आयकर अपीलीय अधिकरण "बी" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्री डी. मन्नमोहन, उपाध्यक्ष **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।

BEFORE SHRI D. MANMOHAN, VP AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No. 47/Mum/2011

(**निर्धारण वर्ष /** Assessment Year: 2007-08)

Natural Gas Company Pvt. Ltd. 53/57, Laxmi Insurance Building, Sir P. M. Road, Fort, Mumbai	बनाम/ Vs.	Dy. CIT, Circle-2(2) (OSD) 5th Floor, Aayakar Bhavan, M. K. Road, Mumbai -400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACT 018 EC		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri S. V. Joshi
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Vijay Kumar Bora

सुनवाई की तारीख / **Date of Hearing**	:	25.02.2015
घोषणा की तारीख / **Date of Pronouncement**	:	22.05.2015

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-5, Mumbai ('CIT(A)' for short) dated 28.10.2010, partly allowing the Assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2007-08 vide order dated 04.12.2009.

2. The short question arising *qua* the first issue agitated per the instant appeal is the maintainability or otherwise in law of the interest on borrowed capital invested in shares. The said shares, acquired by the assessee-company during the financial years (fy) 1980-

81 (or even prior thereto) up to 1992-93, were sold during the relevant previous year, yielding capital gains. The assessee claimed the interest cost from f.y. 1997-98 onwards up to the current year – the year of transfer, indexing it for the inflation as obtaining from year to year, as part of the cost of acquisition and/or improvement, in the computation of income by way of capital gains, chargeable u/s.45. The interest for the period prior to f.y. 1997-98 was not claimed as the same was admittedly claimed and allowed as revenue expenditure in computing the business income u/s. 28, i.e., under the head 'income from business or profession' or as 'income from other sources' u/s. 56. The Revenue disallowing the same, the matter has travelled to the Tribunal at the instance of the assessee.

3. We have heard the parties, and perused the material on record.

The assessee has claimed the interest cost as a part of the cost of acquisition and/or improvement (without actually specifying the same), so that we shall, as was the Revenue, obliged to consider it under either category; the said two costs being specified as eligible deductions u/s.48(ii). The first question, therefore, that arises is as to how is the interest cost relating to borrowings made to finance the acquisition of a capital asset, could be considered as toward its acquisition, which is already complete on the passing of the property therein to its owner-holder. The question, as would be apparent, is broader, including within its ambit, all forms of capital assets. That is, how does it, in any manner, promote or is toward acquiring the asset/shares, which would be borrowing itself. The interest cost is toward the retention of the borrowing and, concomitantly, the retention or the holding of the asset under reference, i.e., is a function of the holding period. It is, thus, rightly described as a holding cost or a period cost, depending upon how one may look at it. This difference is again of relevance in-as-much as the asset may be sold/ realized without the repayment of the debt, so that the interest cost continues independent of the asset. Again, the debt may be repaid/liquidated, extinguishing the interest cost, while the holding of the asset continues. That is, even the holding cost relationship is not automatic or follows as a natural corollary. The two, i.e., the interest cost and cost of the asset, are in any case independent of each other. So, however, it shall not be wrong to describe the interest cost as a period cost, chargeable against the income of the enterprise for the relevant period, against its income from the assets, including the asset under reference, deployed for its activity. Coming back to the acquisition, the said process or event is complete on the transfer of the relevant capital asset to the assessee. The interest cost for the post acquisition period, as would be apparent from the foregoing, does not in any manner contribute toward the same, which process stands completed on the transfer. The same is, at best, a holding cost of the asset and, therefore, revenue in nature, to be, as such, expensed as a period cost for the relevant period. That in fact is precisely what the assessee had done after acquiring the asset in the instant case as well.

In *India Cements Ltd. vs. CIT* [1966] 60 ITR 52 (SC), it was clarified by the apex court that a loan cannot itself be treated as an asset or an advantage for the enduring benefit for the business of the assessee. The expenditure on the raising of the loan, which was sought to capitalized as a part of the cost of the asset by the Revenue, stood disapproved by the apex court, holding it to be a revenue expenditure. Again, it was explained by the apex court in *CIT vs. Tata Iron & Steel Co. Ltd.* [1998] 231 ITR 285 (SC), that the payment or non-payment, as the case may be, of a loan will not alter the cost of asset, which gets crystallized on the acquisition itself. That is, the financial obligation/s attached to an asset would not have a bearing on its cost of acquisition. Applying the said decision, the tribunal in the case of *LML Ltd. v. Jt. CIT* [2014] 33 ITR (Trib) 269 (Mum), discountenanced the insistence by the Department to increase or decrease, as the case may be, the value of the imported raw material on the basis of the corresponding increase or decrease in the purchase liability on account of fluctuation in the exchange rate. This was as the subsequent developments arise only due to the non-payment of the said liability, a financing decision, which should not impact cost, as explained by the apex court in *TISCO Ltd.* (supra), which is, whether in relation to a fixed or a current asset, to be limited to that in bringing the corresponding asset to its present location and condition (refer AS-2 and AS-10 issued by the Institute of Chartered Accountants of India). For fixed assets, the additional qualification would be of bringing it to the working condition for intended use, so that the same would cover the cost of improvement as well. The cost of an investment is, again, per the relevant accounting standard (AS-13), to include all the acquisition costs, including brokerage, fees and duties. The same, as would be evident, are in agreement with the cost of acquisition and cost of improvement as defined u/s. 55 of the Act.

Continuing further, it is well settled that in working out the capital gains (or loss), the principles that have to be applied are those that are a part of the commercial practice, or as a ordinary man of business will resort to when making computation for his business income (*Dhun Dadabhoy Kapadia vs. CIT* [1967] 63 ITR 651 (SC)). This was again endorsed by the apex court in *Challapalli Sugars Ltd.* v. *CIT* [1975] 98 ITR 167 (SC). In *Challapalli Sugars Ltd.* (supra), the apex court upheld the accountancy test for computing the actual cost of a fixed asset, i.e., to include all the expenditure necessary to bring such asset into existence and to put it in working condition, finding the same to be in agreement with the concept of the cost, not statutorily defined, though envisaged under and within the meaning of the expression ‘actual cost’ in section 10(5) of the Income Tax Act, 1922, so that the former shall prevail. The actual cost, it clarified, should be so construed as no man of commerce would misunderstand. The interest for the construction period on the capital borrowed toward the acquisition and installation of the plant and machinery was accordingly confirmed as a part of the actual cost of said plant and machinery. The provisions of the Act, defining the expression ‘cost of acquisition’ and ‘cost of improvement’ are *pari materia*. The interest, as afore-explained, represents the time cost of funds. This also explains and is precisely the reason for our reference thereto as a part of the holding cost, where not attributable to the investment or capital asset in-as-much as it does not contribute to either its acquisition or improvement. In fact, even for the period prior to acquisition, the borrowing cost would form part of the cost of the capital asset only where it contributes to its acquisition or its improvement, i.e., where it is toward the same, as where the asset is under construction, entailing time and, thus, the time cost of the funds deployed thereon. The interest cost under such circumstances represents an essential ingredient toward acquiring the asset. The matter stands explained by the apex court in the case of *Challapalli Sugars Ltd.* (supra) as well as *Tuticorin Alkali Chemicals & Fertilizers Ltd. vs. CIT* [1997] 227 ITR 172 (SC). Again, to bring an expense within the cost of its improvement, the expenditure has to be by way of a (physical) addition or alteration, adding value to the capital asset. Admittedly, no such improvement has taken place to the shares, which continue to be held as such, i.e., as acquired. This is again part of the settled law, for which we may refer to the decision in the case of *Industrial Credits & Development Syndicate Ltd. vs. CIT* [2001] 251 ITR 720 (Kar). We may not dwell on this aspect of the matter further, being a matter of trite law and, in any case, the interest cost under reference being for post acquisition period, and which has admittedly been considered by the assessee itself as a revenue cost, claimed and allowed as a revenue expenditure for the period 1980-81 onwards up to f.y. 1996-97. How could it then transform in character from f.y. 1997-98 onwards, to become a capital cost. This is incomprehensible, i.e., without any change in the underlying facts and circumstances of the case, so that shares continued to be a capital asset or an investment of the assessee. Merely for the reason that from a particular year the dividend income on shares, which is the holding income arising thereon, and against which the interest, as a period expense, would stand to be allowed, is rendered tax-exempt, would not alter its character from revenue to capital. It is in fact preposterous to state so. The same has thus rightly been considered as by the Revenue as an attempt to obviate or circumvent section 14A, by claiming the interest expenses as by the backdoor as it were (refer 3.3.2 of the impugned order). In fact, the very basis that a cost, irrespective of its character or purpose, is to be allowed in computing the taxable income as it had not been claimed earlier, is flawed and bereft of any legal basis. Rather, as shall be evident from the foregoing, there is no inconsistency between the common perception of the same, that would prevail with the man of commerce; the standard accounting practice, to which the Revenue authorities have referred to, and to which the law accords primacy, as well as the legal provisions. The assessee has cited some decisions in its favour, while so has the Revenue. We have also perused the case law relied by the assessee. The same do not advert to any judicial precedence, making down the law in the matter. Two, in all cases of the purchase of shares, viz. *CIT vs. Maithreya Pai* [1985] 152 ITR 247 (Kar.); *Shri Mahendra C. Shah vs. Addl. CIT* [2011] 140 TTJ 16 (Mum); *S. Balan vs. Dy. CIT* [2009] 120 ITD 469 (Pune), which are relevant for specific purposes, the interest has been allowed as being toward the acquisition of the shares. We have already clarified that the purchase of shares in the present case was, beginning prior to 01.04.1981, completed during the f.y. 1992-93. The interest cost, which is a time cost, and thus has only nexus with the time for which the relevant asset is held or, rather, for which the corresponding loan outstands (and to the extent it does), has no bearing on the process of acquisition, which stands completed much earlier. Further, the said decisions would thus have no bearing on a decision. Further, we are also unable to see as to how the decision in the case of *H.G. Craig Harvey vs. CIT* [2000] 244 ITR 578 (Mad), relied upon, would be of assistance to the assessee. In the facts of that case, the assessee became the owner of the shares in the amalgamated company/s on the basis of the shares held in the amalgamating company/s, the cost of which would thus obtain (section 49(2) of the Act). The assessee, however, substituted the cost of acquisition with their fair market value as on 01.01.1964, an option available to it under the Act. The same being available to a shareholder of the amalgamating company, it was explained by the hon'ble court, would not operate to take away the said right from the shareholder of the amalgamated company/s, as the assessee. However, having substituted the said cost, the assessee was not entitled to deduction of the cost of bonus shares, i.e., in addition to the cost of shares of the amalgamating company/s. Clearly, and without doubt, the provisions of the Act shall prevail. We have only explained of the provisions of the Act as being in agreement with the standard and accepted notion and understanding of the cost of acquisition, being defined as including the cost of purchase, further explaining the nature of the interest as a time cost, which cannot thus be confused either with the asset or with the cost of its acquisition. The said decisions are, therefore, completely distinguishable on facts. The case law being relied upon by the assessee would thus be of no assistance to it. On the contrary, we find our self to be in agreement with the assessee by the tribunal in the case of *ITO vs. Vikram Sadanand Hoskote* [2007] 18 SOT 130 (Mum), the facts of which case are *pari materia* to that of the present case and stand rendered after considering the judicial precedence, as well as meeting the reliance on the decisios, also relied upon by the assessee before us.

In view of the foregoing, we find no merit in the assessee's case.

4. The next and the only other issue arising in the instant appeal is the deeming of income *qua* unproved credits by way of business liabilities u/s.41(1) of the Act. While the assessee rests its case on it having not written back the same in books, so that they continue to represent its' liabilities therein, the Revenue considers the same as invalid in the absence of liability being not proved to be an existing liability. Again, both the parties have cited abundant case law, as under:

Assessee : *CIT vs. Bhogilal Ramjibhai Atara* [2014] 222 Taxmann 313 (Guj); *CIT vs. Jain Exports (P) Ltd.* [2013] 89 DTR 265 (Del); *CIT vs. Shri Vardhaman Overseas Ltd.* [2012] 69 DTR 379 (Del); *CIT vs. Nitin S. Garg* [2012] 71 DTR 73 (Guj); *Dy. CIT vs. Hotel Excelsior Ltd.* [2011] 60 DTR 450 (Del-Trib); and *ITO vs. Bhavesh Prints (P.) Ltd.* [2011] 64 DTR 401 (Ahd-Trib)

Revenue : *CIT vs. Modern Farm Services* [2007] 311 ITR 356 (P & H).

5. We have heard the parties, and perused the material on record.

In this regard, we firstly observe that section 41(1) is a deeming provision. As explained by the apex court in *CIT vs. Bhogilal Laherchand* [1954] 25 ITR 50 (SC), deeming involves a number of concepts. By statutory fiction, income which can in no sense be said to have accrued, may be considered as accruing. Similarly, the fiction may relate to the place, the person or the year of taxability. The deeming in the case of section 41(1)(a), applicable in the instant case, is *qua* the benefit by way of cessation or remission of a trade liability in respect of an expenses of business or profession, as the income of business or profession for the year of such cessation or remission. Our second observation is that the cessation or remission of liability is a matter of fact, and which would therefore require being proved. The onus to establish that the conditions of taxability stand satisfied is always on the Revenue. In the present case, the Revenue states of the liabilities continuing to outstand in the assessee's books from 3 to 25 years. Surely, the same raises considerable doubts as to the existence of the liability/s. True, they stand not written back and continue to outstand in the assessee's books, but that is precisely the reason for the same being questioned by the Revenue, or entertaining doubts about the same. The doubt can by no means be considered as not valid, being in accord with the common practice and, thus, discharging the onus that law places on the Revenue. The accounting entries or the treatment that the assessee accords to an asset or liability in its books is not determinative of the matter. Again, the presumption would only be of the same representing the true state of affairs, but the inordinate delay in discharging the same raises considerable and valid doubt as to the existence of those liabilities as at the relevant year-end, i.e., as a fact. The onus on the Revenue, thus, gets discharged and shifts to the assessee, who is in effect only being called upon to show that the position as stated in its accounts reflects the true and correct position. A trading liability would normally get settled within a period of one or two months of it's arising, while in the instant case years and years have passed. The same leads to the question: Why were the same not paid in the normal course and, rather, not paid at all? Is the matter disputed – if so, to what extent, and which shall again have to be demonstrated. In fact, after the lapse of considerable time, it becomes doubtful if the creditor exists, who may have moved to a different place; discontinued business, et. al. No material or evidence or even explanation is forthcoming from the assessee. The only inference under the circumstances is that the liability no longer exists. Per contra, the assessee has obtained a benefit by way of remission or as the case may be cessation of liability. An inference of fact is again only a finding of fact, drawn in consistence and in harmony with in the conspectus of the facts and circumstances of the case.

The next question that arises is as to the year of taxability, and which is the year of remission or cessation of liability. The assessee having claimed it as a liability for the immediately preceding year as well, and which stood accepted by the Revenue, would preclude the assessee from contending that the liability was not existing, or was in fact not a liability even as at the end of the immediately preceding year. That is, it is not open for the assessee to turn back and say that you accepted my lie for the preceding year/s and, therefore, you are bound by it. The only consequence in law is that the cessation or remission has occurred during the relevant previous year. We are in this regard, with respect, unable to agree with the hon'ble high court in the case of *Bhogilal Ramjibhai Atara* (supra) that the law is not clueless in this regard; the said decision having been rendered without considering the decision by the said court in *Hides & Leather Products Pvt. Ltd.* [1975] 101 ITR 61 (Guj)

It needs to be appreciated that when the knowledge of the facts is in the possession of a particular person, it is he alone who can, and whom the law contemplates to exhibit it, in the absence of which an adverse inference, as applicable under the circumstances, shall obtain. We have also perused the case law cited by the assessee. The matter is not virgin, and stands considered by the hon'ble high courts, as in the case of *Kesoram Industries & Cotton Mills Ltd. vs. CIT* [1992] 196 ITR 845 (Cal) at length, as well as by the tribunal in a number of cases. We have already clarified that the existence or otherwise of a liability as on a particular date, which is relevant, is a finding of fact, with the law following as a matter of course. Toward the same, we rely on the decisions in the case of *Modern Farm Services* (supra); *Kesoram Industries & Cotton Mills Ltd.* (supra); *CIT vs. Agarpara Ltd.* [1986] 158 ITR 78 (Cal); as well as *Hides & Leather Products Pvt. Ltd.* (supra), besides by the tribunal in a number of cases, of which we cite a couple, viz. *Kalyani Maan Singh vs. ITO* [2013] 37 CCH 259 (Mum-Trib) and *ITO vs. Sajjan Kumar Didwani* (in ITA Nos. 7716 & 7793/Mum/2012 dated 28.05.2014).

In view of the foregoing, we find little merit in the assessee's case.

6. In the result, the assessee's appeal is dismissed.
परिणामतः निर्धारिती की अपील खारिज की जाती है ।

Order pronounced in the open court on May 22, 2015

Sd/-	Sd/-
(D. Manmohan)	(Sanjay Arora)
उपाध्यक्ष / Vice President	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 22.05.2015

व.नि.स./Roshani, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**