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

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND SHRI N.K. PRADHAN, HON'BLE ACCOUNTANT MEMBER

ITA NO.4838/MUM/2016 (A.Y: 2009-10)

Mr. Jackie Shroff 901, 9th Floor, Freeda One Carter Road, Bandra (West) Mumbai – 400 050 **PAN: AAJPS 6596 A**	*v.*	A.C.I.T Range – 16(1) Aayakar Bhavan, M.K. Road, Mumbai-400 020
(Appellant)		**(Respondent)**

Assessee by : **Shri Madhur Agarwal &**
Shri Pankaj Jain

Department by : **Shri Sushil Kumar Poddar**

Date of Hearing : **25.10.2018**

Date of Pronouncement : **31.12.2018**

O R D E R

PER C.N. PRASAD (JM)

1. This appeal is filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals) – 4, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 27.04.2016 for the Assessment Year 2009-10.

2. The first ground in the appeal of the assessee is against confirming the action of the Assessing Officer in bringing to tax the advances received

by the assessee as income, as against the income shown by the assessee based on completion and release of movies.

3. Ld. Counsel for the assessee, at the outset submitted that the identical issue in appeal is decided against the assessee for the Assessment Year 2006-07 by the Tribunal in ITA.No. 7843/Mum/2010 dated 21.11.2012.

4. On a perusal of the assessment order and appellate order of the Ld. Commissioner of Income-tax (Appeals), we find that the issue has been decided against the assessee by the Tribunal. Thus, respectfully following the said order of the Tribunal for the Assessment Year 2006-07, we sustain the action of the Assessing Officer as well as the Appellate authority and reject the grounds raised by the assessee on this issue.

5. The second ground of appeal, in the appeal of the assessee is with regard to the addition sustained by the Ld.CIT(A) in respect of the advances written off by the assessee.

6. Briefly stated the facts are that, the assessee an individual filed return of income on 8.8.2011 in response to notice u/s. 142(1) declaring loss of ₹.1,66,08,851/-. As the assessee filed return beyond the time specified u/s. 139(4) of the Act the return filed by the assessee was treated as invalid return. Subsequently, the assessment was reopened by issue

of notice u/s. 148 of the Act and the re-assessment was completed u/s. 143(3) r.w.s. 147 of the Act on 27.02.2014 determining the income of the assessee at ₹.10,55,25,340/-.

7. While completing the re-assessment the Assessing Officer on a perusal of the Profit and Loss Account noticed that assessee had written off bad advances of ₹.11,34,59,979/-. Assessee was required to furnish the details regarding written off of bad advances. Assessee vide letter dated 21.01.2014 submitted details of business advances given to M/s. Quest Films and also to Mrs. Ayesha Shroff who is the wife of the assessee. It was contended that in the Financial Year 2001-02 Mrs. Ayesha Shroff's sole proprietor concern M/s. Quest Films had begun for production of a film called "BOOM" and other movies. It was contended that since Mrs. Ayesha Shroff did not have any independent source of income assessee supported her initially to start up the production house and also acted in her films. It was contended that she had also taken loans from various institutional / non institutional lenders for production of films. It was contended that the film "BOOM" was a multi starrer big project movie which got delayed much beyond the schedule time and this has resulted in great financial crunch as the interest and other production cost increased tremendously. It was contended that as this is her first big venture, assessee had funded to ensure that the film be completed and

successfully released in order to recover the cost as also to save his image and good will as the leading film actor in the industry. It was contended that the film "BOOM" was released during the year 2003 and it was a failure at the box office due to which Mrs. Ayesha Shroff suffered a huge loss and she was not in a position to repay the creditors. She also undertook production of film "SANDHYA" which had almost been completed but could not be released due to several legal, technical issues and financial constraints. It was contended that the above two events have caused great financial burden and resulted in complete shutdown of her production house with no scope for any revival.

8. It was contended that assessee funded his wife's production house with intention of recovery of funds advanced for production of the films as also to improve his image as a film actor which was possible only if the films were successful at box office and unfortunately none of the films worked at box office successfully. It was contended that since assessee's wife had borrowed huge amounts from the lenders which could not be paid due to failure of her films, assessee had to rescue her, as non-payment of loans would have resulted into criminal proceedings against her which would have created a serious crisis in his carrier as a film artist having substantial reputation. Therefore, it was contended that since assessee's wife had no source of income, non-payment of the debts owed

by here to borrowers would have resulted in consequences u/s. 138 of the Negotiable Instrumental Act which are criminal in nature resulting in irreparable damage to his reputation besides causing several mental trauma.

9. It was further contended that assessee stood as guarantor to the amounts borrowed by his wife and therefore any default of her would have resulted in his personal guarantees being invoked. Therefore, in order to preserve his image as an actor he had to resort to borrowings from banks to pay all the debts incurred by his wife. Therefore, it was contended that the said loans are advanced to ensure the recovery of his old loans, to improve his image as an actor for preserving his image as an actor besides preventing any criminal proceedings being lodged against the assessee as well as the assessee's wife.

10. However, Assessing Officer not convinced with the submissions made by the assessee, rejected the claim of the assessee and brought to tax the advances written off by the assessee as income of the assessee holding that assessee is only a professional actor and he is not in business of giving loans or advances. The Assessing Officer was of the view that money advanced by the assessee to his wife was exclusively personal in nature. He also observed that the assessee has not produced relevant

information in the course of the proceedings. Therefore, Assessing Officer held that the claim made by the assessee does not fulfill the primary condition of any expenses to be allowed as per Income-tax Act, transaction has no business nexus. Therefore, he held that the loans written off are not allowable as deduction.

11. On appeal the Ld.CIT(A) considering the submissions of the assessee and various case laws including the decision of the Hon'ble Bombay High Court in the case of CIT *v.* K.M. Mody [141 ITR 903] and the decision of the Hon'ble Supreme Court in the case of S.A. Builders *v.* CIT [288 ITR 1], held that the loans given by the assessee are business advances and not personal loans. However, the Ld.CIT(A) held that though these amounts have been advanced in the normal course of business the mere suomoto write off of the same cannot be allowed as deduction, and thus sustained the order of the Assessing Officer. Against this order the assessee is in appeal before us.

12. The Ld. Counsel for the assessee reiterated the submissions made before the lower authorities. He further submitted that assessee funded Mrs. Ayesha Shroff's production house with an intention of recovery of funds advanced for production of the films as also to improve his image as a film actor which was possible only the films were successful at box

office. It is submitted that none of the films did well at box office and she incurred huge loss. It is submitted that this fact should be evidenced from the return of income along with annual accounts filed by Mrs. Ayesha Shroff the assessee's wife for the year ended 31.04.2004 corresponding to the Assessment Year 2004-05. Wherein Mrs. Ayesha Shroff declared loss of ₹.7,66,76,922/- and this return was accepted by the Revenue and assessment was also completed u/s. 143(3) determining the loss of ₹.7,13,00,138/-.

13. Ld. Counsel for the assessee further referring to Page No. 1 and Page No. 9 of the Paper Book which are the agreements entered by the assessee with Innetwork Entertainment Ltd, submitted that assessee stood as guarantor for Mrs. Ayesha Shroff for the loans taken by her for production of films in which the assessee was acted as hero to carryon successfully his carrier. Referring to Clause 31 of the Guarantee Agreement dated 26.07.2002 and Clause 22 of the Guarantee Agreement dated 29.07.2002, it is submitted that the assessee being the guarantor, guarantee the payments of all the amounts due and payable by M/s. Quest Films in case of default or breach of any of the terms and conditions on the part of the producer. Ld. Counsel for the assessee, therefore, submitted that the said loans were advances by the assessee to ensure the recovery of his old loans and to improve his image as an actor, for

preserving his image as an actor besides preventing any criminal proceedings being lodged against him or wife. Therefore, it is submitted that the amounts advanced to by the assessee to his wife is in the nature of business advances and should be allowed as business loss. The Ld. Counsel for the assessee placed reliance on the following decisions in support of his contentions: -

(i) CIT v. K.M. Mody [141 ITR 903 (Bom.)]
(ii) Patnaik & Co. Ltd. v. CIT [161 ITR 365 (SC)]
(iii) CIT v. R.B. Rungta & Co. [50 ITR 233 (Bom.)]
(iv) Sassoon J. David & Co. (P.) Ltd. v. CIT [118 ITR 261 (SC)]

14. Ld. Counsel for the assessee further referring to the order passed by the Tribunal in assessee's own case for the Assessment Year 2006-07 in ITA.No. 7843/Mum/2010 dated 21.11.2012 submitted that the Tribunal held that loans taken by the assessee being the film star has to maintain a certain set of standard of living cannot be said that the loans were utilized for personal purposes.

15. Ld. DR vehemently supported the order of the Assessing Officer. He submitted that it is the finding of the Assessing Officer that assessee is not into any money lending business and the money borrowed by the assessee was also utilized for house hold expenses, therefore, the advances written off cannot be treated as business advances.

16. We have heard the rival submissions, perused the orders of the authorities below. The assessee advanced money to M/s. Quest Films which is the proprietary concern of Mrs. Ayesha Shroff who is the wife of the assessee. The amounts advanced upto 31.03.2008 stood at ₹.9,01,68,594/- out of these advances during the current Assessment Year M/s. Quest Films returned an amount of ₹.1,09,25,851/-, thereby the total advances made by the assessee to M/s. Quest Films stood at ₹.7,92,42,743/- by the end of the current Assessment Year. Similarly, assessee advanced ₹.2,31,80,631/- upto 31.03.2008 to his wife Mrs. Ayesha Shroff and during the current Assessment Year an amount of ₹.1,10,36,405/- was advanced totaling to ₹.3,42,17,236/- to Mrs. Ayesha Shroff. The total advances made by the assessee upto the end of the current Assessment Year stood at ₹.11,34,59,979/-.

17. The assessee's contention was that these amounts were advanced to the proprietary concern of Mrs. Ayesha Shroff the assessee's wife in order to produce the films in which the assessee acted as hero and to boost his carrier as a film actor. It was also the submission of the assessee that the advances were given in earlier Assessment Years i.e. A.Y: 2001-02 for production of the film "BOOM" which was not successful at the box office and to recover the loans which were already given, further loans were advanced for producing the films by assessee's wife as she

did not have any independent source of income. It was the submission of the assessee that the amounts were advanced in the course to build his carrier and there is a business exigency in advancing moneys to his wife, therefore, it should be allowed as business loss. However, Assessing Officer denied the claim of the assessee for the reason that the assessee is not in any money lending business and the expenses cannot be allowed as wholly and exclusively incurred for the purpose of assessee's business. We find that the Ld.CIT(A) accepted the contentions of the assessee that the money's advanced by the assessee to M/s. Quest Films and also to Mrs. Ayesha Shroff are in the nature of business advances observing as under:

> *"6. I have considered the facts of the issue and the submissions of the AR. The Appellant is a noted film star in the Hindi film world. There is no doubt that he was a super star in 1994-1999. However, after this his career started lagging behind and he only played side roles. It is common for film stars to start their 'home productions' to promote themselves. Some succeed, some don't. A glaring example of this is Salman Khan, who has made a very successful comeback through his home production. The Appellants argument that he has financed these movies with an intention of boosting his career therefore carries weight.*

These loans were guaranteed by the Appellant or the Appellant has borrowed moneys from various parties to finance the debts of Quest Films or his wife. Non repayment of these loans by the Appellant would have seriously damaged his image also resulted in criminal proceedings against him as also his wife. This would have also had serious repercussion on the career of his son Tiger, who was aspiring to become a film star in those years. Tiger, now a successful actor in his own right and has acted in many movies. The Appellant has enclosed copies of the Agreement with M/s. IN Network Entertainment Limited where he has stood as a guarantor for the loans borrowed by Quest Films / Ayesha Shroff. Copies of Media report indicating that criminal proceedings were initiated against the Appellants have also been filed.

The loans have been given by the Appellant to Quest Films and Ayesha Shroff since 2002 when the production of these films commenced. The statements of the Appellant and his wife which were recorded by the AO also corroborate these facts.

The Appellant has also produced copies of the assessment order of Ms. Ayesha Shroff for AY 2004-05 to substantiate the fact that these films 'Boom' and 'Sandhya' had resulted in huge losses. Copies of the Appellant accounts for AY 2004-05 to 2006-07 also reveal that loans were taken by the Appellant and advanced to Quest Films / Ayesha Shroff. The issue of allowability of interest of the amounts borrowed by the Appellant to advance loans to Quest Film/ Ayesha Shroff and others had arisen in the AY 2005-06 and 2006-07. The AO had held that the amounts were borrowed by the Appellant to discharge personal liabilities, which included advances to Quest Films, Ayesha Shroff and others and therefore the interest was not allowable. On these facts and circumstances, the ITAT while allowing the Appellants appeal has observed as under:

> *"During the course of the assessment proceedings, the AO found that the assessee has claimed interest on loan taken from Bank of India to the tune of Rs.19,74,073/- and from Kokan Mercantile Bank to the tune of Rs.6,25,238/-. The AO sought explanation from the assessee. The assessee filed reply dt. lih July, 2007 submitted that the loan of Rs. 2 crores was taken from Bank of India in the financial year 2002-03 and loan of Rs. 50 lakhs was taken from Kokan Mercantile Bank in the financial year 2003-04 for discharge of personal liabilities. The AO was of the opinion that the loan has been taken for repaying personal liabilities and purchase of assets. The AO further observed that the assessee has given loan of Rs.9,97,47,562/- to various parties from whom no interest is offered as income. The AO disallowed Rs.25,99,311/- and added back to the income of the assessee.*
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> *Before the Ld. CIT(A), the assessee reiterated his submission that these amounts were borrowed for purchase of assets and also for discharging personal liabilities. After considering the submissions and the materials on record, the Ld. CIT(A) concluded that similar issue had arisen in the past wherein his predecessor in office has allowed claim of interest. In particular, the Ld. CIT(A) referred to the case of A.Y. 1996-97 following his predecessor's decision, the Ld. CIT(A) allowed the appeal of the assessee.*
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> *The Ld. Departmental Representative strongly objected to the findings of Ld. CIT(A) and argued that the assessee has \failed to justify the reasons for which the amount has been borrowed and further the assessee himself has given advances to various persons without charging any interest, therefore findings of the AO should be confirmed.*
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> *Per contra, the Ld. Counsel for the assessee submitted that the assessee has to maintain a certain life style in his profession for which at times he has to borrow money. The Ld. Counsel further pointed out that the amount has been borrowed in earlier years and not during the year under consideration therefore no disallowance should be made.*
>
> *We have considered the arguments from both parties. We find that the money has been borrowed in earlier year. Although the AO has mentioned that the amount has been borrowed for personal usage but has not brought any material on record to substantiate his claim. Further, the assessee being a film star has to maintain a certain set of standard of living for which he may require money from time to time. Even if assuming*

> *that the assessee has borrowed money to purchase luxurious car, that would justify looking to the nature of profession of assessee. Considering all these facts into totality, we do not find any merit in the submissions of the PR, findings of the Ld. CIT(A) are accordingly confirmed. Ground No.2 of Revenue's appeal is dismissed."*

The ITAT has clearly held that borrowing of amounts to maintain his life style and promoting his image as a film star cannot be said to be personal in nature and therefore the amounts lent by the Appellant to various parties including Quest Films / Ayesha Shroff cannot be considered to be personal loans as held by the AO.

The decision of the Bombay High Court in the case of CIT V/s. K.M. Mody (141 ITR 903) deals with issue of lending money to a production house were the assesses brother was playing a main role as also guaranteeing the loans taken by the production company from others. In these circumstances, the Bombay High Court held that the personal relationship of the assessee cannot be the only factor in determining whether the loans given were personal in nature or whether they were in the normal course of business. The Court has held that since the amounts were advanced in the normal course of business, the repayment of these debts was allowable as a deduction in computing total income.

Further, in the other decisions cited by the Appellant, the ratio of decisions is that one has to consider the facts and circumstances of each case and it cannot be held that merely because the advances were given to associate concerns, the same were not in the normal course of doing business even though the assessee was not in the business of lending money.

In my opinion considering all the facts and the decisions relied upon by the Appellant, the view taken by the AO that the said advances are mere personal loans given to Quest Films and Ayesha Shroff cannot be accepted. The AO has also not rebutted the Appellants claim that the said amounts have been given to Quest Films / Ayesha Shroff for producing films. Merely because the loans are advanced by the Appellant to his wife or to her proprietory concern cannot be the only criteria for holding that loans were personal in nature.

> *The AO's reliance on the decision of the Supreme Court in the case of S. A. Builders is completely misplaced. In fact, this decision actually supports the Appellant's case. The Supreme Court in this decision has observed as under:-*
>
> > *"In our opinion, the High Court as well as the Tribunal and other income-tax authorities should have approached the question of allowability of interest on the borrowed funds from the above angle. In other words, the High Court and other authorities should have enquired as to whether the interest free loan was given to the sister company (which is a subsidiary of the assessee) as a measure of commercial expediency, and if it was, it should have been allowed.*
> >
> > *The expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure, if it was incurred on grounds of commercial expediency.*

No doubt as held in Madhav Prasad Jatia's case (supra), if the borrowed amount was donated for some sentimental or personal reasons and not on the ground of commercial expediency, the interest thereon could not have been allowed under section 36(l)(iii) of the Act. In Madhav Prasad Jatia's case (supra), the borrowed amount was donated to a college with a view to commemorate the memory of the assessee's deceased husband after whom the college was to be named. It was held by this Court that the interest on the borrowed fund in such a case could not be allowed, as it could not be said that it was for commercial expediency.

Thus, the ratio of Madhav Prasad Jatia's case (supra) is that the borrowed fund advanced to a third party should be for commercial expediency if it is sought to be allowed under section 36(l)(iii) of the Act.

In the present case, neither the High Court nor the Tribunal nor other authorities have examined whether the amount advanced to the sister concern was by way of commercial expediency.

It has been repeatedly held by this Court that the expression "for the purpose of business" is wider in scope than the expression "for the purpose of earning profits" vide CIT v. Malayalam Plantations Ltd. [1964] 53 ITR 140, CIT v. Birla Cotton Spg. & Wvg. Mills Ltd. [1971J 82 ITR166 etc.

The High Court and the other authorities should have examined the purpose for which the assessee advanced the money to its sister concern, and what the sister concern did with this money, in order to decide whether it was for commercial expediency, but that has not been done.

It is true that the borrowed amount in question was not utilized by the assessee in its own business, but had been advanced as interest free loan to its sister concern. However, in our opinion, that fact is not really relevant. What is relevant is whether the assessee advanced such amount to its sister concern as a measure of commercial expediency.

Learned counsel for the Revenue relied on a Bombay High Court decision in Phaltan Sugar Works Ltd. v. CWT [1994] 208 ITR 989 1 in which it was held that deduction under section 36(l)(iii) can only be allowed on the interest if the assessee borrows capital for its own business. Hence, it was held that interest on the borrowed amount could not be allowed if such amount had been advanced to a subsidiary company of the assessee. With respect, we are of the opinion that the view taken by the Bombay High Court was not correct. The correct view in our opinion was whether the amount advanced to the subsidiary or associated company or any other party was Advanced as a measure of commercial expediency. We are of the opinion that the view taken by the Tribunal in Phaltan Sugar Works Ltd.'s case (supra) that the interest, was deductible as the amount was advanced to the subsidiary company as a measure of commercial expediency is the correct view, and the view taken by the Bombay High Court which set aside the aforesaid decision is not correct.

Similarly, the view taken by the Bombay High Court in Phaltan Sugar Works Ltd. v. CIT [1995] 215 ITR 5851 also does not appear to be correct.

> *We agree with the view taken by the Delhi High Court in CIT v. Dalmia Cement (Bharat) Ltd. [2002] 254 ITR 377 2 that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits."*
>
> *The Appellant has clearly demonstrated that the loan of Rs.11,34,59,9797- was given for commercial reasons and it is not a personal loan as held by the AO.*
>
> *Therefore, based on the above decision of the ITAT in the Appellants own case for AY 2005-06, 2006-07 the Bombay High Court in the case of K.M. Modi and the Supreme Court decision in the case of S. A. Builders, it is held that the loans aggregating to Rs. 11,34,59,9797- are business advances and not personal loans."*

18. These findings of the Ld.CIT(A) that the monies advanced by assessee are in the nature of business advances have not been challenged by the Revenue. However, we find that Ld.CIT(A) sustained the disallowance only for the reason that the assessee has suomoto written off the advances and such suomoto write off is not allowable as deduction u/s. 36(1)(vii) / 37(1) of the Act.

19. The Hon'ble Bombay High Court in the case of CIT *v.* R.B. Rungta & Co. (supra) held as under: -

> *"3. In our opinion, the argument of Mr. Joshi that the Tribunal was not entitled to consider the claim of the assessee for deduction as coming within section 10(1) is not sustainable. It may be that the assessee in claiming a particular deduction, after having set out the facts and circumstances and the manner in which his claim arose, labelled it wrongly and claimed it as falling under a head under which it does not fall. Such a wrong label attached by the assessee to his claim, however, will not disentitle him from getting the relief under the proper head to which the claim belongs if all the facts necessary for treating the claim under that head have been*

already stated by the assessee and no further investigation into any fresh facts is found to be necessary to give the assessee the said relief. In the present case, the facts which the assessee put before the Income-tax Officer and the Tribunal were that he had entered into these transactions on behalf of his constituents. The constituents had suffered losses and when the assessee approached them, they refused to pay the losses on the ground that the transactions were forbidden by the Prohibition Order. The assessee had, however, to pay the amounts to the association because the condition of its business as commission agents obliged it to make the payment in respect of the losses suffered by its constituents. It was on these facts that the assessee claimed that the dues which it had not realised from its constituents but which it had to make good to the association should be allowed as a bad debt to it. The Tribunal on these facts found that the dues owed to the assessee by the constituents could be treated as having become bad or irrecoverable debts on the refusal of the constituents to pay the same and, therefore, could be treated as bad debts. The Tribunal also took the view that at any rate the losses which the assessee suffered by being required to make good the unpaid losses of the constituents to the association represented a commercial loss of the assessee during the year in which he made the payment to the association, in the course of its business as adatia. The losses therefore, according to the Tribunal, could be allowed to the assessee as commercial losses under section 10(1) of the Act. In our opinion the view taken by the Tribunal, that on the facts before it the relief sought by the assessee could be granted to it not only under the head under which the assessee had pitched its claim, but even in the alternative under another head, was correct and the Tribunal was entitled to do so. Under rule 12 of the Appellate Tribunal Rules, the Tribunal in deciding the appeal before it, is not merely confined to the ground set forth in the memorandum of appeal or taken by leave of the Tribunal, but may even rest its decision on any other ground provided before basing its decision on the said new ground, it gives the party affected sufficient opportunity to be heard on that ground. It is not disputed that such an opportunity was allowed to the other side before it had decided in favour of the assessee under section 10(1). On the merits of the said ground also in our opinion the decision of the Tribunal is correct and in the circumstances of the case the assessee was entitled to treat the deductions as a revenue loss in computing its profits of the business under section 10(1), inasmuch as for the purpose of doing its business as an adatiya the assessee had to make those payments to the association."

20. As could be seen from the above decision of the Hon'ble Jurisdictional High Court wherein it has been held that the assessee is entitled to claim a benefit under appropriate head even though it has been wrongly claimed under a particular head. In the case on hand before us though the assessee made his claim that it should be allowed as bad debt the advances written off by the assessee are allowable as business loss

u/s. 28 of the Act, since the assessee has proved that loans were advanced for commercial reasons and it is not a personal loan.

21. In the case of Patnaik & Co. Ltd. *v.* CIT (supra)the Hon'ble Supreme Court held as under: -

> *"5. According to the statement of the case drawn up on the basis of the appellate order of the Appellate Tribunal the assessee was told that if it subscribed for the Government Loan preferential treatment would be granted to it in the placing of orders for motor vehicles required by the various Government Departments and to the further benefit of an advance from the Government up to 50 per cent of the value of the orders placed. Pursuant to that understanding, an advance to the extent of Rs. 18,37,062 was received by the assessee and a Circular was also issued by the State Government to various Departments to make purchases of the vehicles required by them from the assessee. Because of the advance received from the Government, the assessee was able to save Rs.45,000 as bank interest during the year. It was also noticed that the sales shot up substantially. On September 4, 1961 the assessee made a deposit of Rs.5 Lakhs consequent upon a Resolution of the Board of Directors passed about 6 weeks before after a statement made by the Chairman during the Board meeting that the Government had approached him to subscribe to the Government Loan and that the Company should do so as good orders could be expected. The purchase of the loan was approved by the Board of Directors and was ratified in the Annual General Meeting of the shareholders held on December 31, 1961. The Appellate Tribunal found that having regard to the sequence of events and the close proximity of the investment with the receipt of Government orders the conclusion was inescapable that the investment was made in order to further the sales of the assessee and boost its business. In the circumstances, the Appellate Tribunal held that the investment was made by way of commercial expediency for the purpose of carrying on the assessee's business and that therefore, the loss suffered by the assessee on the sale of the investment must be regarded as a revenue loss. We are of opinion that the Appellate Tribunal is right."*

22. As could be observed from above, the Hon'ble Apex Court upheld that, the order of the ITAT in holding that investment made by way of commercial expediency for the purpose of carrying on the assessee's business and the loss suffered by assessee on sale of such investments must be regarded as revenue loss.

23. The Hon'ble Bombay High Court in the case of CIT *v.* K.M. Mody (supra) considered a situation wherein the assessee advanced moneys to his brother who is a film producer and also stood as a guarantor for the loans obtained by his brother. As per Guarantor Agreement the assessee gave a continuing and irrevocable authority to the financier to recover and to appropriate towards the account of the producer all moneys payable by the financier to the guarantor i.e. Assessee. The financier appropriated the amounts payable by the producer the brother of the Assessee by invoking the guarantee agreement and the assessee being a guarantor treated the amount as having been lost in the business and claimed the same as business loss. The Tribunal held that such loss incurred by the assessee was in the course of the carrying on business and should be allowed as business loss u/s. 28 of the Act which decision was confirmed by the Hon'ble Bombay High Court.

24. In the case of Sassoon J. David & Co. (P.) Ltd. *v.* CIT (supra) the Hon'ble Supreme Court held as under: -

> *"1. The assessee-company was neither dissolved nor was its business undertaking sold. It continued to exist as a juristic entity even after the transfer of its shares by D in favour of T. No doubt that on account of such transfer of shares, the transferees gained control on the assessee Co., but neither D nor T derived any direct benefit out of the payment of retrenchment compensation even though such retrenchment might have facilitated the transfer of shares. The High Court wrongly placed more emphasis on the motive with which the amount was expended than the fact that the expenditure was incurred in connection with the business of the assessee. Even assuming that the motive behind the payment of retrenchment compensation was to satisfy the terms of agreement, as long as the amount was laid out or expended wholly and exclusively for the purpose of the business of the assessee, there was no reason for denying the benefit of section \ 0(2)(xv) to the assessee-company if there was no other impediment to do so. The*

assessee-company continued to function even after its control passed on to the hands of T and the expenditure was laid out for the purpose of the assessee's own trade and not for the trade of T who was only the shareholder of the assessee-company. As a result of the expenditure, the assessee Co. was in fact benefited and it was possible for it to earn more profits as a consequence of the reduction in the wage bill. The assessee-company is, therefore, entitled to claim payments in question as business expenditure under section 10(2)(xv).

2. The expenditure in question falls within the third test laid down in the case of Gordon Woodroffe Leather Manufacturing Co. v. CIT [I962J44 ITR 551 (SC) that the sum of money had been expended on the ground of commercial expediency and in order indirectly to facilitate the carrying on of the business. The three tests laid down in the said case, viz., (i) that the payment should have been made as a matter of practice which affected the quantum of salary, (ii) that there was an expectation by the employee of getting a gratuity and (iii) that the sum of money was expended on the ground of commercial expediency and in order indirectly to facilitate the carrying on of the business of the assessee have to be read disjunctively and if they are so read, the present case which satisfied the third test should be held as falling under section 10(2)(xv). The High Court was, therefore, in error in holding that the amount involved in the case did not satisfy the test applicable to the expenditure allowable under section 10(2) (xv).

3. The expression 'wholly and exclusively' used in section 10(2)(xv) does not mean 'necessarily'. Ordinarily, it is for the assessee to decide whether any expenditure should be incurred in the course of his or its business. Such expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits, the assessee is entitled to deduction even though there was no compelling necessity to incur such expenditure. The fact that some body other than the assessee is also benefited by the expenditure should not come in the way of an expenditure being allowed by way of deduction under section 10(2)9xv) if it satisfies otherwise the test laid down by law."

25. As could be seen from the above, the Hon'ble Supreme Court held that money expended on the ground of commercial expediency and in order indirectly to facilitate to carrying on of the business is an allowable expenditure. It was also held that such expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits, the assessee is entitled to deduction, even though there was no compelling necessity to incur such expenditure.

26. In the case of S.A Builders Ltd. *v.* CIT [288 ITR 1] the Hon'ble Supreme Court observed as under: -

"The expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency.

……

We agree with the view taken by the Delhi High Court in CIT vs. Dalmia Cement (Bhart) Ltd. (2002) 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits."

27. In the assessee's case the moneys were advanced to M/s. Quest Films which is the proprietary concern of Mrs. Ayesha Shroff and also in her individual capacity to build up the carrier of the assessee as well as to promote the business of Mrs. Ayesha Shroff and also to recovery the moneys already advanced to her which is all goes to show that the moneys were advanced as a measure of commercial expediency. When the moneys are advanced as measure of commercial expediency such advances are in the nature of business advances and the write off such advances by the assessee should be allowed as deduction u/s. 37(1) or u/s. 28 of the Act as business loss.

28. It is the submission of the assessee that till date the moneys advanced to M/s. Quest Films and also to Mrs. Ayesha Shroff could not

be recovered and there is no possibility of recovery in near future and therefore the amounts write off by the assessee have to be allowed as business loss appears to be justified.

29. In view of our above discussion, we hold that the Ld.CIT(A) having held that the amount advanced by the assessee are business advances is wrong in holding that the said advances cannot be held as deduction as the assessee had written off advances suomoto. We are in agreement with the Ld.CIT(A) that the advances written off by the assessee are business advances and there is no challenge by the Revenue to this finding. Once the advances are held to be business advances they are allowable as deduction either u/s. 37(1) or u/s. 28 of the Act as business loss. Deduction cannot be denied on the ground that the assessee had suomoto written off the advances. Thus we reverse the finding of the Ld.CIT(A) to that extent and direct the Assessing Officer to allow the claim of write off of advances by the assessee as business loss u/s. 28 of the Act.

30. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on the 31st December, 2018

Sd/-	Sd/-
(N.K. PRADHAN)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 31/12/2018
Giridhar, SPS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum