

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BENCH 'A' KOLKATA**

**ITA Nos.1982 & 1983/Kol/2010  
Assessment Years: 2001-02 & 2006-07**

**DEPUTY COMMISSIONER OF INCOME TAX  
CIRCLE-3, KOLKATA**

**Vs**

**M/s BIHARIJI ISPAT UDYOG LTD  
KOLKATA  
PAN NO:AACB0830D**

**C.O. Nos.186& 187/Kol2010  
ITA Nos.1982 & 1983/Kol/2010  
Assessment Years: 2001-02 & 2006-07**

**M/s BIHARIJI ISPAT UDYOG LTD  
KOLKATA  
PAN NO:AACB0830D**

**Vs**

**DEPUTY COMMISSIONER OF INCOME TAX  
CIRCLE-3, KOLKATA**

**B R Mittal, JM and C D Rao, AM**

**Dated: September 06, 2011**

**Appellant Rep by: Shri Basudev Hazra  
Respondent Rep by: Shri R Salarpuria**

***Revenue's appeal dismissed***

**ORDER**

**Per: C D Rao:**

The above two appeals filed by the Revenue and the Cross Objections filed by the assessee are against separate orders dated 10.08.2010 of the CIT(A)-I, Kolkata pertaining to A.Yrs. 2001-02 & 2006-07 respectively.

**ITA No.1982/Kol/2010 (by the Revenue A.Yr.2001-02):**

2. The sole issue raised by the Revenue in this appeal is relating to deletion of addition of Rs.39,50,000/- made by the AO as undisclosed income.

3. The brief facts of this case are that while doing the scrutiny assessment AO has made an addition of Rs.39,50,000/- by observing as under :-

*"During the course of assessment proceedings an enquiry carried out by DIT(Inv.) New Delhi, it was found that M/s.Ankur Marketing during the year had given an accommodation entry to the assessee to the extent of Rs.39,50,000/- on following dates :*

<b>Bank Account</b>	<b>Instrument No.</b>	<b>Amount</b>	<b>Dates</b>	<b>Issuing Bank</b>
Citi Bank, New Delhi	450586	Rs.10,00,000/-	25.01.01	Bank of Punjab, Connaught Place, New Delhi.
-do-	450587	Rs.10,00,000/-	03.02.01	-do-
-do-	450590	Rs.19,50,000/-	20.02.01	-do-

*At the time of enquiry M/s. Ankur Marketing admitted that these were mere accommodation entries, against which matching cash was received by it from the assessee.*

*Under the circumstances, noticed u/s 148 of the Act was issued after getting necessary approval.*

*Later on, 10.10.08 a detailed requisition was sent, the assessee delineated the findings made in the case of M/s. Ankur Marketing.*

*Shri Jhalania, FCA, A/R appeared on 05.10.08 with a petition dt.05.11.08. The case was discussed and examination of the petition of the assessee revealed that no new material could be brought on record by the assessee. Therefore, on 06.11.08 Shri Jhalania, A/R Marketing in this regard was once again brought to his notice. He also asked to produce the party or a confirmation from it to corroborate the claim made by the assessee. However, he express his inability to do so.*

*It is needless to say that the assessee was skirting its responsibility and duties in justifying its own submission regarding the veracity of the transaction. Consequently, the assessee failed to controvert the finding made by the Department. M/s. Ankur Marketing categorically admitted that cash and commission was received from the assessee in cash/DDs/Pos/before for each accommodation entry. Under the circumstances, considering the merit of the case and also failure of the assessee to prove the contrary, I am adding back Rs.39,50,000/- as undisclosed income of the assessee."*

3.1. On appeal after taking into consideration of the various submissions made by assessee, Id. CIT(A) has deleted the same by observing as under :-

*"6. I have gone through the Grounds of Appeal and the assessment order as passed by the A.O. I have also perused the. assessment records. After hearing the appellant and perusing the written submissions filed by it, it appears that the whole dispute between the appellant and the Department centers round the genuineness or*

*otherwise of the two loans of Rs. 10,00,000/ each received from one M/s. Ankur Marketing Ltd. on 24.01.2001 and 01.02.2001 respectively, which were repaid on 16.02.2001. Immediately thereafter the assessee received another sum of Rs. 19,50,000/ from the same party on 19.02.2001 on account of Share Application Money for allotment of 65,000 nos. Equity Shares of Rs. 10/- each at a premium of Rs.20/- per share in the assessee-company.*

*From the record it appears that all the aforesaid transactions were by Account Payee cheques and loan confirmation and also the confirmation for payment of Share Application Money were obtained from the said Ankur Marketing Ltd. with its I.T. File No. and the same were filed with the A.O. For the Share Application Money received by the assessee, shares were allotted immediately after close of the accounting year 2000-01. For the loans received by the assessee, it paid interest after deduction of Income-tax and issued necessary T.D.S. certificate to the said lender, copy of which was filed before the A.O. The assessee also filed its bank statements for proving the fact that all receipts of monies were by Account Payee Cheques.*

*With the aforesaid undisputed facts on record, I am of the considered opinion that the assessee had discharged its initial burden of proving the sources of receipts of monies whether by way of loan or by way of Share Application Money, in the original assessment. The A.O. accepted the said transactions as genuine. Thereafter, on the basis of some information received by the A.O. against the aforesaid transactions, the A.O. could have entertained prima fade belief for assumption of jurisdiction u/s. 147. None the Less for the purpose of making the addition in the reassessment proceedings, the A.O. should have enucleated or brought on record unassailable, concrete and incontrovertible facts that could have clinched the issue in the Departmental favour. This, apparently in view of the law on the subject remains the 'achilles heel' of the assessment order.*

*While appreciating that the Ankur Marketing Ltd. was an outstation party, nothing prevented the A.O. making a reference to the said party u/s 133(6) of the Act, which the A.O. did not do. The AO could have also made an enquiry from the Ankur Marketing Ltd. through his counterpart at Delhi, which was not also been done.*

*The appellant in its written submission has referred to a decision of the Hon'ble Gauhati High Court in Nemi Chand Kothari - Vs. - C.I.T. [(2003) 264 ITR 254, 265] and quoted the relevant portions from the said order in its written submission. After a due deliberation of the facts of the case, I believe that the ratio of the said Gauhati H.C. decision squarely applies to assessee's case and, therefore, hold that the assessee, has discharged the onus on him regarding the sources of receipts of monies aggregating to Rs.39,50,000/-. In any case the source of receipt of the Share Application Money is proved by the admitted facts and borne out by the Record."*

3.2. Aggrieved by this the revenue is in appeal before us.

4. At the time of hearing the Id. DR appearing on behalf of the Revenue has relied on the orders of AO and contended that Id. CIT(A) has erred in deleting the addition of Rs.39,50,000/- made as undisclosed income for getting accommodation entry from one M/s. Ankur Marketing of Delhi without appreciating the evidence on record. He further contended that Id. CIT(A) has erred in ignoring the findings of the enquiry carried out by DIT(Inv.), New Delhi wherein M/s. Ankur Marketing admitted the transactions as accommodation entries in lieu of matching unaccounted cash given

by the assessee. Therefore he requested to uphold the action of AO by setting aside the order of Id. CIT(A).

5. On the other hand, the Id. Counsel appearing on behalf of assessee has reiterated the submissions made before the revenue authorities and further contended that from the record it appears that all the aforesaid transactions were by Account Payee cheques and loan confirmation and also the confirmation for payment of Share Application Money were obtained from the said Ankur Marketing Ltd. with its I.T. File No. and the same were filed with the A.O. For the Share Application Money received by the assessee, shares were allotted immediately after close of the accounting year 2000-01. For the loans received by the assessee, it paid interest after deduction of Income-tax and issued necessary T.D.S. certificate to the said lender, copy of which was filed before the A.O. The assessee also filed its bank statements for proving the fact that all receipts of monies were by Account Payee Cheques. Based on these submissions Id. CIT(A) has deleted the same. Therefore, he requested to uphold the same.

6. After hearing the rival submissions and on careful perusal of materials available on record, keeping in view of the fact that the aforesaid transactions were duly recorded by assessee and the transactions are made by account payee cheques and the interest on the said transactions have been paid after deduction of TDS and that AO should have enucleated or brought on record unassailable, concrete and incontrovertible facts that could have clinched the issue in the Departmental favour as observed by Id. CIT(A). Therefore, we find no infirmity in the orders of Id. CIT(A) and we uphold the same.

7. In the result appeal of the revenue is dismissed.

8. As regarding Cross Objection No.186/Kol/2010 arising out of ITA No.1982/Kol/2010 at the time of hearing, the Id. Counsel appearing on behalf of assessee has not pressed for the same. Therefore, the same is dismissed as not being pressed.

**ITA No.1983/Kol/2010 (by the revenue A.Yr.2006-07)**

9. In this appeal, the revenue has raised the following grounds of appeal :-

*"1. That in the facts and the circumstances of the case, the order of the Id. CIT(A) is erroneous because without any proper reason the CIT(A) accepted the interest free advance for business purposes.*

*2. That in the facts and the circumstances of the case, the order of the CIT(A) is perverse on the ground that without any proof of commercial exigencies the CIT(A) applied the case of SA Builders Ltd.*

*3. That in the facts and the circumstances of the case, the order of the CIT(A) is erroneous because without any basis the Id. CIT(A) came to the conclusion that no borrowed fund was utilized for investment purpose.*

*4. That leave may be granted to add, alter or modify any ground as may arise in the course of appellate proceedings."*

10. The brief facts of this issue are that while doing the scrutiny assessment AO has made disallowance of interest of Rs.18,90,411/- by observing as under :-

*"At the time of scrutiny it was observed that the assessee during the year had doled out interest free loans/advances to many group companies and others. Examination of accounts also revealed that the assessee had borrowed interest bearing funds on which interest of Rs.22,20,787/- was incurred during the year Details of loans taken revealed that out of total payment of interest Rs.18,90,411/- was paid to M/s. Salarpuria Investment (P) Ltd. Consequently, the assessee in the order sheet was asked to explain the rationale and utilization of loan from M/s. Salarpuria Investment (P) Ltd. After much deliberation by a letter dated 26.11.08 the assessee explained that out of the total amount received from M/s. Salarpuria Investment (P) Ltd Rs.2,00,00,000/- was used up to repay loans to M/s. Mauria & Co. Further sum of Rs.1,50,00,000/- was paid to M/s. Crazy Properties Pvt. Ltd. for purchase of properties and the balance sum of Rs.50,00,000/- was paid to M/s. Shivam Stock Broking Pvt. Ltd. for purchase of shares.*

*Repayment of loan to M/s. Mauria & Co. :*

*In this respect the assessee was asked to submit a copy of the ledger of Ms. Mauria & Co. Examination of the ledger revealed that the impugned sum of Rs.2 Crs. Were not utilized for repayment of loan, but actually by that sum, an interest free loan was given to M/s. Mauria & Co. Further enquiry also revealed that M/s. Mauria & Co. was a sister concern of the assessee, with whom it was having an interest free current account transaction. Clearly, no commercial expediency of impugned interest free advances could be adduced by the assessee, which clearly mean that such decisions were taken to bail out friends & relatives of the directors of the assessee company. Thus, artificially, through conscious and consorted effort interest burden was jacked up to reduce incidence of tax.*

*In a landmark judgement in the case of Abhisek Industries, 286 ITR 1 (P&H) Punjab & Haryana High Court held that expediency must be proved for justification of claim of interest. Similar views were taken in the case of Ramanand Sagar, 256 ITR 134 (Bom), Stepweld Industries Limited, 228 ITR 171 (SC). In the case of Calcutta Agency Ltd., 19 ITR 191, Hon'ble Apex Court held that onus is on the assessee to prove commercial expediency. Unilaterally Courts have held that commercial expediency has to be proved for claim of any expenditure. The assessee failed to provide any such explanation. Thus, onus was not discharged, even after such was specifically called for. Thus, collusiveness in this case is loud and clear.*

*Clearly, interest burden was being created deliberately to keep the profit of the assessee at a lower level. This was nothing, but a colourable arrangement conjured by the assessee to avoid payment of tax. This can never be allowed. Respectfully following the decisions in the cases of Abhishek Industries, 286 ITR 1 (P&H), Ramanand Sagar, 256 ITR 134 (Bom) Stepwell Industries Limited, 228 ITR 171 (SC), as discussed above, it may be concluded that interest bearing funds were utilized for non-commercial purposes.*

*Advance to M/s. Crazy Properties Pvt. Ltd.*

*In this case the assessee was asked to submit the details of the transactions undertaken by it. Perusal of the details revealed that no such deal had taken place*

*and finally the interest bearing sum advanced, i.e. Rs. 1,50,00,000/- was refunded. No evidence could be produced to show that money was actually advanced for any purchase of asset. In this respect, the assessee, as an example, pointed out that in some other cases properties were bought and sold and resultant sums were offered as capital gains. Here, it is imperative to point out that buying and selling of properties were not a part of business activity of the assessee. Consequently any interest on borrowed fund utilized for purchase of a property can never be claimed as business expenditure by the assessee. Evidently like in the earlier case it may be concluded that interest bearing funds were utilized for non-commercial purposes.*

*Advance to M/s. Shivam Stock Broking Pvt. Ltd.*

*From the accounts of the assessee it was crystal clear that share dealing was not the business of the assessee. Consequently, investment of interest bearing fund of Rs.50,00,000/- for purchase of shares through M/s. Shivam Stock Broking Pvt. Ltd. directly attracted provisions of section 14A of the Act. Hence, interest attributable to such sum can never be claimed as business expenditure by the assessee. Evidently like in the earlier case it may be concluded that interest bearing funds were utilized for non-commercial purposes.*

*Considering all these the impugned claim of interest of Rs.18,90,411/- is disallowed.”*

10.1. On appeal Id. CIT(A) has deleted the same by observing as under :-

*“1.9. After hearing the assessee and going through the explanations and/or and/or materials brought on record, I am of the opinion that after noticing the fact that both the assessee and the said Mauria Udyog were the business entities and that the assessee had current account transactions with the said party, it was not open to the A.O. to allege that the advance of rs.200.00 lacs in question was for non-commercial purposes. For the other allegation that the interest-free advance was made for reducing the profit of the assessee, reference may be made to the assessee's contention that if interest @ 12% p.a. would have been charged on such advances made by both the parties, the assessee would have suffered loss of 44,49865 by way of interest payable by it to the said Mauria Udyog. This explanation was given in writing vide assessee's letter dated 26.11.2008 to the A.O. However, from the assessment order, I find that the A.O. has not repudiated this contentions of the assessee. On these facts it cannot be alleged that the said current account transactions with Mauria Udyog were not based on any commercial expediency whatsoever, as the assessee, in my opinion, could establish its contentions that such interest free mutual advances benefited both the parties concerned.*

*The A.O. in support of his case has, however, relied on some court decisions as noted on page-2 of the assessment order. The appellant in its written submission (para 1.5.6) has distinguished the said case decisions and it has been shown that these are some what misplaced. After going through the assessment order and the assessee's arguments in this regard, I feel that the cases as cited by the Id. A.O. could hardly advance his contention, inasmuch as in the cited cases it was found that as a matter of fact the giving of advances was against the interest of the assessee.*

*On the other hand, the assessee has placed reliance on the Hon'ble S.C. decision in S.A. Builders Ltd. –vs- CIT [2007] 288 ITR 1] = (2006-TIOL-179-SC-IT) which is more relevant to the issues involved. In the said case, the assessee borrowed funds from*

*the bank on interest and lent it to sister concern without charging any interest. On this factual matrix, it was inter alia held by the Court that what was relevant in this context was whether the amount had been advanced as a measure of commercial expediency and not from the point of view whether the amount was advanced for earning profit (vide pages 08-09)*

*In course of the hearings before me the Id. A.R. had filed a copy of the decision in CIT vs Lalsons Enterprises [2010] 324 ITR 426 (Del.), the facts of which were very similar to those of the case in hand. In the said case it has been inter alia held that In spite of lending interest-free funds to a sister concern by way of mutual advances between the assessee and such sister concern, no corresponding expenditure on interest on borrowed capital was to be disallowed.*

*In view of what has been stated above and relying on the aforesaid Hon'ble Apex Court decision and the Hon'ble Delhi H.C. decision, I hold that advancing monies to Mauria Udyog was not for non-commercial purposes.*

*1.10 In so far as the advance of Rs. 150.00 Lacs to M/s. Crazy Properties is concerned, I am of the opinion that in view of the fact that the assessee was engaged in the business of Non-Banking Financial Company, it was not unusual for it to make advance for purchase of land in course of its business. This explanation was offered by the assessee before the A.O. vide assessee's written explanation dated 05.11.2008, copy of which was given in the paper book. It has been argued by the appellant before me that as I/the Lawyer's written opinion could not be readily traced at the material time of hearing before the A.O., the same could not be filed before the A.O. However, the said written opinion dated 05.10.2005 has been filed before me. Considering the appellant's arguments and having regard to the decision of the Hon'ble Kerala H.C. in Ravindra Nathan's case [265 ITR1 217], I admit the said Lawyer's opinion in evidence and further hold that the assessee could prove the fact of giving advance towards purchase of landed properties. As the title to the said properties were found to be defective on search, such advances were returned in the subsequent year, which will not, in my opinion, prejudice the assessee's case in hand.*

*1.11. Coming to the balance amount of advance of Rs. 50.00 Lacs, it has been admitted by both the A.O. and the assessee that such advance was made for purchase of Shares. After admission of such fact, I feel that nothing more is required for holding that the proportionate expenditure on interest on account of such interest-free advance for purchase of shares should be disallowed u/s. 36(1) (iii) of the Act. Such disallowance is called for in view of the fact that such advance was given for earning income exempt from Income-tax. Therefore, in any case proportionate expenses on interest attributable to this amount of advance of Rs. 50.00 Lacs should be disallowed u/s. 14-A (1) of the Act."*

10.2. Aggrieved by this the revenue is in appeal before us by taking the above grounds and the assessee has raised the following Cross Objections :-

*"1. That on the facts and on the circumstances of the case the learned CIT(A) has erred in holding that proportionate interest attributable to the advance of Rs.50 lakhs given to M/s. Shivam Stock Broking should be disallowed u/s 36(1)(iii) of the Act. Even otherwise and without prejudice, the disallowance, made is highly excessive and unreasonable."*

11. At the time of hearing the Id. DR appearing on behalf of the revenue has relied on the orders of AO. On the other hand, the Id. Counsel appearing on behalf of assessee has relied on orders of Id. CIT(A) and contended that Id. CIT(A) has rightly justified in deleting the additions made by AO. However, as regarding the Cross Objection raised by assessee, the Id. Counsel for assessee submitted that Id. CIT(A) is not justified in saying that proportionate expenses on interest attributable to the amount of advance of Rs.50,00,000/- should be disallowed u/s 14A (1) of the IT Act without giving any finding where there is any nexus between the interest on Rs.50,00,000/- with that of the interest free income. Therefore, he requested to delete these observations made by Id. CIT(A).

12. On the other hand, the Id. DR appearing on behalf of the revenue submitted that since Id. CIT(A) has deleted the disallowance made by AO u/s 14A to the extent of Rs.18,02,450/-. The Id. CIT(A) is justified in directing AO to disallow the proportionate expenses of Rs.50,00,000/-. He requested to uphold the decision of Id. CIT(A).

13. After hearing the rival submissions and on careful perusal of the materials available on record, as regarding revenue's appeal, keeping in view of the following categorical observations of Id. CIT(A) in the case of Maruti Udyog it is pointed out by Id. CIT(A) that I find that the A.O. has not repudiated this contentions of the assessee. On these facts it cannot be alleged that the said current account transactions with Mauria Udyog were not based on any commercial expediency whatsoever.

13.1. In respect of M/s. Crazy Properties the assessee could prove the fact of giving advance towards purchase of landed properties. As the title to the said properties were found to be defective on search, such advances were returned in the subsequent year, which will not, in my opinion, prejudice the assessee's case in hand.

13.2. In respect of advance of Rs.50,00,000/- such disallowance is called for in view of the fact that such advance was given for earning income exempt from Income-tax. Therefore, in any case proportionate expenses on interest attributable to this amount of advance of Rs. 50.00 Lacs should be disallowed u/s. 14-A (1) of the Act.

13.3. Keeping in view of the above specific observations made by Id. CIT(A) we find no infirmity in the orders of Id. CIT(A) in so far as the deletion of the interest. Therefore we dismiss the revenue's appeal.

13.4. As regarding assessee's cross objection it is observed that Id. CIT(A) while deleting the disallowance of Rs.18,02,450/- made by AO u/s 14A of the IT Act by observing as under :-

*"Coming to the present case, I say that in any event interest on the borrowed funds of Rs.50.00 lacs utilized for payment to shivam Stock Broking for purchase of shares, has been disallowed by me u/s 36(1)(iii) vide my order on Ground no.1 of the Grounds of Appeal. Therefore, I am of the opinion that no further disallowance in this case should be made us 14A of the Act."*

13.5. In this regard we are of the view that before applying the provisions of section 14A of the IT Act the disallowance can be made only if there is actual nexus between



the tax free income and expenditure. Therefore, we direct AO to apply provisions of section 14A of the IT Act after analyzing the facts of the present case.

14. In the result the Cross objection is allowed for statistical purposes.

15. In the result both the appeals of the revenue are dismissed and C.O.No.186/Kol/2010 is dismissed and C.O.No.187/Kol/2010 is allowed for statistical purposes.

(Order pronounced in the court on 6.9.2011.)