

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH – AHMEDABAD

Before S/Shri N. S. Saini, AM and S. S. Godara, JM

ITA No.14/Ahd/2012	Asst. Year 1997-98
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Ashima Dyecot Limited, Texcellence Complex, Nr. Anupam Cinema, Khokhra, Ahmedabad.	Vs	Dy. CIT, Central Circle -1(3), Ahmedabad.
(Appellant)		(Respondent)
PA No.AACCA 2753K		

ITA No.58 & 59/Ahd/2012	Asst. Year 1997-98 & 1999- 2000
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Asstt. CIT, Central Circle -1(3), Ahmedabad.	Vs	Ashima Dyecot Limited, Texcellence Complex, Nr. Anupam Cinema, Khokhra, Ahmedabad.
(Appellant)		(Respondent)

Assessee by	Shri Vijay Ranjan, AR
Revenue by	Shri D. C. Mishra, Sr. D.R.

Date of hearing: 7/5/2015
Date of pronouncement: 9/6/2015

O R D E R

PER S. S. Godara, Judicial Member

These are three appeals. The relevant AYs are 1997-98 & 1999-2000. The assessee and the Revenue have filed cross appeals

in the former assessment year. The Revenue has filed another appeal in the latter assessment year. All these cases have arisen from a common order of the CIT(A)-III, Ahmedabad dated 21.10.2011 in both assessment years. The relevant proceedings are under section 143(3) read with 254 of the Income-tax Act; (in short the Act).

For the sake of convenience and brevity, we proceed assessment year-wise.

Assessment Year 1997-98. Assessee's appeal ITA 14/Ahd/2012 and Revenue's appeal 58/Ahd/2012.

2. The assessee's appeal raises following grounds :-
 1. On the facts and in the circumstances of the appellant's case, the CIT(A) erred in not allowing the appeal (fully).
 2. Without prejudice, on the facts and in the circumstances of the appellant's case, the CIT(A) erred in holding that even for A.Y. 1997-98 (i.e. prior to A.Y. 2004-05) interest for the period falling after commencement of production will not be allowable on the borrowings which were allegedly referable to those assets which had not been used for actual production and further erred in not allowing deduction of a sum of Rs.1,97,32,000/- which pertained to the period falling after commencement of production.

3. Without prejudice on the facts and in the circumstances of the appellant's case, the Assessing Officer was directed only to give effect according to decision of Core Healthcare's case by Tribunal and accordingly the Assessing Officer had no jurisdiction and in turn CIT also to raise new issues on facts and in law.
4. Without prejudice on the facts and in the circumstances of the appellant's case, the CIT(A) erred in inferring that out of the original project if some of the business asset are not used for actual production then in respect of those assets business is not set up on the date of commencement of production.
5. Without prejudice on the facts and in the circumstances of the appellant's case the CIT(A) erred in inferring that after completion of original project if further expansion of business takes place then interest on borrowings for that expansion will be deductible but interest attributable to those assets which constituted part of original project would not be allowable even for the period falling after the commencement of production.
6. The appellant craves leave to add, alter, amend and/or withdraw any ground or grounds of appeal either before or during the course of hearing of the appeal.

Similarly, the Revenue's pleading read as under :-

1. The Id. CIT(A) has erred in law and on facts in directing the Assessing Officer to further examine the project report to know whether all the machineries in respect of which loan was sanctioned prior to the setting up of the business of the assessee had been put to use for commercial production, even though the assessment order has been passed on the

basis of directions issued by Hon'ble ITAT and detailed verifications have been made by the AO.

2. On the facts and in the circumstances of the case and in law, the CIT(A) ought to have upheld the order of the AO.
3. It is, therefore, prayed that the order of the CIT(A) be set aside and that of the AO be restored to the above extent.

3. This is second round of litigation between the parties upto the "tribunal". The sole issue in question is that of interest disallowance of Rs.1,97,32,000/-. The Assessing Officer had framed a regular assessment on 29.3.2000 inter alia disallowing the impugned interest sum capitalized and also claimed as revenue expenditure. The assessee preferred an appeal. The CIT(A) in its order dated 8.6.2001 deleted the aforesaid disallowance. The Revenue filed ITA 2003/Ahd/2001 before the Tribunal. The assessee submitted therein that an identical issue had arisen in its case in assessment year 1995-96 in ITA 720/Ahd/1999 and a coordinate bench in its dated 25.11.2003 had remitted the issue back to the assessing officer for decision afresh as per case law of DCIT vs. Core Health Care 298 ITR 198 (SC). The latter coordinate bench accepted this prayer of the

assessee and passed a remand order accordingly for verification of the facts as per the aforesaid case law.

4. The Assessing Officer took up consequential proceedings. He noticed the assessee to have capitalised the interest expenses in question. And also raising the very claim as revenue expenditure. He drew distinction in facts of the instant case with those involved before the hon'ble Supreme Court (supra). And arrived at a conclusion that interest claim was disallowed on the ground that the said assessee had installed new machinery but production had not started. He further observed that it was not the department's case before the hon'ble apex court that a new business had been set up or commenced during the assessment year in question. Thereafter, the assessing officer turned to the facts of the instant case. The assessee had started its commercial production on 23.9.96. and continued to make heavy additions during October to March 1997 of Rs. 38, 38, 78,342/-. The assessee had also shown capital work in progress as on 31.3.1997 of Rs.16, 01, 69, 517/-. This total sum reads almost Rs.54 crores. The assessing officer quoted alleged failure in producing details of the abovesaid outgo and substantive

addition in its plant and machinery even after its commercial production had started with usage of borrowed fund to invoke section 36(1)(iii) of the Act. He tabulated the facts of assessee's case as under :

Different situations	Stage	Tax treatment
Situation 1 –Business is newly set up in the case of newly started concern.	Upto the time of commencement of commercial production	Interest liability up to the stage of commencement of production should be capitalized –Challapalli Sugars Ltd. vs. CIT (1975) 98 ITR 167 (SC)
	After the asset is first put to use	It cannot be capitalized (Expln.8 to sec.43(1). It may be claimed as deduction under section 36 (see also Note infra)
Situation 2 –An existing concern acquiring asset for expanding the same business	Upto the time the asset is put to use	It can be capitalized (i.e. added to the cost of asset). It cannot be claimed as deduction as revenue expenditure under section 36 (proviso to sec.36(1)(iii))
	After the asset is first put to use	It cannot be capitalized (Expln.8 to sec.43(1). It may be claimed as deduction under section 36.
Situation 3 –An existing concern acquiring assets to set up a new undertaking which is an extension to existing business	See Situation 2	
Situation 4 –An existing concern acquiring asset to set up a new undertaking	See Situation 1	

which is not an extension to the existing business	
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This resulted in the impugned disallowance being made of interest sum amounting to Rs.1,97,32,000/-.

5. The assessee preferred an appeal. The CIT(A) has partly accepted its arguments as follows :

“4. I have considered the statement of facts attached with the appeal memo. It may be mentioned that the Hon'able ITAT while setting aside the issue to the file of the AO has directed the AO as under:

"14. We have considered the rival submissions and perused the record. We find that the fact of the case required verification in the light of the judgement of jurisdictional High Court in the case of DC IT versus-Core Healthcare Ltd from the record. Under the circumstances we are sending back the matter to the file of AO with a direction to verify the facts in the light of the judgement of jurisdictional High Court cited supra and decide the matter accordingly after providing reasonable opportunity of hearing to the assessee. "

4.1. After verifying the facts from the record, the AO observed in the assessment order as under:

"The facts of the case as appearing in the case of Core-Healthcare and that of assessee are materially different. This is so, because in the case of assessee even though the commercial production was started on 23/9/1996, the assessee continued to make heavy additions towards plant and machinery and the addition during October to March 1997 period amounted to Rs.38,38,78,342. In addition, the assessee has also shown capital work in progress for the year ending 31/3/1997. at an amount of Rs.16,01,69,570. Thus, in the case of assessee, after the start of commercial production, the addition in plant and machinery including capital work in progress comes to Rs.54 crores approximately. This was not the fact in the case of Core

Healthcare Ltd and hence, since the facts are not identical, with due respect to the apex court's decision, it is submitted that though the assessing officer relied upon the said case, If %vas not the only case biit several other case laws were also relied upon."

4.2. In this case the commercial production-was started on 23/9/1996. This fact has not been disputed by the AO in the assessment order. According to the AO since the business is 'newly setup, up to the time of commencement of commercial production the interest liability up to the stage of commencement of production should be capitalised as held by the Hon'ble Supreme Court in the case of Challapalli Sugar Ltd, 98 ITR 167 (SC). However, after the asset is first put to use, the interest expenses cannot be capitalised in view of explanation 8 to section 43

(1). In that case only it can be claimed as deduction -under section 36 of the Income-tax Act. According to him, since all the assets have not been put to use up to the commencement of commercial production, in that case in respect of those assets which are put to use after the commencement of commercial production, interest pertaining to the period after the commencement of commercial production but before the asset is first put to use, may be capitalised. Alternatively at the option of the taxpayer interest can be claimed as deduction under section 36 as revenue expenditure. The AO also referred to a situation where an existing concern acquires asset for expending its business. In that case upto the time the asset is first put to use the interest on the borrowed capital can be capitalized. It cannot be claimed as deduction under section 36 of the Income-tax Act. The interest can be claimed only after the asset is first put to use. According to the AO, since the assets has not been put to use the interest thereon cannot be allowed as revenue expenditure under section 36 of the Income-tax Act.

4.3. During the course of appeal proceedings, the AR was asked to produce the project report submitted for sanctioning of the loan to know as to in respect of which, plant and machinery the appellant obtained loan for its new project. It may be mentioned that it is possible that the appellant applied for loan of Rs. 'X' for its new project of business, say, in respect of 10 looms. Out of this, the appellant installed only two Looms (say) and stalled commercial production out of these, two looms. The balance eight looms were not yet put to use for the commercial production. In that case, the appellant would be entitled to interest in respect of the borrowed funds used for the purchase of two looms only. In respect of the balance eight

looms not put to use or from which commercial production had not started, the appellant would not be entitled to interest. However, the project report could not be submitted by the AR before me on the ground that the same is not readily available.

4.4. It may be clarified that the decision of Hon'ble Supreme Court in the case of Core Healthcare is in respect of the claim of interest on the borrowed funds used for the expansion of the business of the assessee. There is a difference between expansion and newly setup of the business. The business cannot be expanded unless it is first fully setup. If the original project of the appellant was to install 10 looms and only two looms are put to use by the appellant out of the 10 looms and from such two looms the appellant had started commercial production, then it cannot be said that the balance eight looms represent the expansion of the business. The decision of Hon'ble Supreme Court; in the case of Core Healthcare would not apply in respect of the interest expenses incurred for the purchase of the eight looms. In this case, the setting up of the business will mean the installation and commercial production from all the 10 looms. If however, after setting up and ' commercial production from the 10 looms, the appellant wants to expand his business by putting up another five looms, then it would amount to the expansion of the business for which the interest would be allowable on the borrowed funds to purchase the five looms. The honourable Supreme Court in the case of Gore Healthcare has discussed the situations about the interest expenditure on the borrowed funds of the live looms. It does not discuss the situation: regarding the eight looms not put to use for the newly setting up of its business. Further, the contention of the appellant that the ITAT, Special Bench in the case of Ashima Syntex Ltd., 117 ITD.1 (Ahd) has allowed interest expenses, is of no help since in that case there was no such finding of the AO that the Plant and Machinery has not been put to use. In the present case the AO has categorically mentioned that during the year ending March, 1997 the appellant has purchased Plant and Machinery of Rs.38.38 crores out. of which Rs. 16.01 .crores is shown as capital work-in-progress and that after the date of commercial production-on 23/9/1996, the appellant has purchased total Plant & Machinery worth Rs.54 crores including the capital work-in-progress. This finding of the AO is not 'disputed by the appellant. This shows that all the Plant & Machinery was not put to use by the appellant for its production. It is therefore essential to know whether such Plant and Machinery is purchased by the appellant out of its own funds or borrowed funds.

4.5. In view of the above discussion, the AO is directed to examine the project report to know whether all the machineries in respect of which the loan was sanctioned prior to the setting up of the business of the appellant, had been put to use for commercial production. If he finds that only some of the machineries as per the project report have been installed and put to use for the commercial production, then he would allow interest expenses on the borrowed funds utilised for the purchase of only those machineries which had been put to use for commercial production. In respect of the machinery not put to use for commercial production interest expenses on the borrowed funds will be disallowed by him. The appellant would be entitled to capitalisation of such interest expenses in the cost of that plant and machinery till the time it is put to use for commercial production. It would be the duty of the appellant to provide the details of project report and the machineries put to use for commercial production in respect of which, the loan was obtained by the appellant and claimed in the return of income.”

This leaves both the parties aggrieved.

6. We have heard both the sides and perused the case files. The assessee refers to the hon'ble apex court's judgment in Core Health Care (supra) and submits that section 36(1)(iii) only requires the interest sum in respect of capital borrowed for the purpose of the business or profession. The Revenue seeks to restore the Assessing Officer's finding. We intend to disagree with submissions of both the parties. It stands narrated in the preceding paragraph that a coordinate bench in its earlier order has already held facts of the issue involved in the impugned assessment year identical to those in assessment year 1995-96 (supra). However, both the lower

authorities have nowhere considered any consequential order passed in the earlier assessment year. In other words, they have not taken into account the specific directions in the earlier remand order. Nor do the parties before us have placed on record any such consequential order passed in earlier assessment year dealing with the very issue of interest disallowance. In these circumstances, we reiterate our earlier directions and remit the grounds raised by both the parties to the Assessing Officer for passing a fresh order as per law invariably following consequential order; if any, passed in assessment year 1995-96 in furtherance to the tribunal's direction. The grounds raised by both the parties in these two appeals are allowed for statistical purposes.

ITAs 14 & 58/Ahd/2012 are allowed for statistical purposes.

Assessment Year 1999-2000 Revenue's appeal ITA 59/Ahd/2012.

A perusal of this case reveal that assessing officer had disallowed impugned interest sum of Rs.1,25,06,250/- on the very same line as in assessment year 1997-98. The CIT(A) has accepted the assessee's contentions as under :-

“6. As regards the disallowance of interest in A.Y. 1999-2000, it was stated that as on 1.4.1998 there was opening balance of Plant & Machinery of Rs.72 crores. The additions during the year are only Rs.2.68 crores. The facts are therefore, different from the facts in A.Y: '1997-98." However, the AO has followed the assessment order for A.Y. 1997-98 to make disallowance of interest of Rs. 1,25,06,250/- without mentioning as to which Plant & Machinery were not put to use by the appellant. In A.Y. 1998-99 no disallowance of interest was made by the AO on this ground. Further in A.Y. 1999-2000 the appellant has shown sales of more than 136 crores. In the absence of any contrary finding it would be presumed that the Plant & Machinery was put to use by the appellant and therefore, the interest expense is allowable on the borrowed funds for machinery. The disallowance of interest expense in A.Y. 1999-2000 is therefore, deleted.”

We have heard both sides. Case record perused. The CIT(A) has distinguished facts of the impugned assessment year with those involved in 1997-98 as adjudicated herein above. He presumes that the assessee has put to use its plant and machinery and allows the impugned interest sum to have been incurred on borrowed funds for machinery. We reiterate that the assessee has already started its commercial production on 23.9.1996. Therefore, we held it entitled for deduction of impugned sum incurred on capital borrowed for purpose of the business in question. The Revenue's grounds accordingly fail.

Revenue's appeal ITA 59/Ahd/2012 is dismissed.

To sum up, ITAs 14 & 58/Ahd/2012 are allowed for statistical purposes and ITA 59/Ahd/2012 is dismissed. Ordered accordingly.

Order pronounced in the open Court on 9/6/2015

Sd/-
(N. S. Saini)
Accountant Member
9/6/2015

Sd/-
(S. S. Godara)
Judicial Member

Mahata/-

Copy of the order forwarded to:

1.	The Appellant
2.	The Respondent
3.	The CIT concerned
4.	The CIT(A) concerned
5.	The DR, ITAT, Ahmedabad
6.	Guard File

BY ORDER

Dy. Registrar, ITAT, Ahmedabad

1. Date of dictation: 20.5.2015
2. Date on which the typed draft is placed before the Dictating Member: 21.5.2015 other Member:
3. Date on which approved draft comes to the Sr. P. S./P.S.:
4. Date on which the fair order is placed before the Dictating Member for pronouncement: _____
5. Date on which the fair order comes back to the Sr. P.S./P.S.:
6. Date on which the file goes to the Bench Clerk: 9/6/2015
7. Date on which the file goes to the Head Clerk:
8. The date on which the file goes to the Assistant Registrar for signature on the order:
9. Date of Despatch of the Order: