IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH
(Conducted Through Virtual Court)
Before: Ms. Annapurna Gupta, Accountant Member
And Ms. Suchitra Kamble, Judicial Member

ITA No. 1647/Ahd/2012
Assessment Year 2009-10

M/s. Bajaj Foods Ltd. A-401, Samudra Complex, Nr. Nest Hotel, C.G. road, Ahmedabad PAN No: AAACB6184D (Appellant)	Vs	The ITO, Ward-1(2), Ahmedabad (Respondent)

Appellant by : Shri Parimalsigh Parmar, A.R.
Respondent by : Shri Dinesh Singh, Sr. D.R.

Date of hearing : 17-02-2022
Date of pronouncement : 25-02-2022

आदेश/ORDER

PER : ANNAPURNA GUPTA, ACCOUNTANT MEMBER:-

The present appeal has been filed by the Assessee against the order passed by the Commissioner of Income Tax (Appeals)-6, Ahmedabad, (in short referred to as CIT(A)), dated 26-06-2012, u/s. 250(6) of the Income Tax Act, 1961(hereinafter referred to as the "Act") pertaining to Assessment Year (A.Y) 2009-10.

2. Ground no. 1 raised by the assessee, it was stated, was general in nature and is therefore not being dealt with by us.

3. Ground no. 2 to 2.1, it was common ground, related to the same issue of disallowance of interest u/s. 36(1)(iii) of the Act amounting to Rs.14,54,731/-. The said grounds read as under:

> *2.0 The Commissioner of Income tax (Appeals) erred in not deleting the disallowance of Rs. 14,54,731/- in respect of interest payment u/s. 36(1)(iii) The appellant submits that interest expenses were incurred wholly and exclusively for the purpose of business and no disallowance is justified. The disallowance being contrary to the facts and contrary to the provisions of law be deleted.*
> *2.1 The appellant without prejudice to above further submits that disallowance in any event is excessively high and it be directed to be substantially reduced. It is submitted that it be so held now.*

4. The contention of the Ld. counsel for the assessee before us was that identical issue stood adjudicated by the ITAT in the case of the assessee itself in assessment year 2010-11 in ITA No. 2276/Ahd/2015 vide order dated 21.02.2019 wherein the issue was restored back to the A.O. for deciding afresh. Copy of the order was placed before us.

5. Ld. D.R. fairly agreed with the above contention of the ld. Counsel for the assessee.

6. In the light of the above submissions made before us, we shall now proceed to adjudicate the issue.

7. The facts relating to the issue are that the disallowance of interest u/s. 36(1)(iii) of the Act was made by the A.O. on interest free loans and advances given by the assessee amounting in all to Rs. 1,98,55,747/- pertaining to the following :

Shraddha Intl. Rs. 29,92,179/-
Specific foods Inc. Rs. 1,68,63,587/-

8. The disallowance was made by the A.O. noting that the assessee had borrowed interest bearing funds by way of secured loans to the extent of Rs. 217.23 lacs and

paid interest thereon amounting to Rs. 25,97,905/-. The A.O. also noted that the assessee had not established any business purpose for making the advance and the interest free funds he held were invested in assets of the assessee company. He therefore held that it was borrowed funds which were used for making the interest free advances and accordingly disallowed interest thereon @ 12% which worked out to Rs. 23,82,690/- but was restricted to the extent of interest payment made by the assesse of Rs. 14,54,731/-.

9. The ld. CIT(A) upheld the disallowance.

10. We have gone through the order of the ITAT in the case of assessee in assessment year 2010-11 and we have noted therefrom that the ITAT on finding that the assessee's pleadings, that it had sufficient own funds to cover the advances for business purposes, was not adjudicated despite specific submissions made before the lower authorities, restored the issue back for adjudication afresh. The relevant findings of the ITAT at para 5 of the order is as under:

> *5. We have heard both the sides and perused the maternal on record carefully. In respect of outstanding advance of Rs.3.63 crores to M/s. Bajaj Herbal Pvt. Ltd the sister concern of the assessee, the ld. CIT(A) stated that the assessee had mentioned that advance was given for the property named Sarthik (405) but no details were submitted to substantiate the fact. Therefore the ld. CIT(A) held that claim of interest u/s. 36(i)(iii) of the act was not for the purpose of the business of the assessee. In respect of advance of Rs. 22 lacs to M/s Sarnath Enterprise the ld. CIT (A) stated that it was claimed that advance was for purpose of property but no confirmation from the said party was furnished therefore the claim of interest u/s. 36(i)(iii) of the act was disallowed. It is also noticed that as per page no. 8 of the assessment order, the assessing officer stated that assessee was having interest free funds in the form of share capital and reserves and surplus to the extent of Rs. 2,61,14,663/- only. However as mentioned above in this order, the ld. counsel has submitted that the assesse was having total interest free funds aggregating to Rs. 4,41,33,783/- and pleaded that no disallowance u/s.36(i)(iii) is called for. In the light of aforesaid facts and circumstances, we observe that the Assessing officer and the ld. CIT (A) has not given categorical finding on the following issues. (i) Whether assessee had sufficient interest free funds to cover advances given to its associate concerns and no interest bearing fund was advanced to its associate concerns. (ii) Whether the money advanced to the sister concerns and others was for the purpose of business need of the*

assessee. The ld. counsel has submitted that such fact was categorically pointed out before the assessing officer and the same has not been denied by either of the lower authorities. During the course of appellate proceedings before us these contentions of the ld. counsel was not controverted by the Revenue Therefore, we are of the view that it would be appropriate to restore this issue to the file of the assessing officer to decide de-novo on the points (i) and (ii) as above after affording adequate opportunity to the assessee. Accordingly this ground of the appeal is restored to the file of the assessing officer for deciding afresh as directed above. Therefore this ground of appeal of the assessee is allowed for statistical purpose.

11. In the impugned case before us, we have noted from the order of the Ld. CIT(A) that he has restored the issue to the A.O. for determining whether the advances were for the purpose of business of the assessee, while the rest of the arguments of the assessee were rejected. Ld. Counsel for the assessee has pointed out from his submissions before the A.O. reproduced at para 5.3 of the order as under that the contention of availability of sufficient own interest free funds for making the impugned advances was made :

5.3 Assessee's submission.

The assessee filed a written submission dated 14/11/2011 stating that the said interest is paid for the purpose of business. Relevant portion of said business is reproduced as under:

> *"Our company has made payment of interest of Rs. 13,30,6947- to the banks and interest of Rs. 1,24,0377- to other aggregation to Rs. 14,54,7317- as against "' payment of interest of Rs. 12,86,8247- to the banks and payments of interest of Rs. 2227- to others aggregation to Rs. 12,87,0467- in respect of previous year ended 31st March, 2008. It is submitted that our company has made borrowing from banks for various facilities and interest has been paid to the banks for utilizing the credit facilities. It is further submitted that our company has accepted deposits from the directors of the company and the family members of the directors of the company aggregation to Rs. 67.53 lacs on which no interest has been paid by our company. It is submitted that under the circumstances it be appreciated that on the unsecured loans from the directors and others there is no payment of interest. Payment of interest has been substantially effected on secured loans to Rs. 217.23A lacs accepted by our company from the banks. We trust this will explain the query raised by your good self as to why interest of Rs. 14.55 lacs has been paid as against loans aggregating to Rs. 598.42 lacs by our company."*

12. He also pointed out that the AO had noted the quantum of interest free funds available with the assessee at page 5 para B of his order as under:

> *B) On further verification of balance sheet, it is found that the assessee company is having interest free funds in the form of share capital and reserves and surplus to the extent of Rs.84,11,519 only. The break up of which is given here under:*
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> | | |
> |---|---|
> | *Share capital* | *Rs. 2,0833,880* |
> | *Reserve and surplus* | *Rs. 1,01,59,839* |
> | *Total* | *Rs. 3,09,93,719* |

13. He pointed out that this amount of Rs.3,09,93,719/- was sufficient for making the interest free advances of Rs.1,98,55,747/-. and in view of the settled proposition of law in the case of CIT vs. Reliance Industries Ltd.410 ITR 466(SC) that where sufficient own interest free funds were available, the presumption is that the said funds were used for making interest free advances calling for no disallowance of interest, the issue be adjudicated following the said proposition.

14. Considering the above submissions of the assessee regarding the proposition of law settled by the Hon'ble Supreme court vis a vis the presumption of utilization of own funds for making interest free business advances in the case of Reliance Industries (supra) and noting the fact that the sufficiency of own funds was pointed out by the assessee ,and further considering the order of the ITAT in the case of the assessee itself in the preceding year assessment year 2010-11 restoring identical issue back to the AO for adjudication considering the availability of own funds for making interest free advances, we consider it fit to restore this issue back to the A.O. to adjudicate the issue afresh in the light of the aforesaid submissions made by the assessee.The AO is directed to verify the fact of availability of own interest free funds with the assessee for making the impugned interest free advances and thereafter adjudicate the issue in accordance with law. Needless to add, the assessee be granted due opportunity of hearing.

15. Ground No 2 to 2.1 are allowed for statistical purposes.

16. Ground no. 3 to 3.2, it was common ground, related to the same issue of disallowance of expenses amounting to Rs. 30,29,717/- invoking the provisions of section 40(a)(ia) of the Act. The said ground reads as under:

> *3.0 The Commissioner of Income tax (Appeals) erred in upholding disallowance of Rs. 30, 29, 717/- provisions of section 40(a)(ia). The appellant submits that observations made by the assessing officer are grossly incorrect. The appellant further submits that disallowance made by the assessing officer is contrary to the facts and unsustainable in the eyes of law. The disallowance be quashed.*
> *3.1 The appellant submits that under the facts and circumstances prevailing in the case there was no default and the tax at source was not required to be deducted. The appellant submits that in view of facts in case of the appellant provisions of section 40(a)(ia) were not attracted and no disallowance ought to have been made. The disallowance made by the assessing officer be deleted.*
> *3.2 The appellant without prejudice to above further submits that disallowance in any event is excessively high and it be directed to be substantially reduced . It is submitted that it.be so held now.*

17. Ld. Counsel for the assessee pointed out from the assessment order that the impugned disallowance was made on account of non-deduction tax at source on payments made for export clearing and forwarding charges, shipping freight and export expenses amounting in all to Rs. 30,29,797/- pertaining to the following parties. :

Sr. No.	*Name of the parties*	*Export clearing and forwarding charges*	*Shipping freight*	*Export expenses*	*Total*
(i)	*Freight lines (i) Pvt. Ltd.*	*536964/-*	*1434784/-*	*287722/-*	*2259470/-*
(ii)	*J.M. Baxi & Co.*		*594957/-*	*175360/-*	*770327/-*
	Total				*3029797/-*

18.It was pointed out from the assessment order that the contention of the assessee that no tax was required to be deducted on same, being payments made to agents of non-resident shipping companies for freight and for payments made on behalf of the non-residents ,was rejected by the A.O. for lack of evidence. He drew our attention to the findings of the A.O. page 13 of the A.O. order is as under:

> *The above contention of the assessee is duly considered & the same is found self serving and devoid of any merit. The submission of the assessee is very general in nature. The contention of the assessee that M/s J.M. Baxi & Co M/s Freight lines (i) Pvt. Ltd. are the shipping agents of non resident ship owners namely M/s Mearks shipping and M/s Nedloyed shipping is not tenable. Apart from tendering a bald explanation to that effect, in support of the same, the assessee has not led any evidence in this regard. In the absence of any supporting evidence produced by the assessee, the assessee's above explanation can not be accepted.*
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> *In the absence of any evidences produced by the assessee, in the matter, the assessee's explanation that M/s J.M. Baxi & Co M/s Freight lines (i) Pvt. Ltd. are the shipping agents of non resident ship owners is not acceptable. The preposition of law is unexceptionable that carry onus lies upon the assessee to prove that the payment made of Rs.30,29,727/- to M/s J.M. Baxi & co. and M/s Freight lines (i) Pvt. Ltd. are the shipping agents of non resident ship owners namely M/s Mearks shipping and M/s Nedloyed shipping Though the assessee was given reasonable opportunities to explain above payments, the assessee miserably failed to submit a single evidence which could substantiate its above contention. The assessee's failure to deduct tax in respect of above payment which involved payment to clearing and forwarding agents amounted to non- compliance with section 194C of the IT Act thereby attracting disallowance u/s. 40(a)(ia) In the totality of the facts and circumstances of the case, I therefore, concurrently come to the conclusion that the assessee has made an default in not making IDS compliance in connection with payments to above two parties. Accordingly it is held that provisions of Section 40(a)(ia) is squarely applicable to the case of the assessee. Under the context, an amount of Rs.30,29,797/-on account of payments made to above two parties is disallowed and added back to the total income of the assessee company u/s 40(a)(ia) of the Act. Penalty proceedings u/s. 271(1)(c) of the Act for furnishing inaccurate particulars of income are being initiated on this account.*

19. ld. Counsel for the assessee further pointed out that the despite reiterating these contentions before the Ld. CIT(A) also. The same were also rejected for the same reasons by the Ld. CIT(A). He drew our attention to para 4.3 of the Ld. CIT(A) order in this regards is as under:

4.3 I have considered the facts of the case; assessment order and appellant's written submission. Appellant did not deduct TDS on shipping freight and other expenses paid to C and F agents which was disallowed by the assessing officer under section 40 (a) (ia) of IT act. Appellant submitted that the payment was made to agent of nonresident shipping companies on which no TDS was deductible as per circular number 723 issued by CBDT. However appellant did not submit any evidence to prove that the payment made to C and F agents was as agents of non-resident shipping companies. I agree with the assessing officer that onus is on the appellant to prove that the ocean freight was paid to non-resident shipping companies or their agents. In the absence of this, the TDS was deductible. Since appellant could not prove that payments were made to non-resident shipping companies or their agents by documentary evidence, appellant committed default by not deducting TDS. Accordingly the addition made by the assessing officer is confirmed.

20. Before us Ld. Counsel for the assessee contended that firstly it was factually incorrect that evidences of these payments were not placed before the lower authorities. He contended that all evidences were filed before the Ld. A.O. and CIT(A) also and in this regard drew our attention to the submission of the assessee reproduced by the Ld. CIT(A) at para 4.2 of his order mentioning that the photo-copies of invoices raised by the assessee with respect to the impugned parties had been enclosed on specimen basis. He thereafter took us to the copies of the invoices placed before us at paper book page no. 70 to 50 and referring to the same pointed out that they related to payments made to agents providing export facility and were related to the Ocean freight paid by them to foreign shipping companies on behalf of the assessee, the handling charges paid by them, Bill of lading charges paid by them etc.. It was pointed out that:

a) all these payments were by way of reimbursements of expenses incurred by the agents on behalf of the assessee and were not in the nature of income of the agents and therefore no tax was liable to be deducted on the same by the assessee. Reliance was placed on the following case laws:

**** CIT vs. Gujarat Narmada Valley Fertilizers Co. Ltd. – Tax Appeal No. 315 of 2013 (Annexure "C");***

**** Smt. Madhu Mehta vs. DCIT - 181 TTJ 768 (Mum.) (Annexure "D");***

**** Eimco Elecon (India) Ltd. Vs. Additional CIT 58 SOT 14 (Annexure "E").***

(b) that even otherwise the payment for Ocean freight related to foreign shipping companies who were required to pay taxes as per the provisions of section 172 of the Act and no TDS was required to be deducted on such payments. Our attention was drawn to the following decisions in support.

**** Steelco Gujarat Ltd. Vs. ACIT – (2018) 92 taxmann.com 27 (Ahmedabad Trib.)" – Annexure "A"***

**** Bajaj Herbals Pvt. Ltd. vs. ITO – ITA 2277/Ahd/2015 and others – Anneuxre "A/1".***

21. Ld. D.R. on the other hand contended that since the invoices of the assessee had not been verified and examined by the revenue authorities and some of the sample invoices in the paper book reveal that the contention of the assessee were not entirely correct, since some invoices reveaedl payment made to the agents for freight paid to Indian shipping Companies, the contention of the assessee in this regard would fail. He therefore pleaded that the matter be restored back to the A.O. to be decided in the light of the evidences placed by the assessee.

22. We have heard both the parties. Undeniably the disallowance of expenses u/s. 40(a)(ia) of the Act has been made for want of evidences without considering the contentions advanced by the assessee on merits,but ld. Counsel for the assesee has demonstrated that the evidences were filed to the lower authorities. The issue therefore needs to be adjudicated on merits. We therefore consider it fit to restore

this issue back to the A.O. to adjudicate it afresh in accordance with law after considering and verifying the evidences filed by the assessee, and the contentions made by the assesseee. Needless to add due opportunity of hearing be granted to the assessee

22.1 Ground of appeal No.3 to 3.2 is allowed for statistical purposes.

23. Ground no. 4 to 4.2 relates to the issue of disallowance of expenses relating to payments made to non residents as per the provisions of section 40(a) of the Act amounting to Rs. 2,37,234/-. The grounds read as under:

> *4.0 The Commissioner of Income tax (Appeals) erred in upholding disallowance of Rs. 237234/- made by the AO by invoking provisions of section 40(a). The submits that observations made by the assessing officer are grossly unjustified as they have been made without affording any opportunity of being heard. The appellant further submits that disallowance made by the assessing officer is contrary to the facts and unsustainable in the eyes of law. The disallowance be quashed.*
>
> *4.1 The appellant submits that under the facts and circumstances prevailing in the case there was no default in the matter of tax to be deducted at source. The appellant submits that in view of facts of the case provisions of section 40(a) were not attracted and no disallowance ought to have been made. The disallowance made by the assessing officer be deleted.*
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> *42. The appellant without prejudice to above further submit that disallowance in any event is excessively high and it be directed to be substantially reduced. It is submitted it be so held now.*

24. Ld. Counsel for the assessee pointed out from the assessment order that the disallowance related to interest payment made to Barclays Bank , holding that it was not a resident bank but a foreign bank on which no TDS had been deducted as per

Section 195 of the Act. Disallowance of the entire interest paid to the bank of Rs. 2,37,234/- was accordingly made u/s. 40(a) of the Act. The same he pointed out was upheld by the Ld. CIT(A).

25. Ld. Counsel for the assessee pointed out that identical issue was there before the ld. CIT(A) for assessment year 2012-13 also in the case of the assessee wherein the Barclays Bank was found to be scheduled commercial bank as per the provisions of the Banking Regulation Act, 1949 and therefore was not a non resident. That the provisions of section 195 of the Act requiring tax deduction at source on interest paid to it were therefore not applicable nor was TDS required to be deducted as per section 194A of the Act also. Our attention was drawn to the relevant finding of the Ld. CIT(A) for assessment year 2012-13 , copy of which was placed as Annexure-G before us, as under:

> *5.2 Decision:*
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> *I have gone through the facts mentioned in the assessment order and the submission filed by the appellant. My predecessor in appellant's own case for A.Y. 2010-11 has given relief by following comments:-*
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> *"Ground No.5 is against the disallowances of interest payment of Rs. 1,46,079/- u/s.40(a)(ia) of the Act being payment made to foreign bank without deduction of TDS. The Assessing Officer disallowed the interest payment made by appellant of Rs. 1,46,079/- to Barclays Bank treating the same as foreign bank and on account of non-deduction of TDS u/s. 195 of the Act. The appellant during appeal proceedings submitted list of scheduled banks which are regulated under Banking Regulation Act 1949 as prescribed by RBI and Barclays bank is treated as scheduled commercial bank. It was contended that as per clause(a) of first proviso to section 194A(3) of the Act the appellant was not required to deduct TDS out of such interest payment I am inclined with appellant's contention that Barclays bank is a scheduled commercial bank under Banking Regulation Act 1949 hence appellant is not required to deduct TDS u/s.194A of the Act and also cannot be held in default u/s.201 of the Act. In such circumstances no disallowances can be made u/s.40(a)(ia) of the Act for interest payment made to bank.*

The A.O. is directed to allow such interest payment of Rs. 1,46,079/- and delete the addition so made. The appellant gets relief accordingly. This ground is disallowed."

26. Ld.DR relied on the order of the Ld.CIT(A).

27. We have heard both the parties. Undeniably the interest paid to Barclays Bank by the assessee has been added to the income of the assessee for non deduction of tax at source thereon as per section 195 of the Act treating the said Bank to be a non resident. The order of the Ld.CIT(A) in the case of the assessee however for another A.Y ,i.e A.Y 12-13 reveals that Barclays Bank was found to be a resident and no tax deductible on the interest payment made to it as per section 194A of the Act. The fact of the status of the Bank therefore appears contradictory and in the absence of the same having been examined as per law at any stage in the impugned year, this issue is also restored back to the AO for adjudication afresh . The AO is directed to determine the residential status o f the Bank to which the impugned payment of interest is made and consider the findings of the Ld.CIT(A) in A.Y 2012-13 for the same. He may thereafter adjudicate the issue of disallowance of the expense for non deduction of tax at source in accordance with law. Needless to add the assessee be granted due opportunity of hearing in this regard.

28. Ground of appeal No.4 to 4.2 is allowed for statistical purposes.

29, In effect appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 25-02-2022

Sd/-	**Sd/-**
(SUCHITRA KAMBLE)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER True Copy	**ACCOUNTANT MEMBER**

Ahmedabad : Dated 25/02/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-