IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND SHRI VIKAS AWASTHY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1448/PUN/14
निर्धारण वर्ष / Assessment Years : 2010-11

M/s. K.S. Cold Storage, S.No.58/2/1, Hol-T-Haveli, Near Railway Crossing, Nandurbar – 425412	**Vs.**	ACIT, Circle-3(1), Dhule
PAN : AACFK7346B		
(Appellant)		(Respondent)

आयकर अपील सं. / ITA No.1580/PUN/14
निर्धारण वर्ष / Assessment Years : 2010-11

DCIT, Circle-3(1), Dhule	**Vs.**	M/s. K.S. Cold Storage, S.No.58/2/1, Hol-T-Haveli, Near Railway Crossing, Nandurbar – 425412
		PAN : AACFK7346B
(Appellant)		(Respondent)

Assessee by	Shri Sunil Ganoo
Revenue by	Shri Sudhendu Das
Date of hearing	27-11-2018
Date of pronouncement	28-11-2018

आदेश / ORDER

PER R.S.SYAL, VP :

These two cross appeals - one by the assessee and other by the Revenue arise out of the order passed by the CIT(A)-1, Nashik on 03-06-2014 in relation to the Assessment Year 2010-11.

ITA No.1580/PUN/2014 - By Revenue :

2. The first ground raised by the Revenue in its appeal is against the deletion of addition of Rs.3,17,318/- made by the Assessing Officer (AO) on account of disallowance of interest.

3. Succinctly, the facts of the case are that the assessee claimed net deduction of Rs.3,17,318/- on account of interest. On being called upon to substantiate the claim for deduction, the assessee submitted its ledger account of interest which transpired that there was payment of interest of Rs.11,72,341/- and also receipt of interest amounting to Rs.7,55,692/-. The net amount of interest paid in excess of interest income was claimed as deduction. The assessee explained that it re-started its cold storage on 16-03-2010 and

for that purpose it borrowed certain funds on which such interest was paid. The AO disallowed the deduction of interest amounting to Rs.3,17,318/- on the premise that the amount of loan was utilised for the purposes of `creating of an asset' and consequently interest on such loan was not deductible . The ld. CIT(A) overturned the assessment order on this point, against which the Revenue has come up in appeal before the Tribunal.

4. Having heard both the sides and gone through the relevant material on record, it is noticed that the assessee's cold storage was destroyed by fire and it had to re-construct/renovate the same. For that purpose, it arranged certain loans on which the impugned interest was paid. The AO has disallowed the interest by treating it as relatable to creation of capital asset, which in our considered opinion, is not a correct position. Proviso to section 36(1)(iii) of the Income-tax Act, 1961 (hereinafter also called 'the Act') provides that 'any amount of interest paid in respect of capital borrowed for acquisition of an asset (whether capitalized in the books or not); for any period beginning from the date on

which the capital was borrowed for acquisition of the asset till the date on which the said asset was first put to use, shall not be allowed as deduction'. The crucial words used in the proviso to section 36(1)(iii) are 'capital borrowed for acquisition of an asset'. Unless capital is borrowed for 'acquisition of an asset', any interest paid on such borrowing till such asset is first put to use, cannot be covered within the ambit of such proviso so as to qualify for disallowance. We are confronted with a situation in which there is `no acquisition' of any asset by utilizing the amount borrowed on which interest is paid. On the contrary, it is a case of re-construction of the damaged cold store with the borrowed capital. As such, re-construction or renovation of an existing cold store plant, destroyed by fire, cannot be considered as 'acquisition of an asset', so as to fall within the purview of the proviso. The Hon'ble Punjab & Haryana High Court in *CIT Vs. Bhupindra Flour Mills (P) Ltd. (2011) 59 DTR 307 (P&H-HC),* has held that an amount spent by the assessee on demolition of structure which had caught fire and major repair of the premises during the period when the business was in existence, is admissible as a revenue expenditure. In view of

the above legal position, we are satisfied that the ld. CIT(A) was justified in deleting the addition of Rs.3,17,318/- made by the AO by disallowing the net interest paid.

5. The only other effective ground in the Revenue's appeal is against deletion of addition of Rs.1,35,50,851/-, being, the amount of insurance claim received by the assessee.

6. The facts apropos this ground are that the assessee received certain amount of insurance claim for the loss of goods and also cold storage plant. The amount of insurance claimed in relation to plant at a sum of Rs. 1,35,50,851/- was shown in the Schedule of fixed assets by means of reduction from the Nil Opening Balance and addition to the block of assets for a sum of Rs.3,55,56,948/-. The AO invoked the provisions of section 45(1A) of the Act and held the amount of Rs.1,35,50,851/- chargeable to tax. The ld. CIT(A) deleted the disallowance by relying on an order passed by the Mumbai Bench of the Tribunal in the case of J.*R. Enterprises Vs. ACIT (2009) 24 DTR 311* and also another order of the Chennai Bench of the Tribunal in *Chemfab Alkalis Ltd. (IT*

No.563/Mds/2012) dated 24-08-2012. The Revenue is aggrieved by the deletion of addition.

7. Having heard both the sides and perused the relevant material on record, it is observed that the assessee received insurance claim of Rs.1.35 crore on account of land and incurred actual expenditure on renovation/re-construction of Rs.3,55,56,948/-. The Mumbai Bench of the Tribunal in J.*R. Enterprises (supra)* has held that the provisions of section 45(1A) of the Act are inapplicable because of the receipt of insurance claim of Rs.1.57 crore against the actual expenditure incurred of Rs. 3.82 crore. The Chennai Bench of the Tribunal in *Chemfab Alkalis Ltd. (supra)* also considered a similar situation in which the amount of insurance claim was less than the amount of actual expenditure incurred on re-construction/renovation and it was held that no short term capital gain u/s. 45(1A) of the Act can be charged under such circumstances. No contrary decision has been brought to our notice by the ld. DR. Respectfully following the precedent, we uphold the impugned order on this score.

8. In the result, the appeal of the Revenue is dismissed.

ITA No.1448/PUN/2014 - By Assessee :

9. First three grounds of the assessee's appeal challenge the passing of the assessment order on the ground that no notice u/s.143(2) of the Act was validly served.

10. Briefly stated, the facts concerning this issue, as mentioned in the assessment order, are that statutory notice u/s. 143(2) was issued on 26-09-2011 and duly served fixing the date of hearing on 05-10-2011, which was not attended to by the assessee. Thereafter, a notice u/s. 142(1) was also issued on 20-04-2012. The assessment was finalised at a total income of Rs.1.28 crore and odd as against the returned loss of Rs.10.38 lac and odd. The assessee challenged before the ld. CIT(A) that the notice u/s. 143(2) was not served on partners. The ld. CIT(A) took up the matter with the AO who sent a copy of the notice u/s. 143(2) which was shown to have been received by one Shri Harish C. Pawar, Manager of M/s. K.S. Cold Storage on 28-09-2011. Since the notice was served and the assessment proceedings were also attended by the assessee, the ld. CIT(A) dismissed the assessee's ground, against which the assessee has approached the Tribunal.

11. The ld. AR contended that the notice u/s. 143(2) was not served on the partners of the assessee firm as is the requirement under the law. He submitted that the service of notice on Shri Harish C. Pawar, Manager of the assessee did not tantamount to a valid service and hence the assessment be quashed. This was strongly opposed by the ld. DR.

12. We have heard both the sides and gone through the relevant material on record. A copy of order sheet of the assessment proceedings has been placed on record. Entry dated 13-08-2012 of the assessment proceedings notes that Shri D.P. Lunawat, Advocate attended on behalf of the assessee. This order sheet entry further records that office copy of notice u/s. 143(2) was shown to Shri D.P. Lunawat, duly signed by the assessee firm and received by Shri Harish C. Pawar, Manager. It goes on to state that the ld. AR was asked if he still had any objection to the service of notice, to which Shri Harish C. Pawar stated that 'he has no objection'. This shows that, firstly, the notice was addressed to the assessee firm and served upon its Manager, who was available at that time at the address of the assessee-firm and secondly,

the assessment was completed with due participation of the assessee. Under these circumstances, a question arises as to whether service of notice u/s. 143(2) on the Manager of the assessee firm would invalidate the assessment proceedings? In our considered opinion, the answer to this question needs to be given in negative alone.

13. Section 292BB of the Act, which is relevant for our purpose reads as under :

> *"Notice deemed to be valid in certain circumstances.*— Where an assessee has appeared in any proceeding or cooperated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was—
>
> (*a*) not served upon him; or
> (*b*) not served upon him in time; or
> (*c*) served upon him in an improper manner:
>
> **Provided** that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment.".

14. This section was inserted by the Finance Act, 2008 w.e.f. 01-04-2008 and covers the assessment proceedings under

consideration. It provides that where an assessee appears in any proceedings and cooperates in an inquiry relating to the assessment etc., it shall be deemed that any notice issued under any provisions of this Act, which is required to be served, has been duly served upon him as per law. When it is so, the assessee shall be prohibited from taking any objection in any proceedings that the notice was not properly served upon him. The proviso to this section states that if an assessee raised an objection before the completion of assessment that the notice was not properly served, then the provision deeming a proper service on attending the assessment proceedings etc., shall not apply.

15. We are confronted with a situation in which the assessee did raise objection before the AO during the course of assessment proceedings itself that the notice was not properly served upon him. However, the AR of the assessee appearing before the AO, gave his 'no objection' for furthering the assessment proceedings. When the second limb of the ld. AR not objecting to the continuation of assessment proceedings despite service of notice on the assessee's manager is

considered in conjunction with the first limb of the assessee initially objecting to the service of notice, the inference which follows is that the assessee did raise objection initially but withdrew the same before the AO. In such a scenario, the initial objection stood withdrawn by the later 'no objection' tendered before the completion of the assessment, making it a case of not objecting to the valid service of notice before the AO. Thus, the proviso to section 292BB of the Act, which was triggered by raising an initial objection before the AO, was given a goby and got set to rest by the ld. AR not objecting to such objection in terms of order sheet entry dated 13-08-2012. Once the proviso is held to be inapplicable, the main provision of section 292BB gets magnetized, which deems proper service of notice on the assessee appearing before the AO in the assessment proceedings, thereby debarring it from raising any objection of improper service of notice before any proceedings under the Act, including the Tribunal.

16. The ld. AR relied on the judgment of Hon'ble Supreme Court in the case of *Himalayan Cooperative Group Housing Society Vs. Balwant Singh (Civil Appeal Nos. 4360-61 of*

2015) to contend that the concession given by the Authorised Representative before the AO had no legal legs to stand on and the same cannot bind the assessee. Facts of the *Himalayan Cooperative Group Housing Society (supra)* are that the appellant-society in that case raised a demand on its members for payment towards allotment of residential quarters/apartments on 28-05-1998. The respondents failed to comply with the demand. The appellant-society, after following the due procedure, passed a resolution expelling the respondents from the membership of the society. The resolution required confirmation of the Registrar of Cooperative Societies, who approved the resolution but gave one more opportunity to the respondents to pay their outstanding dues. No such payment was made and the resolution got confirmed. As a result, the respondents ceased to be the members of the appellant-society. The order of the Registrar was challenged before the Writ Court. The Writ Court approved the order of the Registrar. However, on the request made by the respondents seeking issuance of direction to the appellant-society for consideration of their request to construct and allot additional quarters, the court issued certain

directions, as the ld. Counsel appearing for the appellant-society agreed and did not object to the same. When the matter finally came up before the Hon'ble Supreme Court, the ld. Counsel appearing for the appellant-society contended that the society had, at no point of time, authorised its counsel to make any concession before the Writ Court. Their Lordships observed that the Writ Court ought not to have issued the impugned directions merely on the basis of concession of the ld. Counsel.

17. In our considered opinion, this judgment does not advance the case of the assessee any further. It is so for the reason that in that case the : 'appellant-Society at no point of time had authorised the learned counsel for the appellant-Society to make any concession before the Writ court'. When the attention of the ld. AR was drawn towards the fact that normally a Power of attorney issued for income-tax proceedings contains an undertaking by the assessee to ratify all the acts of its authorised representative, no material could be brought to our notice that the power of attorney issued by the assessee to its Authorized representative before the AO

was an exception and did not contain such a ratification clause. Notwithstanding the same, day-in and day-out, ld. counsel appearing for the assessees do not press certain grounds at various legal forums, which are dismissed on their concession. If the contention of the ld. AR is taken to a logical conclusion, that even if an authorised representative, duly empowered, is making any concession, the court must invariably call upon the concerned-assessee in person and seek concession from him rather than the counsel, then the proceedings would be needlessly delayed, causing unwarranted waste of the precious time of the courts. In our considered opinion, once an assessee empowers his authorised representative to appear before the AO or for that purpose, any other appellate court in the income tax proceedings and undertakes to ratify his acts, there is no need to ignore any concession made by the ld. Authorised representative and personally call upon the assessee to make concession in every case. The ld. AR could not draw our attention towards any decision under the income-tax proceedings in which the concession given by the ld. AR was successfully challenged by the assessee before the higher court on the ground that such concession by the ld. AR was invalid.

In view of the foregoing discussion, we are of the considered opinion that there is no merit in the grounds raised by the assessee in this regard, which are hereby dismissed.

18. Ground No. 4 of the assessee's appeal is for expunging certain remarks made by the ld. CIT(A) in his order.

19. Having heard both the sides and gone through the relevant material on record, we find that the ld. CIT(A), after dismissing the assessee's ground of non-service of notice u/s.143(2), also made certain remarks about the ld. ARs advising them not to raise frivolous grounds of appeal and verifying the facts doubly before filing Form No.35. In our considered opinion, such remarks were not called for. It is the duty of every appellate authority to consider the issue raised before it and decide the same rather than commenting on the conduct of the ld. AR, unless such a conduct is specifically under challenge before it. We, therefore, expunge the following lines from page 16 of the impugned order, which read as under :

> "ARs of the appellant firm are also advised to not raise frivolous grounds of the appeal and verify the facts doubly before filing Form No.35 and contesting the issue in the appeal."

20. This ground is allowed *pro tanto.*

21. In the result, appeal of the assessee is partly allowed.

Order pronounced in the Open Court on 28th November, 2018.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 28th November, 2018
सतीश

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) /
   The CIT (Appeals)-1, Nashik
4. आयकर आयुक्त / The CIT-1, Nashik
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
   "**ए**" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

//True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	27-11-18	Sr.PS
2.	Draft placed before author	28-11-18	
3.	Draft proposed & placed before the second member		
4.	Draft discussed/approved by Second Member.		
5.	Approved Draft comes to the Sr.PS/PS		
6.	Kept for pronouncement on		
7.	File sent to the Bench Clerk		
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		

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