IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Income Tax Appeal No. 186 of 2013 (O&M)
Date of Decision: 6th September, 2016

Commissioner of Income Tax, Jalandhar-I, Jalandhar

…..Appellant

versus

M/s Max India Limited

.....Respondent

CORAM:- HON'BLE MR.JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE.
HON'BLE MR. JUSTICE DEEPAK SIBAL, JUDGE.

Present: Mr. Vivek Sethi, Advocate for the appellant

Mr. Ajay Vohra, Senior Advocate with
Mr. Gaurav Jain, Advocate for the respondent

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S.J. VAZIFDAR, CHIEF JUSTICE:

This is an appeal against the order of the Tribunal allowing the assessee's appeal by deleting the disallowance made by the Assessing Officer. The matter pertains to the assessment year 2002-03. The Tribunal's order was passed also in ITA No.119 (Asr)/2011 which is the matter relevant to this appeal.

2. The following substantial questions of law arise in this appeal:-

"(i) Whether on the facts of the case and in law the Hon'ble ITAT was justified in holding that no expense is attributable to the exempted income as the revenue had failed to establish a direct nexus between the expenses incurred and the income earned ignoring that even indirect expenses are attributable u/s 14A as has been made clear by providing for Rule 8D(2) in subsequent assessment years?

(ii) Whether on the facts of the case the ITAT is right in holding that the legal and professional expenses are allowable ignoring the fact that the assessee has failed to discharge its onus with respect to rendering of services by the payee?"

3. The assessee are engaged in various activities which they carry on through their different divisions, such as, the packaging, metallise, max foil, pharma, treasury and healthcare divisions.

4. The assessees filed a return declaring a 'nil' total income under the normal provisions with a brought forward loss and ₹ 6,80,27,490/- computed under section 115JB of the Income Tax Act, 1961. A revised return in the same terms was filed except to declare a short term capital gain arising from the sale of one of the divisions. The matter was taken up for scrutiny and a questionnaire was addressed to the assessee.

Re: Question (i)

5. During the previous year relevant to assessment year 2002-03, the assessee admittedly earned exempted income by way of interest of which Rs.55 lakhs was interest on Maharashtra State Electricity Bonds and ₹ 2,91,97,852/- was earned by way of dividends. The aggregate amount of ₹ 3,46,97,852/- was deducted by the assessee being exempted under the Act. The question is whether there was any expenditure relatable to the exempted income for, if there was, the provisions of Section 14A of the Act would apply. Section 14A reads as under:-

> **"14-A. Expenditure incurred in relation to income not includible in total income**.— (1) For the purposes of computing the total income under this Chapter, no deduction shall be allowed in

> respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.
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> (2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.
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> (3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act.
>
> **Provided** that nothing contained in this section shall empower the Assessing Officer either to reassess under Section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under Section 154, for any assessment year beginning on or before the 1st day of April, 2001."

6. The Assessing Officer rejected the assessee's contention that it had not incurred any expenditure for the purpose of earning the exempt income observing that the possibility of the assessee having incurred expenditure relatable to such exempt income could not be ruled out. The Assessing Officer held that on identical facts for the Assessment Year 2001-02, *ad hoc* disallowance relatable to such expenditure incurred for the purpose of earning exempt income was made and on the same basis he made a disallowance of ₹ 1.5 crores under Section 14A. The assessee contended that the investment had been made out of its own funds and not from the borrowed funds and, therefore, disallowance was not called for; that the dividend was received as long term investment during the relevant previous year and that no expenditure was attributable towards earning the same as the dividend received was only incidental to the holding of shares; that the dividend was received by single dividend warrants, and therefore,

no expenditure was incurred to earn such dividend; that the assessee had not claimed any expenditure in relation to income which did not form part of the total income; that there was no nexus between the dividend expenditure and the expenses which were sought to be deducted and that the revenue had failed to establish any nexus between the expenditure and the exempt income.

7. The CIT (Appeals) not only upheld the Assessing Officer's order of disallowance but enhanced the same to about Rs. 4.33 crores. The CIT (Appeals), however, noted as had the Assessing Officer that the assessee had failed to produce the bank statements though called upon to do so. The assessee on the other hand expressed its inability to produce the bank statements in respect of the utilization of the borrowed funds or to show the sources of funds for the investment made on the ground that the bank statements related to an 'old period' and that it was difficult, therefore, to produce the same. The assessment order under Section 143(3) was passed on 30.03.2004 and the order of the CIT (Appeals) is dated 19.01.2006. The same pertain to the assessment year 2002-03. The assessee, however, further contended that the positive cash flow and surplus interest free funds available with the assessee during the relevant previous year were sufficient to cover the said interest free investment. The presumption, it was contended, is that the said investments were made from the assesses interest free reserves and, therefore, it was for the department to rebut the presumption by establishing the nexus between the funds borrowed on investment and the said investment. The CIT (Appeals) drew an adverse inference which was one of the main reasons for the order passed by the CIT (Appeals). The assessee also relied upon the agreements it had entered

into with various lenders to establish that the funds borrowed on interest were utilized for purposes other than the said investment. The CIT (Appeals) analysed each of the documents. It was observed that in the absence of the bank books and bank statements it was not possible to determine whether the assessee had received free funds available at the time when the relevant investment was made or whether the said investment was made out of interest bearing funds and that as the finding about the utilization of funds can be made from a direct study of the books of accounts and the relevant bank statement, a presumption is liable to be drawn against the assessee in this regard. The assessee's contention that the bank statements were not readily available was not accepted. It was observed that the appellant was otherwise able to produce and submit details of all matters relating to the proceedings in respect of other grounds but had not produced the bank statements or the bank books. It was further observed that the bank statements alongwith bank books were in the exclusive custody of the assessee and could lead to a finding that the assessee utilized borrowed funds for the purpose of making investments. These facts were, therefore, in the special knowledge of the assessee. The documents being in the custody of the assessee and the assessee having failed to produce the same though asked to do so, when a show cause notice was served upon him for enhancement, the CIT (Appeals) drew an adverse inference against the assessee. The CIT (Appeals) also analyzed the balance sheet and the cash flow statement submitted by the assessee for the relevant period.

8. We pause here to deal with certain observations made by the CIT (Appeals). It was observed that during the previous financial year i.e.

the financial year 2001-02, the assessee's borrowings of interest bearing funds, had increased as had its net investments whereas its shareholders funds decreased. The CIT (Appeals) held that a natural presumption, therefore, arises from the balance sheet that the increase in borrowings had gone to fund the increase in investments yielding exempt income.

9. This presumption is unfounded. Merely because the interest free funds with the assessee have decreased during any period, it does not follow that the funds borrowed on interest were utilized for the purpose of investing in assets yielding exempt income. If even after the decrease the assessee has interest free funds sufficient to make the investment in assets yielding the exempt income, the presumption that it was such funds that were utilized for the said investment remains. There is no reason for it not to. The basis of the presumption as we will elaborate later is that an assessee would invest its funds to its advantage. It gains nothing by investing interest free funds towards other assets merely on account of the interest free funds having decreased. In that event so long as even after the decrease thereof there are sufficient interest free funds the presumption that they would be first used to invest in assets yielding exempt income applies with equal force.

10. The CIT (Appeals) also observed that since the business of the assessee was mainly in its operation, it must be presumed that most of the share capital would go into operational assets like fixed assets before being used for making investments. There is no basis for such a presumption. An assessee would naturally make the investment in a manner most beneficial to itself. It is not required to use its free reserve such as share capital towards operational assets first and then for making investments to yield

exempt income. The natural course of business would suggest that the assessee would utilize the funds to the maximum advantage which in cases such as these would lead to making investments for the operational assets first out of interest bearing funds.

11. The CIT (Appeals) thereafter analysed various loan agreements. Some of the conclusions were as follows: Though in some cases there are specific covenants about the use or non-use of funds for investment in shares, there is no such stipulation in respect of many of the other borrowings by the assessee. Some of the repayments were linked to the sale of shares by the assessee which sale proceeds would not be available for the purpose of immediately making fresh investment. The assessee's contention that there was a specific covenant in respect of the loan agreements that the loans could be utilized for business purposes only is not borne out from the documents placed on record.

The CIT (Appeals) concluded as under:-

> "**10.3** In the light of the facts noted earlier and in the absence of details, a reasonable basis for the disallowance out of interest expenditure would be to consider that both interest bearing and non-interest bearing funds available with the assessee have been used in all the assets in their respective proportions of the total funds available with the assessee as shareholders' funds and as borrowed funds. This includes utilization in investment from which exempt income is earned or can be earned. However, taking into account the fact that some loans do have a specific covenant for non-utilization in shares etc. and that borrowed funds invested in such shares may have been repaid from the profits or other non-interest bearing funds during the year, I think it fair to allow a 50% reduction on the borrowings so determined, on estimate, to take care of such situations. Since these funds change throughout the year, the averages of their values at the beginning and at the end of the year as per the balance sheet are considered to determine the ratios. Since many of the investments are coming from earlier years and the assessee had borrowed funds in earlier years also, I am of the view that the balance sheet of the assessee will be a better guide for apportionment of expenses as compared to the cash flow statement, since it takes into account the brought forward capital as well as the borrowings and

investments. The financial cost of the borrowed funds is computed by the working out the average cost of funds, which is the total interest expenditure divided by the average of the borrowings at the beginning and at the end of the year and applying it to the average of the specified investments for the year. For this purpose, the investments in share of companies listed outside India (to which Section 115 O is not applicable), and the taxable bonds like the 6% capital index bonds, debentures of NALCO and bonds from HDFC are excluded from the total investments to arrive at the specified investments from which no income is expected to be earned.

10.4 The computation of the financial expenditure works out as under:-

		1.4.2001	**1.4.2002**	**Average**
Shareholders' Rs. 000)	A	5255753	5173108	5214431
Loan funds (Rs. 000)	B	1291595	1867238	1579417
Ratio of borrowed funds to total funds	C=Average A/(Avg.A+ Avg.B)			0.23
Relaxation in ratio by 50%	D=0.5*C			0.12
Interest expenditure (Rs. 000)	E			154928
Average cost of funds	F=E/ Average of B			9.81%
Specified investments (Rs.)	G	3107576219	4486634216	3797105218
Investment of borrowed funds in Specified Investments (Rs.)	H=D*G			441370746
Interest expenditure on borrowed funds invested in Specified Investments (Rs.)	I=H*F			**43294905**

The amount disallowable u/s 14A on account of interest expenditure is thus, computed at ₹ 4,32,94,905/-."

The above conclusion of the CIT (Appeals) is in respect of the utilization of the funds namely the funds borrowed on interest and the interest free funds available with the assessee. The CIT (Appeals) also dealt with the disallowance on account of the administrative expenses. It was contended that the investments were handled only by the treasury division

on which a small part of expenditure on personnel was incurred by the assessee. The CIT (Appeals), however, estimated the administrative expenditure relating to the investment from which exempt income was earned to be ₹ 20 lacs during the relevant previous year. Accordingly, the disallowance under section 14A was computed at ₹ 4,52,94,905/- which was the sum of ₹ 4,32,94,905/- and ₹ 20,00,000/- respectively. This, therefore, replaced the disallowance of ₹ 1.50 crores made by the Assessing Officer. The Assessing Officer was directed to consider the amounts of disallowance also for computing the income and tax liability under section 115JB of the Act.

12. The Income Tax Appellate Tribunal, however, set-aside the order of the CIT (Appeals) in so far as it disallowed the deduction of ₹ 4,52,94,905/- under section 14A on account of interest expenditure. The Tribunal, however, sustained the order in so far as it estimated ₹ 20 lacs towards administrative expenditure relating to the investment from which exempt income was earned.

13. The Tribunal rightly noted that the main thrust of the orders impugned before it was that the assessee had failed to furnish the bank statements and that, therefore, an adverse inference ought to be drawn against it. The Tribunal, however, also observed that the authorities indicated that the presumption as regards the utilization of interest free funds and borrowed funds in a mixed pool ought to be in favour of the assessee. The Tribunal noted that the assessee is a listed company and was required to publish its accounts and submit the same before various statutory authorities such as SEBI, Stock Exchanges as well as to the share holders and financial institutions. In view thereof the Tribunal did not

accept the department's contention that the funds flow statements submitted by the assessee which in turn were prepared on the basis of the audit accounts for the year under consideration were not authentic.

14. The Tribunal was certainly entitled to draw such an inference. It is a reasonable inference. The Tribunal addressed itself to the correct question, namely, to determine if there was any nexus between the additional investments with the interest free borrowed funds. The following findings of fact of the Tribunal are of vital importance: the assessee had during the relevant time invested an aggregate amount of ₹ 152.05 crores out of which an amount of ₹ 28.18 crores was made in shares of foreign companies. The dividend from the foreign companies was taxable. This, therefore, left an amount of ₹ 123.87 crores which yielded dividends which were exempt from income tax. The assessee realized 117.97 crores from the sale of its investments in the earlier years; ₹ 46 crores was generated from the assessee's operating activities; ₹ 6.87 crores was received from sale of fixed assets and there was an opening cash balance of ₹ 8.90 crores. The aggregate of surplus funds on which there was no interest burden was ₹ 179.74 crores. This amount was available during the relevant previous year. Thus such funds were in excess of the investment of ₹ 123.87 crores. In addition thereto the assessee had generated cash from its financing activities of an aggregate amount of ₹ 24.24 crores. It had purchased fixed assets aggregating only to ₹ 54.62 crores during the relevant period. The findings, therefore, that the assessee had sufficient interest free funds to make the investment yielding tax free returns cannot be faulted. The absence of bank books in these circumstances would not justify an adverse inference being drawn for whichever way the matter is viewed, the assessee

had sufficient funds available to it on which no interest was payable. This brings us to the legal issue of a presumption to be made when there is a pool of funds which include interest bearing funds and interest free funds.

15. Mr. Vohra's reliance upon the judgment of the Supreme Court in *East India Pharmaceutical Works Ltd. v. Commissioner of Income Tax 1997 Income Tax Reports 224 (SC)* is well founded. The Tribunal referred the following question to the High Court:-

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the payment of interest of ` 28,488/- on money borrowed for payment of income-tax was not an expenditure laid out wholly and exclusively for the purpose of business as contemplated by sub- section (1) of Section 37 of the Income-tax Act, 1961?"

In that case, the assessee had an over draft account with the bank. It claimed a sum of ₹ 28,488/- as an allowable expenditure under section 37(1) of the Act which represented the interest paid on the overdraft amount. The overdraft was for payment of income tax. The authorities as well as the High Court came to the conclusion that the payment of income tax would not fall within the scope of the expression "*for the purpose of business*". It was contended on behalf of the assessee, however, that it had deposited the entire profits in the over draft account and the amount thus deposited being much more than the tax liability, it should have been presumed that the taxes were paid out of the profits of the relevant year and not out of the over draft account for running of the business. The Supreme Court held as under:-

> **"3.** Mr. Dipak Bhattacharyya, learned counsel appearing for the appellant, argued with vehemence that the assessee having deposited the entire profits in the

overdraft account and the amount thus deposited in the overdraft account being much more compared to the income tax liability and the tax paid, it should have been presumed that in essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business. Consequently the interest paid by the assessee on the overdraft account relatable to the payment of income tax should have been allowed as an admissible deduction in the computation of the assessee's business income. In support of this contention the learned counsel appearing for the appellant relied upon the decisions of the Calcutta High Court in *Woolcombers of India Ltd.* v. *CIT*[(1982) 134 ITR 219 : (1981) 23 CTR 204 (Cal)] , *Reckitt and Coleman of India Ltd.*v. *CIT* [(1982) 135 ITR 698 : (1982) 26 CTR 24 (Cal)] , *Indian Explosives Ltd.* v. *CIT*[(1984) 147 ITR 392 : 1983 Tax LR 356 (Cal)] and *Alkali & Chemical Corpn. of India Ltd.* v. *CIT* [(1986) 161 ITR 820 (Cal)] . The learned counsel also urged that these decisions having been allowed to be operative for more than 14 years, the principle of stare decisis should be made applicable and, therefore, it must be held that the High Court committed error in not accepting the assessee's contention.....

4. Having considered the rival submissions at the Bar though we find considerable force in the arguments advanced by the learned counsel appearing for the appellant but in the facts and circumstances of the present case, on going through the order of the Tribunal as well as the question referred to by the Tribunal for being answered by the High Court and the arguments advanced before the Tribunal as well as in the High Court by the counsel appearing for the assessee, it is not possible for us to hold that any such contention, as was advanced before this Court by the assessee had in fact been advanced either before the Tribunal or before the High Court. The question whether a presumption can be drawn that the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business as was drawn in *Woolcombers case* [(1982) 134 ITR 219 : (1981) 23 CTR 204 (Cal)] by the Calcutta High Court and was followed in 3 other cases of the same High Court, would essentially depend upon the fact as to whether the entire profits had been pumped into the overdraft account, whether such profits were more than the tax amount paid for the relevant year and all other germane factors. But when the assessee never advanced the contention either before the Tribunal or before the High Court and the amplitude of the question posed before the High Court does not bring within its sweep the contention as is advanced by Mr Bhattacharyya, learned counsel in this Court, it would not be appropriate for this Court to look into the additional papers produced by the assessee for entertaining the contention and answering the same. It is true that the Calcutta High Court in *Woolcombers case* [(1982) 134 ITR 219 : (1981) 23 CTR 204 (Cal)] came to the conclusion that where profits were sufficient to meet the advance tax liability and profits were deposited

> into the overdraft account of the assessee then it should be presumed that the taxes were paid out of the profits of the year and not out of the overdraft account for the running of the business. But to raise the presumption in that particular case there were sufficient materials and the assessee had urged the contention before the High Court. The aforesaid decision has been followed in the case of *Reckitt* [(1982) 135 ITR 698 : (1982) 26 CTR 24 (Cal)] where without any further discussion the *Woolcombers case* [(1982) 134 ITR 219 : (1981) 23 CTR 204 (Cal)] has been followed. But it may be noticed that the question posed in *Reckitt case* [(1982) 135 ITR 698 : (1982) 26 CTR 24 (Cal)] was directly to the effect as to where the entire trading receipts deposited by the assessee in the overdraft account and the tax was paid out of the overdraft account whether the interest paid by the assessee for payment of tax out of the overdraft account is an allowable deduction. In *Indian Explosives Ltd. case* [(1984) 147 ITR 392 : 1983 Tax LR 356 (Cal)] the aforesaid two decisions of the Calcutta High Court had been followed and the question that had been posed was to the effect whether the interest on an overdraft account paid towards the amount drawn for discharging the tax liability could be an allowable expenditure and, therefore, the High Court answered in favour of the assessee and against the Revenue. It may be noticed that in the aforesaid case the Court did not express any opinion on the question whether the interest paid on money borrowed for payment of tax was allowable as business expenditure. To the same effect is the decision of the Calcutta High Court in *Alkali Chemical Corpn. of India Ltd.* [(1986) 161 ITR 820 (Cal)]
>
> .....emphasis supplied."

16. It may be said that this was a case where the funds were all in a common pool viz. in the overdraft account. It would, however, make no difference even if the funds are in different accounts. The presumption would still apply so long as the interest free funds are available. Our view is supported by the judgment of a Division Bench of the Bombay High Court in *Commissioner of Income Tax v. Reliance Utilities and Power Ltd. 2009 (313) ITR (Bombay),* where it was held:-

> "If there be interest-free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest-free funds available. In our opinion, the Supreme Court in *East India Pharmaceutical Works Ltd.* v. *CIT*, [1997] 224 ITR 627 had the occasion to consider the decision of the Calcutta High Court in *Woolcombers of India Ltd.*, [1982] 134 ITR 219 where a similar issue had arisen.

> Before the Supreme Court it was argued that it should have been presumed that in essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business and in these circumstances the appellant was entitled to claim the deductions. The Supreme Court noted that the argument had considerable force, but considering the fact that the contention had not been advanced earlier it did not require to be answered. It then noted that in *Woolcombers of India Ltd.'s case*, [1982] 134 ITR 219 the Calcutta High Court had come to the conclusion that the profits were sufficient to meet the advance tax liability and the profits were deposited in the over draft account of the assessee and in such a case it should be presumed that the taxes were paid out of the profits of the year and not out of the overdraft account for the running of the business. It noted that to raise the presumption, there was sufficient material and the assessee had urged the contention before the High Court. The principle, therefore, would be that if there are funds available both interest-free and over draft and/or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available with the company, if the interest-free funds were sufficient to meet the investments. In this case this presumption is established considering the finding of fact both by the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal."

We are in respectful agreement with these observations. There is no reason to restrict the presumption to cases where the funds from different sources are mixed in a common pool. The rational for the presumption is that an assessee would utilize its funds prudently ensuring that it derives the greatest financial advantage. If that be the rational we see no reason for the presumption to be restricted to cases where the different funds are mixed in a common pool. It is, however, only a presumption.

17. In *HDFC Bank Ltd. v. Deputy Commissioner of Income Tax and others, 2016 (383) ITR 529 (Bombay),* the petitioner filed its return of income for the assessment year 2008-09 in which it declared an income of ₹ 5.81 crores from the investment and securities which were exempt from tax. It treated these investments as stock in trade. The petitioner had during that year paid interest on borrowed funds and claimed the same as expenditure. The petitioner claimed that the investment in tax free securities

was made out of its own tax free funds and therefore no disallowance could be made under section 14A. The petitioner contended that it was possessed of sufficient interest free funds of ₹ 2153 crores as against the investment in tax free securities of ₹ 52.02 crores and that there was a presumption that the investment which had been made in the tax-free securities had come out of the interest-free funds available with the petitioner. The Division Bench held:-

> **"15.** It is clear that for the first time in the case of HdFC Bank Ltd. (supra) that this Court took a view that the presumption which has been laid down in *Reliance Utilities and Power Ltd.* (supra) with regard to investment in tax free securities coming out of assessee's own funds in case the same are in excess of the investments made in the securities (notwithstanding fact that assessee concerned may also have taken some funds on interest) applies, when applying Section 14A of Act. Thus, decision of this Court in HDFC Bank Ltd. (supra) for the first time on 23rd July, 2014 has settled the issue by holding that the test of presumption as held by this Court in *Reliance Utilities and Power Ltd.* (supra) while considering Section 36(1)(iii) of the Act would apply while considering the application of Section 14A of the Act. The aforesaid decision of this Court in HDFC Bank Ltd. (supra) on the above issue has also been accepted by the Revenue inasmuch as even though they have filed an appeal to the Supreme Court against that order on the other issue therein viz. broken period interest, no appeal has been preferred by the Revenue on the issue of invoking the principles laid down in *Reliance Utilities and Power Ltd.* (supra) in its application to Section 14A of the Act. Therefore, the issue which arose for consideration before the Tribunal had not been decided by this Court in *Godrej and Boyce Manufacturing Co. Ltd.* (supra). It arose and was so decided for the first time by this Court in HDFC Bank Ltd. (supra). Thus, there is no conflict as sought to be made out by the impugned order. Thus, the impugned order has proceeded on a fundamentally erroneous basis as the ratio decindi of the order in *Godrej and Boyce Manufacturing Co. Ltd.* (supra) had nothing to do with the test of presumption canvassed by the petitioner before the Tribunal on the basis of the ratio of the decision of this Court in HDFC Bank Ltd. (supra).
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> **16.** At the hearing Mr. Suresh Kumar, learned Counsel for the Revenue urged that on the facts of this case no fault can be found with the order of the Tribunal. It is submitted that, the petitioner was not able to establish before the Assessing Officer and the CIT(A) that the amounts invested in the interest free securities came out of interest free funds available with the petitioner. In that view of the matter, it is submitted by him that the order of this Court in HDFC

> Bank Ltd. (supra) would not apply to the facts of the present case. We are unable to understand the above submission. The Assessing Officer passed the Assessment order on 22nd December, 2010 under Section 143(3) of the Act. The CIT (A) passed an order on 21stNovember, 2011 dismissing the petitioner's appeal. On both the dates, when the orders were passed by the Assessing Officer and CIT (A), the authorities did not have the benefit of the order of this Court in HDFC Bank Ltd. (supra) rendered on 23rd July, 2014. Once the issue is settled by the decision of this Court in HDFC Bank Ltd. (supra), there is now no need for the assessee to establish with evidence that the amounts which has been invested in the tax free securities have come out of interest free funds available with it. This is because once the assessee is possessed of interest free funds sufficient to make the investment in tax free securities, it is presumed that it has been paid for out of the interest free funds. Consequently, we do not find any merit in the above submission made at the hearing on behalf of the Revenue.
>
> .....emphasis supplied"

We respectfully agree with these observations. While it is only a presumption, it is one which is in the assessee's favour. The Department could have rebutted this presumption by calling for the records from the bank itself. It chose not do so at though the assessee stated that it was not in possession of the records. There was no application either before the Tribunal or before us for an opportunity to lead further evidence in this regard.

18. A similar view was taken by the Bombay High Court in *Commissioner of Income Tax v. HDFC Bank Ltd. 2014 (366) ITR 505.*

19. A Division Bench of this Court in *Bright Enterprises Pvt. Ltd. v. Commissioner of Income Tax 2016 (381) ITR 107,* to which one of us (S.J.Vazifdar, C.J.) was a party, followed the judgment in *CIT v. Reliance Utilities and Power Ltd. 2009 (313) ITR (Bombay) (supra).* It was held as follows:-

> **"23.** As we noted earlier, the funds/reserves of the appellant were sufficient to cover the interest free advances made by it of Rs.10.29 crores to its sister company. We are entirely in agreement with the judgment of the Bombay High Court in *Commissioner of Income Tax* v. *Reliance Utilities & Power Ltd.*, (2009) 313

> ITR 340, para-10, that if there are interest free funds available a presumption would arise that investment would be out of the interest free funds generated or available with the company if the interest free funds were sufficient to meet the investment."

20. In the circumstances, question No.(i) is answered in favour of the respondent-assessee.

Re; Question No. (ii)

21. The issue in this regard raises essentially a question of fact and not one of law. It required the authorities to appreciate the facts and to take a decision on the basis of balance of probabilities.

22. According to the assessee it incurred expenditure of about ₹ 1.25 crores towards legal and professional charges paid to M/s Max UK Ltd. M/s Max UK Ltd. admittedly is the assessee's associated enterprise. The audit report under section 92E was filed alongwith the return of income. The assessee and M/s Max UK Ltd. entered into an agreement dated 01.07.1999. The relevant provisions thereof as set out in the assessment order read as under:-

> "Max UK has agreed to provide the services set forth hereunder:-
> (a) explore business opportunities initially in the field of Health Care, Financial Services, Life Insurance, Information Technology and allied areas;
> (b) identify potential collaborations/partners desirous of entering into venture(s) in the aforesaid business areas;
> (c) conduct due diligence of the potential collaborators/partners as regards its financial, management, technical capabilities and suitably for entering into a collaboration/joint venture;
> (d) information sharing and bridging of the cultural gap between the potential collaborators/partners and MAX.
> (e) upon identification of a collaborator/partner and further upon completion of due diligence as aforesaid, render further assistance to MAX for establishing contact with such potential collaborators/parties and further provide necessary interface and transactional services for facilities/consummating the collaboration/joint venture arrangements; and

(f) other support services, as may be required, from time tome."

23. There is some discrepancy regarding the pound sterling equivalent to the Indian rupees that were paid. This need not detain us as it not relevant for this judgment. The parties proceeded on the basis that the amount paid was ₹ 1.25 crores and in respect of which the assessee sought a deduction. On queries raised by the Assessing Officer, the assessee contended that it had also entered into an agreement with M/s Max UK Ltd. for other services and that the amount of ₹ 1.25 crores was included in the legal and professional expenses of its corporate office aggregating to about ₹ 2.12 crores. In support of his contention that the services were infact rendered and from which the assessee benefited, the assessee relied upon the fact that its total exports were in excess of ₹ 29 crores and that it had also benefited in the area of Health Care Services pursuant to the notification received from M/s Max UK Ltd.

24. The Assessing Officer and the CIT (Appeals) held that the assessee had not furnished any details to establish that the services were infact rendered; that although the agreement provided details of the services to be provided, the assessee was unable to establish that the services were actually provided and that there was no material to establish that M/s Max UK Ltd. was involved in any manner in obtaining export orders for the assessee or in facilitating the exports and that particulars of the information had not been submitted.

25. The Tribunal on the other hand perceived the facts entirely differently and held in favour of the assessee. The Tribunal found that the nature of the services rendered by M/s Max UK Ltd. was supported by an

invoice. It was further found that the nature of the services provided by M/s Max UK Ltd. were such that it was difficult to provide evidence of the services having actually been rendered. Further, the Tribunal accepted as relevant the assessee's contention that it was infact able to achieve an export turnover of ₹ 29 crores and that the same demonstrated prima-facie that the services were rendered by M/s Max UK Ltd.

26. It is not possible to say that the conclusion arrived at by the Tribunal is absurd or perverse. It is a possible view. The services such as of the nature mentioned in the agreement between the assessee and M/s Max UK Ltd. would not necessarily be recorded in writing. Advice, introductions, information may well be communicated orally. The possibility of this is enhanced on account of the fact that these are group companies. Even if each of the facts by itself does not support the Tribunal's conclusion taken together they certainly do. The Tribunal has, therefore, taken a possible view.

27. Question No. (ii) is, therefore, also answered in favour of the assessee.

28. The appeal is, accordingly, dismissed.

(S.J.VAZIFDAR)
CHIEF JUSTICE

(DEEPAK SIBAL)
JUDGE

06.09.2016
'ravinder'

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No