₹.263.86 against 324.58 lakhs worked out by the Assessing Officer. Accordingly, Assessing Officer is directed to adopt the above

disallowance apart from 2% in respect of proportionate management expenses as discussed above. In the result, the loss determined by the Assessing Officer is reduced and the income is considered as enhanced”.

Thus he enhanced the disallowance under section 14A on the amount of interest pertaining to equity shares held as investment and restricted the interest on advances given from ₹.15.60 lakhs to ₹.11.90 lakhs. Assessee is contesting the above action of the CIT (A) in the grounds raised.

7.3 It was the contention of the learned Counsel that the CIT (A) has no powers to enhance the amount as was done by him under section 14A as the provisions speak of satisfaction of the Assessing Officer for disallowance of the amount. It was further submitted that as per the decision of the Hon'ble ITAT in the case of Blue Star India Ltd in ITA Nos.1838 & 1840/Mum/2007 dated 30.09.09, the disallowances can be restricted to the actual amount originally allowed by the Assessing Officer. Therefore, the CIT (A)'s action in enhancing the amount is not correct. Further it was submitted that the ratio adopted by the CIT (A) in allocating the amount is artificial, notional and rate of interest is also not correct. Further it was submitted that assessee is in the business and was approved by the RBI as NBFC and therefore the amounts advanced and loans considered are to be considered as for the purpose of business. Therefore, disallowance under section 36(1)(iii) does not arise.

7.4 The learned Departmental Representative however, in his reply submitted that the CIT (A) has equal powers with that of Assessing Officer and whatever Assessing Officer can do the CIT (A) can also do. Therefore, there are no restrictions on CIT (A) to consider the enhancement of the amount, if the Assessing Officer has done something wrong in the assessment. With reference to the disallowance of amount, he supported the order of the CIT (A) to submit that he has examined the nature of the amount and restricted the amounts accordingly.

7.5 We have considered the issue and perused the record. There is no dispute with reference to the fact that the amounts are to be disallowed under section 14A, if they are utilized for the purpose of earning exempt income. Further, there is no dispute that if the amounts are diverted for non business purposes, the disallowance under section 36(1)(iii) is also required to be made. Therefore, with reference to the disallowance per se the legal provisions do attract about the disallowance on which there is no dispute. However, the issue is with reference to the quantum of the disallowance and amounts to be considered. The Assessing Officer originally has considered only the investment in Zee Tele Films Ltd alone for consideration of disallowance under section 14A as that investment only yielded dividend income which was exempt, whereas the CIT (A) considered the entire amount invested in shares for disallowance. However, in our view, neither the Assessing Officer nor the CIT (A) examined whether the investment in shares is also assessee's business activity or not. As seen from the order in earlier appeal for AY 1999-2000, we have noticed that disallowance under section 36(1)(iii) was restricted to the amounts advanced as share application money, whereas disallowance on other amounts was not done. Assessee also contested that investment in own trading in shares is its business activity. This aspect requires examination by the Assessing Officer. Not only that assessee had its own funds in earlier years and the nature of investment made therein in those years if carried over cannot be considered as investments out of the borrowed funds. Unless the amounts on which the interest was paid was related to either share investment activity or share trading activity and necessity for borrowing funds was examined by the Assessing Officer and the nexus established, it is very difficult to arrive at the disallowance on proportionate basis out of the total funds available to the respective investments as was done by the CIT (A). It was the observation of the Assessing Officer that

assessee's capital has been wiped out as assessee has suffered losses. The issue of borrowing funds in the year and utilization of the funds, whether they are for the purpose of business or not, have to be examined afresh. Therefore, without giving any finding on the amount of quantum to be considered, we restore the issues covered in Ground No.1 with reference to disallowance under section 14A and also disallowance of interest to the extent of ₹.324.58 lakhs made by the Assessing Officer (restricted by the CIT (A) to ₹.263.83 lakhs) to the file of the Assessing Officer to examine the contention of assessee that funds are utilized for the purpose of business and to establish the nexus, if any of borrowed funds diverted to non-business purpose and accordingly disallow the amount. We make it clear that the disallowance, if any, made should not exceed the amounts contested by assessee in the grounds of appeal as the Revenue has accepted the restriction of disallowance under section 36(1)(iii).

7.6 With reference to the disallowance in respect of advance to Shri Rishikumar Chakrapani and to the MPCC, on facts we are of the opinion that the amounts were advanced for non business purpose and there is nothing on record to indicate that these advances are for the purpose of business. Consistent with the view taken in AY 1999-2000 in appeal No.ITA No.933/Mum/2006, the disallowance of interest in respect of advances to Shri Chakrapani stands confirmed. Further the disallowance confirmed by the CIT (A) to the extent of advance given to the MPCC also stands confirmed as there is no evidence on record that the amount was advanced for business purpose. Accordingly the sub-ground in Ground No.2 with reference to disallowance to the extent of ₹.11.90 lakhs stands confirmed and that part of the ground is rejected.

7.7 The Assessing Officer is directed to examine the facts and arrive at the disallowance under section 14A/36(1)(iii) on facts and applicable law while re-determining the disallowance in

consequential proceedings. It is also noticed that the issue of disallowance under section 14A in 2000-01 was restored to the file of the Assessing Officer by the order of the ITAT in ITA No.7238/Mum/2003 dated 6.3.2009. The findings if any in that year may also be kept in mind while treating the disallowances in this year. Assessee should be given an opportunity and its submissions should be examined properly. The Assessing Officer is also directed to examine whether the amounts disallowed can also be set off against the capital gain income, if there was income from capital gain on the investment activity. With these directions, the issue in Ground No.1 and partly in Ground No.2 pertaining to the interest disallowance to an extent of ₹.263.83 lakhs is restored to the file of the Assessing Officer. The orders of the Assessing Officer and the CIT (A) are set aside to that extent for redoing it according to law and facts.

7.8 In the result the appeal in ITA No. 1494/Mum/2005 is partly allowed.

ITA No.4682/Mum/2007 – AY 2003-04.

8. In this year assessee has raised only one ground on disallowance of interest of ₹.7,28,32,759/- out of ₹.19,31,06,072/- disallowed by the Assessing Officer. It was the contention that assessee paid interest on borrowings which have been applied in the business which constitute investment on share trading and investments for the purpose of business. The Assessing Officer on examination of the various investments and advances given by assessee towards share application money, interest free advances restricted interests claimed and made a disallowance of ₹.19.31 crores which the CIT (A), based on the submissions of assessee restricted it to proportionate amount and disallowed the amount of ₹.7.28 crores, as considered in Para 3.6 of the CIT (A)'s order.

8.1 Considering the arguments of the learned Counsel and the learned Departmental Representative, we are of the opinion that the issue is to be re-examined by the Assessing Officer in the light of the decisions taken in AY 2001-02 above. Unless there is a finding that assessee's investment is not business activity and the funds are not utilized for the purpose of business, disallowance under section 36(1)(iii) does not arise. There is no disallowance under section 14A in this year as the dividend income was taxable. Therefore, the interest disallowance has to be considered under section 36(1)(iii). If there is income or loss under the head "capital gains", the interest disallowance under section 36(1)(iii) pertaining to the investment activity is also to be considered as deduction, while working out the capital gain. Accordingly, the Assessing Officer is directed to examine the nexus with borrowed funds on which interests was claimed to the utilization of funds either in investment activity or in business activity and disallow amount accordingly under section 36(1)(iii) and consider whether it is allowable while working out capital gain etc. In the case of advances to Mr.Rishikumar Chakrapani and also to MPCC, consistent with the stand taken in the earlier years, the interest disallowance on the above amount has to be disallowed as there are already findings that the amounts are advanced for non business purposes. To that extent, the disallowance of interest stands confirmed. With these directions the issue in this ground is restored to the file of the Assessing Officer for fresh consideration after examining the facts and to decide according to law. Assessee should be given an opportunity to make submissions and furnishing the necessary details in this regard. With these directions the appeal is considered as partly allowed for statistical purposes.

ITA No.1912/Mum/2008 – AY 2004-05

9. In this year assessee raised only one ground on disallowance of interest of ₹.9,78,48,670/- out of ₹.15,26,40,065/- disallowed by the Assessing Officer.

9.1 Considering the arguments of the learned Counsel and the learned Departmental Representative, we are of the opinion that the issue in this appeal is also to be re-examined by the Assessing Officer in the light of the decisions taken in AY 2003-04 above. Unless there is a findings that assessee's investments is not business activity and the funds are not utilized for the purpose of business, disallowance under section 36(1)(iii) does not arise. There is no disallowance under section 14A for this year as the dividend income was taxable. Therefore, the interest disallowance has to be considered under section 36(1)(iii). If there is income or loss under the head "capital gains", the interest disallowance under section 36(1)(iii) pertaining to the investment activity is also to be considered as deduction, while working out the capital gain. Accordingly, the Assessing Officer is directed to examine the nexus that borrowed funds on which interests was claimed to the utilization of funds either in investment activity or in business activity and disallow amount accordingly under section 36(1)(iii) and consider whether it is allowable while working out capital gain etc. In case advances to Mr.Rishikumar Chakrapani and also to MPCC consistent with the stand taken in the earlier years, the interest disallowance on the above amount has to be disallowed as there are already findings that the amounts are advanced for non business purposes. To that extent the disallowance of interest stands confirmed. With these directions the issue in this ground is also restored to the file of the Assessing Officer for fresh consideration after examining the facts and according to the law. Assessee should be given an opportunity to make submissions and furnishing the necessary details in this regard. With these

directions the appeal is considered as partly allowed for statistical purposes.

10. In the result, assessee's appeal in ITA No. 933/Mum/2006 is dismissed and other appeals are partly allowed for statistical purposes.

Order pronounced in the open court on 24th February, 2012.

Sd/-
(V.Durga Rao)
Judicial Member

Sd/-
(B. Ramakotaiah)
Accountant Member

Mumbai, dated 24th February, 2012.

Vnodan/sps

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The concerned CIT(A)*
4. *The concerned CIT*
5. *The DR, "G" Bench, ITAT, Mumbai*

By Order

Assistant Registrar
Income Tax Appellate Tribunal,
Mumbai Benches, MUMBAI