IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR

VIRTUAL HEARING

BEFORE: DR. S. SEETHALAKSHMI, JM
&
SHRI RATHOD KAMLESH JAYANTBHAI, AM

ITA No. 502/Jodh/2018
(ASSESSMENT YEAR- 2004-05)

M/s Sunil & Company 29/12 Light Industrial Area, Jodhpur	Vs	ACIT, Circle-01, Jodhpur
(Appellant)		**(Respondent)**
PAN NO. AAAFS 4988 B		

Assessee By	Sh. Amit Kothari, CA
Revenue By	Sh. S. M. Joshi, JCIT-DR
Date of hearing	14/07/2023
Date of Pronouncement	03/08/2023

O R D E R

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by assessee and is arising out of the order of the Commissioner of Income Tax (Appeals)-1, Jodhpur dated 31.07.2018 [here in after referred as (CIT(A))] for assessment year 2004-05 which in turn arise from the order dated 28.03.2013 passed

under section 143(3)/254 of the Income Tax Act, by ACIT, Circle-01, Jodhpur[here in after reffered to as "ld. AO"].

2. The assessee has marched this appeal on the following grounds:-

> *"1. That on the facts and in the circumstances of the case, Ld. CIT(A) erred in sustaining the disallowance of interest for Rs. 13,23,694/- made by Ld. AO.*
> *2. The appellant crave liberty to add, amend, alter, modify, or delete any of the ground of appeal on or before its hearing before your honour."*

3. At the outset of hearing, the Bench observed that there is delay of 03 days in filing of the appeal by the assessee for which the ld. AR of the assessee filed an application for condonation of delay with following prayers:

> "Sub: Application for condonation of delay of 3 days in filing of appeal.
> The above appeal is preferred against the order of Ld. CIT(A)-1, Jodhpur.
>
> 2. The appeal ought to have been filed on 30/10/2018. But as the CA appeared before CIT(A) and received order, erroneously intimated last date of filing as 09/11/2018 (date of receipt erroneously taken as 10/09/2018 instead of 30/08/2018), and due to engagement of professionals in Income Tax Audits the correct date was not examined in due course and the appeal could not be preferred within the statutory period. Hence a delay of 3 days is caused in filing the appeal. The said delay is not due to wilful default.
>
> It is prayed that the ITAT Bench may be pleased to condone the delay of 3 days in filing the appeal."

4. During the course of hearing, the ld. DR did not objected to assessee's application for condonation of delay and prayed

that Court may decide the issue as deem fit in the interest of justice as delay is of three days only.

5. We have heard the contention of the parties and perused the materials available on record. The prayer by the assessee for condonation of delay of three days has merit and we concur with the submission of the assessee. Thus, the delay of three days in filing the appeal by the assessee is condoned in view of the decision of Hon'ble Supreme Court in the case of Collector, land Acquisition vs. Mst. Katiji and Others, 167 ITR 471 (SC) as the assessee is prevented by sufficient cause and therefore, the appeal is admitted and the same is decided based on the merits of the case.

6. The fact as culled out from the records is that in this case return was filed on 18.10.2004 declaring total income at Rs. 20,51,390/-. Assessment u/s 143(3) was completed on 29.12.2006 by then AO, ACIT 14(2), Mumbai at total income of Rs. 40,54,590/- by making following additions:

1. Disallowing purchases amounting to Rs. 2,12,551/- which were bogus in view of the observation of the ld. AO.
2. Disallowance of interest u/s. 36(1)(iii) of Rs. 16,33,869/-.

3. Disallowance of part of personal nature expenses of Rs. 1,56,776/-.

Against the above additions so made the appeal filed by the assessee before the CIT(A) against these additions. The said appeal was dismissed. Thereafter the assessee filed second appeal before the Hon'ble ITAT. The Hon'ble ITAT confirmed the addition on a/c of personal nature expenses amounting Rs. 1,56,776/-. Whereas, regarding other two issues restored back to the issue to the file of AO. To decide the issues afresh notice u/s 143(2) was issued to the assessee on 07.11.2012. Originally, appellant was being assessed at Mumbai, later, in the meanwhile, assessee got itself transferred to the jurisdiction of present AO. Now the assessee before us in the second round of litigation. The only issue before us in the second round is disallowance of interest which was earlier disallowed for an amount of Rs. 16,33,869/- which was reduced by the ld. AO and confirmed the addition to the extent of Rs. 13,23,694/-.

7. Aggrieved from the said order again the assessee preferred an appeal before the Commissioner of Income Tax, Appeals-1, Jodhpur. A propose to the grounds so raised the relevant finding of the ld. CIT(A)/NFAC is reiterated here in below:

"5.2.1 Following the directions of the Hon'ble ITAT vide Order in ITA No. 3147/Mum/2009 dated 09.03.2011, the assessing officer has considered the submissions of the appellant that as per balance sheet of the assessee on 31st March 2004, Rs.51.70 lacs was net profit of appellant.

However, the appellant wanted that Rs. 23.05 lacs also be added back to its profit, in arriving at the profit for the year, because this amount was debited for claiming the depreciation, which otherwise was not an outgo in real terms. AO rightly declined the claim of the appellant stating that though, depreciation is not an actual expenditure and hence it is not an outflow of funds but as per the Income Tax norms depreciation is to be claimed and allowed compulsorily if the assessee is eligible to get it. If there remains unabsorbed depreciation in the case of any assessee than it is carried forward until it becomes nil by reducing its amount from income of any subsequent year. In this way it is outflow of fund. I do concur with the view of the AO. In the case of Bombay Sales Corporation [2017] 86 taxmann.com 9 (Ahmedabad - Trib.) held that, since no interest free own funds were available at disposal of assessee, disallowance of proportionate interest expenses was justified.

5.2.2 Assessing Officer accepted the contention of the assessee that it had net profit of Rs.51.70 lacs. AO further stated that the appellant did not earn this profit in one day or it was not remaining same throughout the year. Therefore for simplification, he considered that it was zero at the beginning of the year and Rs.51.70 lacs (Rs.51,69,579/-) on the last day of the year i.e. 31.03.2004. Accordingly, for calculation purpose its average value Rs.25,84,790/- was taken and interest amount @12% was computed to Rs.3,10,175/-. Accordingly, interest amounting to Rs.16,33,869/- disallowed earlier was reduced by the amount Rs.3,10,175/-; thus, effective disallowance became Rs.13,23,694/-. Appellant himself had been charging interest in earlier years but non-charging of interest in the year under consideration cannot be agreed to in view of discussion at paras 5.1 and subparas included thereto, above. Thus, I do not find any infirmity in the stand taken by the assessing officer; disallowance made by the AO is confirmed, hereby. Appellant fails on this front.

6. In the result, the appeal is dismissed."

8. The ld. AR appearing on behalf of the assessee has filed a paper book containing the following submission / evidences:

S. No.	Particulars	Pages
1	Written submissions filed before ld. CIT(A) on 23.02.2007 and 27.07.2018	1-7
2	Submissions filed before ld. AO	8-10
3	Copy of Judgment in the case of Bright Enterprises P. Ltd. vs. CIT (2015) 381 ITR 107 (P & H)	11-17
4	Documents relating to Synco Industries Ltd. showing proceedings before Board for Industrial and Financial Reconstruction.	18-26
5	Account statement of Synco Industries Ltd. for A.Y 2003-04 and A.Y 2004-05	27-31
6	Order of Hon'ble ITAT in the case of appellant for A.Y 2004-05 in which the issue relating to interest was set aside.	32-31
7	Judgment in the case of CIT vs. Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom)	42-43
8	Judgment in the case of S. A. Builders Ltd. vs. CIT (2006) 206 CTR 631 (SC)	44-45

8.1 The ld. AR of the assessee reiterated the submission filed before the ld. CIT(A) and submitted that the ld. CIT(A) has not appreciated the fact of the case and before dealing with the fact he draw our attention to the finding of the ITAT in first round of litigation

> 12. The Ld. Counsel for the assessee submitted that the assessee had sufficient interest free funds in the form of partners capital as on 31.3.2003 of Rs. 242.55 lakhs and as on 31.3.2004 of Rs. 325.74 lakhs which covered the lending to SIL of Rs. 141.52 lakhs and Rs. 122.46 lakhs on those dates respectively. In these circumstances, we deem it fit to restore the issue to the file of the AO to examine the balance sheet of the assessee on those dates and decide the issue afresh in accordance with law. The AO while deciding the issue should keep in mind the ratio of the decision of the Jurisdictional High Court in the case of CIT v. Reliance Utilities & Power Ltd., (313 ITR 340)

Referring the above observation of the ITAT and drawing out attention to the order which is under attack before us. As it is evident the assessee in the first round contended the assessee is saving sufficient free funds and based on that ITAT has set a side the issue to verify a fresh but we note from the order of the assessing passed in the second round of litigation where in he has considered the profit of the assessee after the depreciation at Rs. 51,69,579/- calculated on that the assessee entitled to a relief of Rs. 3,10,175/- [Amount relief= 51,69,579 *12 %= Rs. 6,20,350/- (Rs. 6,20,350/- was averaged out considering that the profit is earned over a period of time and arrived half of that as relief i.e. Rs. 3,10,175/-)]. We note that even the ld. CIT(A) has not dealt with the direction of the ITAT in its true spirit and therefore, the assessee is in second round of relief for the sustained addition of Rs. 13,23,694/-.

9. The ld DR is heard who has relied on the findings of the lower authorities and contended the submission made by the assessee is duly considered and the fact that the company to whom the money is advance in BIFR is also considered by the ld. CIT(A) and therefore, he relied upon the finding of the order of the ld. CIT(A).

10. We have heard the rival contentions, perused the material placed on record and gone through the direction of the ITAT given to the ld.AO in the first round of litigation. We note that the ITAT has given the following direction in the first of round litigation in ITA No. 3147/Mum/2009:

> 12. The Ld. Counsel for the assessee submitted that the assessee had sufficient interest free funds in the form of partners capital as on 31.3.2003 of Rs. 242.55 lakhs and as on 31.3.2004 of Rs. 325.74 lakhs which covered the lending to SIL of Rs. 141.52 lakhs and Rs. 122.46 lakhs on those dates respectively. In these circumstances, we deem it fit to restore the issue to the file of the AO to examine the balance sheet of the assessee on those dates and decide the issue afresh in accordance with law. The AO while deciding the issue should keep in mind the ratio of the decision of the Jurisdictional High Court in the case of CIT v. Reliance Utilities & Power Ltd., (313 ITR 340)

10.1 On this issue we note from the court file that in the year under consideration the assessee has not charged the interest on the debit balance of loan which was given to M/s. Synco Industries Limited(SIL). The said borrower is a sick company declared by the BIFR. In the original assessment proceeding an addition of Rs. 16,33,869/- was made by disallowing the claim of the assessee u/s. 36(1)(iii). The matter was restored to the file of the ld. AO to verify the fact that whether the assessee is having sufficient interest free fund or not to advanced the money to SIL. In remand proceeding the ld. AO has granted the relief of Rs. 3,10,175/- [Amount of relief= 51,69,579 *12

%= Rs. 6,20,350/- (Rs. 6,20,350/- was averaged out considering that the profit is earned over a period of time and arrived half of that as relief i.e. Rs. 3,10,175/-)]. The assessee pleaded that the fund advanced to SIL was historical in nature. The assessee firm was charging the interest on such advances till 31.03.2000 which is not under dispute. Thereafter SIL was declared sick company on 20.05.2000 w.e.f.30.09.1999(APB18-26). Based on these facts the assessee has stopped charging the interest on the debit balance of SIL. The ld. AO without appreciation of this fact and the directionof the ITAT that the assessee is having interest free funds or not the ld. AO has given only part relief. The assessee also filed a detailed submission based on the facts of the assessee the assessee is having sufficient interest free funds. The relevant part of the written submission made before the ld. CIT(A) is reiterated here in below:

"i. The assessee had advanced loan of Rs 12245671.90 as on 31 March 2004 which was approximately 40% of capital of M/S Sunil and Company which stood at 32570408.00 as on 31 March 2004. Thus, it was the need of the hour to advance funds to the Synco Industries otherwise such sum of Rs 12245671.90 would have become irrecoverable and would have to be written off. As the things stands now. M/S Synco Industries Limited has come out of BIFR and is running successfully and also Sunil and Company holds approximately 90% of the shareholding of M/S Synco Industries Limited. Thus, the decision to lend the funds was purely out of commercial expediency and was in the best Interest of protecting the interest of the assessee.

j. In such circumstances provisioning of interest over such doubtful and substandard principal outstandings would have lead to a breach of fundamental tenates of accounts as enshrined in AS-9 of ICAI and income would not present true and fair picture.

k. The expression for the purpose of business was explained by the Hon'ble Apex Court in the matter of Madhav Prasad Jatia vs. CIT (SC), 118 ITR 200 (SC) by referring to the decision of Malyalam Plantation, 53 ITR 140 (SC), wherein it was held as

It cannot be disputed that the expression "for the purpose of business" occurring in s 10(2) (ii) as also in 10(2) (xv) is wider in scope than the expression "for the purpose of earning income profits or gains" occurring in s 12[2] of the Act and, therefore, the scope for allowing a deduction under s 10/21 (1) or 10(2) (xv) would be much wider than the one available under s 12(2) of the Act. This Court in the case of Commissioner of Income Tax, Kerala v. Malayalam Plantations Ltd has explained that the former expression occurring in s. 10(2) (iii) and 10(2)(xv), its range being wide, may take in not only the day-to-day running of a business but also the rationalisation of its administration and modernisation of its machinery; it may include measures for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile title, it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for the carrying on of a business; it may comprehend many other acts incidental to the carrying on of the business but, however wide the meaning of the expression may be, its limits are implicit in it; the purpose shall be for the purposes, of business, that is to say, the expenditure incurred shall be for the carrying on of the business and the assessee shall incur it in his capacity as a person carrying on the business.

"Emphasis Supplied"

It would be appropriate to highlight that the Hon'ble Apex Court specifically held that "measures for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile title" is an expenditure Incurred for the purpose of business:

As can be evident from the facts above, the advances by the assessee to the sister concern were historical in nature and fresh advances were given to protect the interest of the assessee and the funds already advanced by the assessee. M/S Synco Industries Limited had become a sick Industry and no banking or financial Institution was ready to fund the concern. Thus, it was imperative for the assessee to protect the funds already advanced by it from becoming bad debts that M/S Synco Industries to continue it's working. Smooth working of M/S Synco

Industries could only have been ensured with the availability of the funds which nobody was ready to lend them. Therefore, assessee in the best interest of protecting the funds advanced by it from becoming bad debts, decided to fund afresh to Synco Industries. It was purely a matter of business expediency or commercial expediency and for the purpose of business.

l. It was further held by Hon'ble Delhi High Court in CIT v. Dalmia Cement, ITR No. 249-250/1987 (Delhi High Court), while relying upon the Hon'ble Supreme Court's decision in S.A. Builders Ltd. V CIT (Appeals) that,

"clearly the loan given by the assessee company to its subsidiary company was for the purpose of business and commercial expediency and therefore the assessing officer was not justified in disallowing the claim of interest for being debited as a revenue expenditure".... We therefore, answer reference by holding that the Tribunal was correct in holding that no portion of the interest paid by the assessee on its borrowed funds can be disallowed on the ground that a portion thereof has been diverted to subsidiary company and that the Assessing Officer was not justified as disallowing the assessee company in debiting the interest paid to the bank as a revenue expenditure merely because it has given further loan of Rs. 40,00,000/- to its subsidiary Company."

m. In the matter of S.A. Builders Ltd. V CIT (Appeals), (2007) 158 Taxman 74 (SC. Hon'ble Apex Court vide para 35 of the judgment held that,

"We wish to make it clear that it is not our opinion that in every case interest on borrowed loan has to be allowed it the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case. For instance, if the Directors of the sister concern utilize the amount advanced to it by the assessee for their personal benefit, obviously it cannot be said that such money was advanced as a measure of commercial expediency. However, money can be said to be advanced to a sister concern for commercial expediency in many other circumstances (which need not be enumerated here). However, where it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances borrowed money to s subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans."
It is again reiterated that the decision that loans were historical in nature and in the course of business to a sister concern and advance as a matter of commercial expediency and the non provisioning of interest thereon which was irrecoverable in for seeable future was also part of a commercially expedient view and in consonance with AS-9 of ICAI, wherein in the given set of circumstances

protecting the principal was the permanent consideration and its recovery to the extent of Rs.19,06,165/- during the year is evidence enough of the prudent handling of containing the probable loss of principal outstanding with no normal legal recourse of recovery in foreseeable future.

In the light of the above submissions, the position of law becomes clear as being settled on the point that where an interest free loan in extended to a sister concern, even it were out of an interest bearing fund, no notional interest income or charges can be created or otherwise no deduction of interest can be disallowed, without recording a specific finding that there was no commercial expediency in extending interest free loan to the sister concern. In the instant case commercial expediency is very well exist in the form of protecting its principal outstanding with sister concern and there is no other recourse is available to the assessee to recover the same.

In the alternative and without prejudice to anything contained above, learned assessing officer has erred in not considering the fact that the depreciation does not entails outlay of cash fund and therefore, it can be considered as part of surplus available to the assessee for advancing to M/S Synco Industries Limited."

10.2 We note from the order of the ld. AO and ld. CIT(A) that there is no discussion in the order of the lower authorities on the direction given by the bench. The only relief that the assessee was given the relief to the extent of the current year net profit divided equally on that amount the relief was given to the assessee. There is no discussion in the order of the lower authority that the assessee till 31.03.2000 regular in charging the interest and has stopped because of the fact that the recovery of further interest becomes doubtful from 01.04.2000 on account of the fact that the company SIL become sick and therefore, we see no reason not to consider the plea of the assessee

that when the interest is not received no disallowance can be made. Even the ld. AO through ld. DR at the time of hearing also did not controvert the fact the assessee is having sufficient balance which is interest free as on 31.03.2044 at Rs. 3,25,70,408/- as against the SIL debit balance of Rs. 1,22,45,671.90 and in fact that the assessee earlier charging interest and has stopped on account of the reason that the company becomes Sick and even the recovery of the principle amount in doubt how revenue can tax disallow the claim of interest to the extent of the advance of SIL as notional interest and that too on historic advance given in earlier years. Considering the said set of facts and considering the decision of the apex court in the case of S A Builders [158 Taxman 74 (SC)] where in apex court held that

> **35.** We wish to make it clear that it is not our opinion that in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case. For instance, if the Directors of the sister concern utilize the amount advanced to it by the assessee for their personal benefit, obviously it cannot be said that such money was advanced as a measure of commercial expediency. However, money can be said to be advanced to a sister concern for commercial expediency in many other circumstances (which need not be enumerated here). However, where it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans.

In the absence of the controverting arguments of revenue we have not hesitation to believe that the advance given by the assessee to SIL

which was for business purpose and the assessee holding substantial amount of the share holding in that company the disallowance of interest considering the direction of the bench that the assessee is having sufficient fund which are interest free and therefore, we vacate the disallowance of Rs. 13,23,694/-. Based on these observation ground no. 1 raised by the assessee is allowed. Ground no. 2 & 3 are general in nature and does not require any adjudication.

In the result, appeal of the assessee is allowed.

Order pronounced under rule 34(4) of the Appellate Tribunal Rules, 1963, by placing the details on the notice board.

Sd/-	Sd/-
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
Judcial Member	Accountant Member

Dated : 03/08/2023
**Ganesh Kumar, PS*
Copy to:
1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR
6. Guard File

Assistant Registrar
Jodhpur Bench