

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT**

**BEFORE SHRIPAWAN SINGH, JM & DR. A.L.SAINI, AM**

**आयकरअपीलसं./ITA No.261/SRT/2018**

**(निर्धारणवर्ष / Assessment Year: (2012-13)**

**(Virtual Court Hearing)**

Pragati Glass Pvt. Ltd., Kharach, Kosamba (R.S), Dist. Bharuch-394120	V s.	Assistant Commissioner of Income Tax, Circle-1, Vadadora.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: <b>AABCP7377H</b>		
<b>(Assessee)</b>		<b>(Respondent)</b>

Assessee by : Shri Surendra Modiani, C.A

Respondent by : ShriDependra Kumar– Sr.DR

सुनवाईकीतारीख/ **Date of Hearing** : 27/10/2021

घोषणाकीतारीख/**Date of Pronouncement**: 27/12/2021

**आदेश / ORDER**

**PER DR. A. L. SAINI, ACCOUNTANT MEMBER:**

Captioned appeal filed by the assessee, pertaining to assessment year 2012-13, is directed against the order passed by the Commissioner of Income Tax(Appeals)-1, Vadodara, dated 08.01.2018, which in turn arises out of an assessment order passed by the Assessing Officer ('AO' for short) u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), dated 31.03.2015.

2. Grounds of appeal raised by the assessee are as follows:

*"1. The order of the learned Commissioner (Appeals) is against law and facts.*

*2. The learned Commissioner (Appeals) erred in confirming addition of Rs.25,00,000/- amount received for issue of shares. Your Assessee submits that the disallowance is not justified and prays that the same be deleted.*

*3. The learned Commissioner (Appeals) erred in confirming disallowance of interest to the extent of Rs.12,09,891/- on account of interest free loan to sister concern. Your assessee submits that the disallowance is not justified and prays that the same be deleted.*

*4. The learned Commission (Appeals) erred in confirming disallowance of expenditure on repairs to the extent of Rs.27,38,798/- and instead, allowing depreciation at 10% in respect thereof. Your Assessee submits that the disallowance is not justified and prays that the same be deleted."*

3. Ground No.1 and 2 relate to addition of Rs.25,00,000/- on account of share capital / share premium.

4. The relevant material facts, as culled out from the material on record, are as follows. The assessee is engaged in the business of manufacturing of glass bottles and components. During the year under consideration, the assessee company has issued 7500, 5% Convertible Non-Cumulative Redeemable Preference Shares of Rs. 100/- each at a premium of Rs. 900/- each to M/s Nakshtra Electricals & Engineers Pvt. Ltd. and Mr. Mohammad Imran Attarwala. The details of shares issued are as under:-

Sr No.	Name of shareholder	No of shares	Share Capital	Share premium	Total
1	M/s Nakshtra Electricals & Engineers Pvt. Ltd.	2500	100	900	25,00,000/-
2	Mr. Mohd. Imran Attarwala	5000	100	900	50,00,000/-
Total					75,00,000

The assessee was asked to furnish documentary proof of share subscribers such as their PAN No., I.T. returns, Bank statements highlighting the transactions, to submit the source of Income /receipt with documentary proof, out of which investments is made, reason for subscription, copies of correspondence regarding the application for subscription to Preference share capital to prove the genuineness of the transaction and also to establish creditworthiness of the share holders.

5. In response, assessee company, vide letter dated 27/03/2015, submitted the details of the above mentioned new share holders. However, on verification of the details submitted, it was noticed by the assessing officer that in the case of M/s Nakshtra Electricals & Engineers Pvt. Ltd., the following discrepancies were noticed:

- 1) *The said company / shareholder has filed its return of income for A.Y 2012-13 at Nil. The profit and loss account of the company for the year ended 31.03.2012 shows Nil income as apparently there is no business activity in this company. An amount of Rs.5,525/- is shown as administrative expenses and accordingly loss is shown at Rs.5,525/-. These facts show that the shareholder does not have*

*creditworthiness to invest an amount of Rs.25,00,000/- in the assessee-company during the year under consideration.*

- 2) *No documentary proof in respect of source from which the subscription has been made has been filed.*
- 3) *On perusal of the balance sheet of the party as on 31.03.2012, it is seen that the said company has shown investment in the assessee's company at Rs.25,00,000/- as on 31.03.2011 and 31.03.2012, whereas the bank statement of the assessee shows payment of Rs.25,00,000/-during the year on 03.05.2011. This shows that the balance sheet of the share capital investor is completely unreliable. Also, the genuineness of investment by the party in share capital of the assessee-company is doubtful.*

6. Considering the above discrepancies noticed as stated above, it was noted by AO that assessee had failed to discharge the primary obligation to prove the creditworthiness of the shareholder and genuineness of the transaction in the case of M/s Nakshtra Electricals & Engineers Pvt. Ltd, therefore, assessing officer treated the aforesaid sum of Rs. 25,00,000/- (share capital Rs.2,50,000/- and share premium of Rs. 22,50,000/-), received as unexplained cash credit u/s 68 of the Income Tax Act, 1961.

7. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before Ld. CIT(A) who has confirmed the action of Assessing Officer.

8. We have given our thoughtful consideration to rival contention. Learned Counsel for the assessee reiterated the submissions made during the appellate proceedings. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. We note that Ground Nos. 1 and 2 raised by the assessee pertain to addition of Rs.25 lakhs made u/s 68 on account of unexplained cash credit being the amount received from issuance of shares. The AO examined this issue at length and noticed that the assessee had shown investment in shares in the name of M/s. Nakshatra Electricals and Engineers Pvt. Ltd. at Rs.25 lakhs. On perusal of the return of income of M/s. Nakshatra Electricals and Engineers Pvt. Ltd., it was noticed that the said company had shown investment of Rs.25 lakhs as on 31.03.2011 and 31.03.2012.

But, in fact, the payment received only on 03.05.2011. At this juncture, Id DR submits before the Bench that it is not certain whether share capital relates to assessment year 2011-12 or assessment year 2012-13? We find merit in the submissions of Id DR for the Revenue and therefore, we remit this issue back to the file of the assessing officer to examine the fact whether share capital was introduced in assessment year 2011-12 or in assessment year 2012-13, and after ascertain this basic facts the assessing officer should adjudicate the issue afresh in accordance with law. Therefore, statistical purposes, ground no.1 and 2 raised by the assessee are allowed.

9. Coming to ground No.3, which relates to disallowance of interest to the extent of Rs.12,09,891/- on account of interest free loan to the sister-concern.

10. Succinct facts are that during the assessment proceedings, it was observed by the assessing officer that assessee has accepted interest bearing funds from bank and have been utilized for giving interest free loans and advances to P G Glass Pvt. Ltd. Moreover, M/s P G Glass Pvt. Ltd. is a related party covered u/s 40A(2)(b) of the Act. It was also observed by assessing officer that assessee has taken bank loans which were not utilized wholly and exclusively for business carried on by the assessee. Hence, it was held by the assessing officer that interest bearing loans have been utilized not for the purpose of business of the assessee carried on by him but diverted for making interest free loans and advances to the extent of Rs. 1,50,07,000/- to M/s P G Glass Pvt. Ltd. Since, the assessee has paid interest of Rs.2,00,72,166/- @ 16% on cash credit loan, interest at the rate of 16% is calculated on the loan and advance given to M/s P.G. Glass Pvt. Ltd. which works out to Rs.12,09,891/-. Accordingly, disallowance at Rs.12,09,891/- was made by AO u/s 36(l)(iii) of the I.T. Act. 1961.

11. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before Ld. CIT(A) who has confirmed the action of Assessing Officer observing as follows:-

**“4.3. Ground No.3** pertains to disallowance of interest at Rs.12,09,891/- u/s 36(1)(iii). The AO noticed that the assessee company had diverted interest bearing funds amounting to Rs.1,50,07,000/- to associate concern P.G. Pvt. Ltd. without charging any interest undisputedly, the assessee has paid huge interest amounting to Rs.2,00,72,166/- on cash credit account. Ld. AR has vehemently submitted that shareholders capital and reserves and surplus were to the tune of Rs.55.73 crores and hence, no interest can be disallowed. However, it is noticed that the **interest free advance to the sister concern was given out of cash credit account bearing interest burden.** The total short term borrowings have increased during the year under consideration from Rs.15.24crores to Rs.20.04 crores. Since, there was direct nexus between the interest free advances given to the associate concern and borrowed funds, in my considered view, the decisions relied upon by the Ld. AR are distinguishable on facts. Accordingly, I hold that the disallowance u/s 36(1)(iii) is called for since the assessee has not utilized borrowed funds for the purposes of business to the extent of interest free advances. This view gets support from the ratio laid down in the following cases:

i) **CIT vs Harrisons Malayalam Ltd. (2012) 25 taxmann.com 546 (Ker):**

After referring to the decision of the Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom), it has been held that when there is nexus between interest bearing loans & interest free advances to subsidiaries, even if, own funds are available in common pool, disallowance of interest relating to interest free advances u/s 36(1)(iii) has to be made.

ii) **Punjab Stainless Steel Industries v. CIT (2010) 324 ITR 396 (Del.)**

In this case, after considering the decision of the Hon'ble SC in the case of SA Builders Ltd. (2007) 288 ITR 1 and Munjal Sales Corporation (2008) 298 ITR 298, the Hon'ble High Court has confirmed the disallowance pertaining to interest free advances given to sister concerns. Disallowance u/s 36(1)(iii) was confirmed on the ground that the advances were extended out of borrowed and not from any credit balances available with the assessee-firm. Further, there was no finding that interest free advances were given for business purposes.

4.3.1. In view of the above factual and legal position, thus, the disallowance made by the AO is confirmed and Ground No. 3 is dismissed.”

12. We have heard both the parties. Learned Counsel submits before the Bench that assessee-company has interest free own fund, out of that interest free advance have been given to assessee, therefore no disallowance should be made. However, ld DR argues that interest free advance to the sister concern was given out of cash credit account bearing interest burden, therefore addition made by the assessing officer should be upheld. We find merit in the submissions of ld DR for the Revenue, therefore, we remit this issue back to the file of the assessing officer to examine whether interest free advance to the sister concern was given out of cash

credit account bearing interest burden. We make it clear that if interest free advance to the sister concern was given out of cash credit account bearing interest burden then addition should be sustained and if interest free advance to the sister concern was given out of own free funds, such as share capital, reserve and surplus then in that circumstances there should not be any addition. Thus, ground no.3 raised by the assessee is allowed for statistical purposes.

13. Ground No.4 relates to disallowance of expenditure on repairs to the extent of Rs.27,38,798/-.

14. Brief facts *qua* the issue are that assessing officer observed from the profit and loss account, of the assessee company that assessee has claimed repairs and maintenance of Building to the tune of Rs.63,43,875/- in the profit and loss account. During the course of assessment proceedings, the assessee was asked to furnish bills/vouchers with supporting evidences for verification. Ongoing through details filed by assessee, the AO noticed that following amounts were paid for road repairing work, which are of the nature of capital expenditure:

Sr. No	Bill/voucher No.	Name of party	Amount
1	06/370	Keshavji Devji & Sons, Tarsadi	Rs.3,53,160/-
2	06/373	Keshavji Devji & Sons, Trasadi	Rs.5,16,100/-
3	09/226	Bharat M Ramani, Kosamba	Rs. 73,920/-
4	06/227	Shree Ram Quarry, Kosamba	Rs. 93,841/-
5	09/384	Vijay engineering, Vadodara	Rs.1,69,298/-
6	09/385	Vijay Engineering, Vadodara	Rs.1,69,298/-
7	09/386	Bharat M Ramani, Kosamba	Rs.7,00,255/-
8	09/387	Shree Ram Quarry, Kosamba	3,53,164/-
9	09/388	Chintan M Ramani Kosamba	Rs,2,33,349/-
10	09/389	Shree Ram Quarry, Kosamba	Rs.1,51,904/-
11	09/390	Bharat M Ramani, Kosamba	Rs. 72,900/-
12	09/391	Bharat M Ramani, Kosamba	Rs. 91,185/-
13	09/392	Shree Ram Quarry, Kosamba	Rs. 99,020/-
		Total	Rs.30,42,198/-

As the above mentioned expenditures claimed by the assessee were capital in nature, therefore, assessee was asked to explain as to why (repairing & maintenance to building) should not be treated as capital expenditure.

15. In response, the assessee has replied as follows:

*"company has detailed road network throughout the plant. As the company's warehouses are spread over the plant area, heavy vehicles including export containers during the years plied over the roads reducing the life of roads. Company is able to take major repair work of roads during shut downs only. As during A. Y. 2012-13, there were two shut downs, company has taken up repairing work of roads, hence road maintenance expenses are higher during the year."*

However, assessing officer rejected the contention of the assessee and held that following expenses debited to profit and loss account should be capitalized after allowing depreciation on the same as under:

Amount	Depreciation allowed @ 10%		Expenses to be capitalized
	Before Sep.-11	After Sep.11	
Rs.3,53,160/-	Rs.35,316/-	--	Rs.3,17,844/-
Rs.5,16,100/-	Rs.51,610/-	--	Rs.4,64,490/-
Rs. 93,841/-	Rs. 9,384/-	---	Rs. 84,457/-
Rs.1,34,102/-	Rs.13,410/-	--	Rs.1,20,692/-
Rs.,1,69,298/-	Rs.16,929/-	--	Rs.1,52,369/-
Rs.7,00,255/-	Rs.70,025/-	---	Rs.6,30,230/-
Rs.3,53,164/-	Rs.35,316/-	----	Rs.3,17,848/-
Rs.2,33,349/-	Rs.23,334/-	--	Rs.2,10,015/-
Rs.1,51,904/-	Rs.15,190/-	---	Rs.1,36,714/-
Rs. 72,900/-	Rs. 7,290/-	---	Rs. 65,610/-
Rs. 91,185/-	Rs. 9,118/-	---	Rs. 82,067/-
Rs. 99,020/-	Rs. 9,902/-	---	Rs. 89,118/-
Rs.30,42,198/-	Rs.3,04,216/-		Rs.27,37,982/-

Therefore, an amount of Rs.27,37,982/- was disallowed by assessing officer and added to the total income of the assessee treating the said expenditure as capital in nature.

16. Aggrieved by the order of Assessing Officer the assessee carried the matter in appeal before the Ld. CIT(A) who has partly allowed the appeal of the assessee. Aggrieved by the order of Ld. CIT(A) the assessee is in appeal before us.

17. We have heard both the parties and perused the materials available on record. Learned Counsel argues that entire expenditure is revenue in nature. On the other hand ld DR for the Revenue contends that since, the construction of road has got enduring benefits, the cost incurred has to be capitalized and accordingly, the action of the AO on this account should be confirmed. We note that this Ground pertains to capitalization of road and building repair expenses to the tune of Rs.30,42,198/- and then allowing 10% depreciation resulting into net addition of Rs.27,37,982/-. On perusal of the details available on record, learned CIT(A) observed that except for 2 items of expenditure being bills of Vijay engineering, Vadodara at Rs.1,34,102/- and Rs.1,69,298/-, other items pertained to so called road repairing. Looking to the quantum of expenditure, it emerges that the assessee had constructed the new roads in its business premises. Since, the construction of road has got enduring benefits, the cost incurred has to be capitalized. We note that ld CIT(A) allowed routine repair expenses to the tune of Rs.1,34,102/- and Rs.1,69,298/- respectively. Thus, ld CIT(A) has passed a reasoned and speaking order and we do not find any infirmity in the order of ld CIT(A). That being so, we decline to interfere in the order passed by ld CIT(A), therefore, we dismiss ground no. 4 raised by the assessee.

18. In the result, appeal of the assessee is allowed to the extent indicated above.

Order pronounced on 27/12/2021 by placing the result on the notice board.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

Surat/दिनांक/ Date: 27/12/2021  
Dkp Outsourcing Sr.P.S.

**Sd/-**  
**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

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Assistant Registrar/Sr. PS/PS  
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