आयकर अपीलीय अधिकरण "एल" न्यायपीठ मुंबई में।

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

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI C.N. PRASAD, JUDICIAL MEMBER

ITA NO. 830/MUM/2014 : (A.Y : 2009-10)

M/s Rhodia Specialty Chemicals India Ltd. (Formerly known as M/s Albright & Wilson Chemicals India Ltd.), Phoenix House, A Wing 4th Floor, 462 Senapati Bapat Marg Lower Parel (West) Mumbai – 400 013 **PAN : AAACA3841L**	Vs. Addl. CIT – Circle 6(1) Room No.511, Aayakar Bhawan MK Road New Marine Lines Mumbai – 400 020

ITA NO. 622/MUM/2014 : (A.Y : 2009-10)

DCIT -7(2) Room No.624, MK Road Mumbai – 400 020	Vs. M/s Rhodia Specialty Chemicals India Ltd. (Formerly known as M/s Albright & Wilson Chemicals India Ltd.), Phoenix House, A Wing 4th Floor, 462 Senapati Bapat Marg Lower Parel (West) Mumbai – 400 013
(अपीलार्थी **/ Appellant)**	**(**प्रत्यर्थी / **Respondent)**

निर्धारिती **की ओर से** / **Assessee by : Shri Manish V Shah**
राजस्व **की ओर से / Revenue by : Shri Rajguru M**

सुनवाई की तारीख / **Date of Hearing : 25/01/2017**
घोषणा की तारीख / **Date of Pronouncement : 24/04/2017**

आदेश / O R D E R

PER C.N.PRASAD (J.M.) :

These appeals are filed by the Assessee and Revenue against the order of the Ld. CIT (Appeals)-14, Mumbai dated 26.11.2013 for the assessment year 2009-10 arising out of the assessment order passed u/s 143(3) of the Act.

2. Ground no. 1 in the appeal of the Assessee is in respect of addition of Rs.41,165/- made for the mismatch of AIR data with the Assessee's accounts.

3. Briefly stated the facts are that the Assessing Officer has received AIR information on credit card transactions and the Assessee was requested to reconcile the data with the books of account as there was some mismatch. It was found that AIR data showed credit card transactions amounting to Rs.5,34,631/- through American Express Banking Corporation by the Assessee during the year under consideration, but, whereas in the books of the Assessee it showed a credit card transaction of Rs.4,93,466/-. Thus, there was a mismatch to the extent of Rs.61,732/-. The Assessee submitted before the Assessing Officer that it is unable to reconcile the difference as the records of the Assessee company showing credit card transaction of Rs.4,93,466/- only. However, the Assessing Officer added this difference of Rs.61,732/- as income observing that the Assessee failed to get the confirmation from American Express Banking Corporation in respect of whom there was mismatch. He

observed that the Assessee has not discharged the primary onus to match the transactions in the accounts with AIR data.

4. The Assessee preferred appeal before the Ld. CIT (Appeals) and submitted that the difference between the two figures i.e. (5,34,631-4,93,466) is only Rs.41,165/- and not Rs.61,732/-, therefore, the Assessing Officer is not justified in making the addition of Rs.61,732/-. It was further submitted that the Assessee company had issued credit cards to two of its employees to incur expenses on behalf of the company. It was submitted that these credit cards were sometimes used by the employees for their personal purposes apart from business purposes and the personal expenses of the employees were borne by the employees only since the respective employees either paid directly or recovered from them by the Assessee. Therefore, it was submitted that the difference in the expenditure booked by the Company on the said credit cards and the amounts shown by the credit card issuing bank was because of the Assessee accounted for only those expenses which were incurred for the purpose of Assessee's business only. Therefore, it was contended that the Assessee reconciled and submitted details only upto Rs.4,93,466/- which was accounted for in the books of the Assessee and differential amount of Rs.41,165/- represented the amount which was in personal nature i.e. personal expenses incurred by the employee through the credit card provided by the company. Therefore such amount was never accounted in the books of the Company. The Ld. CIT(Appeals) without appreciating the submissions of the

Assessee sustained the addition observing that Assessee admitted that such difference pertains to personal expenses of the employees and therefore not allowable.

5. The Ld. Counsel for the Assessee before us referring to page nos. 94 and 99 of the paper book, the statements of account given by the credit card Company i.e. American Express Banking Corporation submits that personal expenses incurred by the Assessee were clearly demarcated and recovered from the employees and therefore the Assessee accounted for all the expenditure correctly and hence there is no difference as observed by the Assessing Officer. The Ld. Counsel for the Assessee further submits that the Assessing Officer has not provided the exact details where there is a mismatch and in the absence of any such specific information it is difficult for the Assessee to reconcile the difference. Therefore, the Ld. Counsel submits that when the Assessee has provided the details along with explanation accounting for the credit card payments to the extent of the Assessee incurring such expenditure for the purpose of the its business, the Assessing Officer should not have treated the difference of Rs.41,165/- as income of the Assessee solely based on the AIR information. The Ld. Counsel for the Assessee further placing reliance on the decision of the Coordinate Bench in the case of AF Ferguson and Company Vs. JCIT in ITA No.5037/Mum/2012 dated 17.10.2014 submits that the addition made solely on the basis of AIR information without providing complete details of parties and the transactions, addition cannot be made.

6. The Ld. DR on the other hand supported the orders of the authorities below.

7. We have heard rival submissions, perused the orders of the authorities below and the decision relied on. The Assessing Officer received AIR data i.e. the credit card payments of Rs.5,34,631/- and forwarded the same to the Assessee for reconciliation. The Assessee reconciled and furnished the details in respect of the transactions upto an amount of Rs.4,93,466/-. The Assessee submitted that in the absence of specific details, it is not able to reconcile with the figure of AIR data and the amounts which were debited in its books of account were reconciled with the details. The lower authorities, however were of the view that it is for the Assessee to reconcile the figures and in the absence of any such reconciliation, the amount was held to be treated as income of the Assessee. The Assessee before us submits that the Assessing Officer has not provided the specific information i.e. party-wise and transaction-wise details and therefore in the absence of such specific information, it is highly impossible to reconcile the transaction with the figure of AIR data and to explain as to why such difference arose. The Assessee also further contended that based on AIR information addition cannot be made. In the case of AF Ferguson & Co., more or less a similar case came up for consideration before the Coordinate Bench and the Coordinate Bench by observing as under held that in the absence of full

details of parties and transaction, the addition solely based on AIR information is not sustainable in the eyes of law.

> "6. We have considered the rival contentions of the ld. representatives of the parties. It is an undisputed fact on the file that the professional fees shown by the assessee in its P&L account far exceeds than the amount shown in the AIR information. Even the assessee has reconciled the major portion of the receipts. It has not been denied by the Revenue Authorities that full and complete details of the parties are not mentioned in the AIR information. The addition in this case has been made by the lower authorities solely on the basis of AIR information. In our view, the addition, made solely on the basis of AIR M/s. A.F. Ferguson & Co.
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> information, especially in the absence of full details of parties and when the professional receipts declared by the assessee far exceeds than the amount mentioned in the AIR information, is not sustainable in the eyes of law. Our above view is fortified with the decision of the Bangalore Bench of the Tribunal in the case of "DCIT vs. Shree G. Selva Kumar" in ITA No.868/Bang/2009 decided on 22.10.10 and another in the case of "Mrs. Arati Raman vs. DCIT" in ITA No.245/Bang/12 decided on 05.10.12 wherein it has been held that the assessment order based only on the AIR information would not stand in the eyes of law. If the assessee denies that he is in receipt of income from a particular source, it is for the AO to prove that the assessee has received income as the assessee cannot prove the negative. Reliance can also be placed on the decision of Mumbai Bench of Tribunal in the case of Shri S. Ganesh vs. ACIT" in ITA No.527/M/2010 decided on 08.12.10 wherein the Tribunal has held that in the absence of any material brought by the revenue authorities that the assessee has received amount more than the professional fees which has been declared by him in the P&L account and when the professional income declared by the assessee far exceeds the professional fees shown in the AIR information, then additions solely based on the AIR information are not sustainable.
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> 7. In view of our above observations and in the facts and circumstances of the case, the additions made by the Revenue solely based on the AIR information are not sustainable and the same are hereby ordered to be deleted."

8. In the case on hand before us also, the Assessing Officer has not provided the transaction-wise and party-wise details to the Assessee for reconciliation and in the absence of such complete details simply because the Assessee could not reconcile the figure matching with the AIR data, addition cannot be made solely based on such AIR information. However, the Assessee out of Rs.5,34,631/- has given the details and explanation to an amount of Rs.4,93,466/-. Therefore, following the said decision, we direct the Assessing Officer to delete the addition.

9. Ground No.2 and 3 of the Assessee's appeal is in respect of the issue as to whether the interest earned on fixed deposits from banks amounting to Rs. 43,57,525/- and interest received on deposits with MIDC or MSEB amounting to Rs.4,12,924/-is assessable under the head income from business or income from other sources.

10. Briefly stated, the facts are that the Assessee during the assessment year under consideration, received interest of Rs.43,57,525/- on fixed deposits from banks and interest of Rs.4,12,924/- on deposits with MIDC & MSEB. The Assessee claimed this income to be business income and not income from other sources. The Assessing Officer placing reliance on the decisions of the Hon'ble Apex Court in the cases of Tuticorin Alkali Chemicals Limited [227 ITR 502] and CIT Vs. Rajasthan Land Development Corporation [211 ITR 597] held that interest income from fixed deposits and deposits with MIDC & MSEB should be

taxed under the head income from other sources. Having held that interest on fixed deposits is assessable under the head income from other sources, he denied the claim of the Assessee for set off of such income against carry forward losses under the head business income. On appeal, the Ld. CIT (Appeals) following the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Swani Spice Mills Pvt. Ltd. [332 ITR 288] and analyzing various decisions on issue held that interest income is assessable under the head income from other sources on the facts of this case.

11. The Ld. Counsel for the Assessee before us placing reliance on the following decisions submits that income from fixed deposits in Banks, MIDC & MSEB should be assessed under the head income from business and not under the head income from other sources.

1. CIT Vs. Paramount Premises Ltd. [190 ITR 259] (Bom)
2. Eveready Industries India Ltd. Vs CIT [323 ITR 312] (Cal)
3. CIT Vs. Jagdishprasad M. Joshi [318 ITR 420] (Bom)

12. The Ld. DR strongly placed reliance on the orders of the authorities below and the decision of the Bombay High Court in the case of Swani Spice Mills Pvt. Ltd. (supra) and submits that interest on fixed deposits can never be income from business as the Assessee is not into money lending, but engaged in the business of manufacturing of chemicals and bulk drugs.

13. We have heard the rival submissions, perused the orders of the authorities below. The Assessee earned interest on fixed deposits from banks and on deposits with MIDC or MSEB and claimed such interest is assessable as business income and not under the head income from other sources. Almost similar issue has been considered by the Jurisdictional High Court in the case of CIT Vs. Swani Spices Pvt. Ltd (supra), wherein the Assessee received income from discounting bills and inter corporate deposits from out of surplus funds and claimed as business income for the purpose of deduction u/s 80HHC of the Act. The Jurisdictional High Court considering various decisions held that income received by way of bill discounting charges and interest on inter corporate deposits would not fall under the head of profits and gains of business or profession but would fall under the head income from other sources. The Hon'ble Supreme Court in the case of Pandian Chemicals Ltd. Vs. CIT [202 ITR 278] held that interest from deposits with electricity board is not income derived from business of the undertaking. Respectfully following the above said decisions, we hold that interest on fixed deposits with banks, interest on deposits with MIDC / MSEB would not fall under the head of profits and gains of business of profession but would fall under the head income from other sources. These grounds are dismissed.

14. Ground Nos. 4 and 5 are relating to the disallowance/addition on account of debit balances of creditors written off amounting to Rs.7,64,057/-.

15. Briefly stated, the facts are that the Assessing Officer noticed that the Assessee has reduced this amount from its computation of income as creditors balances written off. In the course of assessment proceedings, the Assessing Officer called for the details, explanation was sought from Assessee how this amount is allowable. The Assessee submitted the details of the creditors balances written off giving breakup which is mentioned at page 19 of the assessment order. Further, the Assessing Officer also asked to explain how this amount qualifies for deduction and he also required the Assessee to explain why this amount should not be brought to tax u/s 41(1) of the Act as cessation of liability. Before the Assessing Officer, it seems that no explanation was provided by the Assessee. The Assessing Officer therefore disallowed the write off of creditors balances which was reduced by the Assessee in the computation of income and he also made addition of the very same amount u/s 41(1) of the Act as cessation of liability. The Assessee carried the matter to the Ld. CIT (Appeals) and the Ld.CIT (Appeals) held that this amount is capital and is not revenue in nature and therefore not allowable u/s 37(1) of the Act. The Ld. CIT (Appeals) also observed that the Assessee failed to explain that why this amount was not debited/credited to the books of accounts when it is incurred in the course of business. The Ld. CIT (Appeals) confirmed the addition/disallowance. However the Ld. CIT (Appeals) directed the Assessing Officer to verify the submission of the Assessee that same amount cannot be disallowed and directed to grant relief if there is double disallowance.

16. Before us, the Ld. Counsel for the Assessee submits that these amounts represents the payments made to 3 parties namely :-

1. Praweg Conveyor - Rs.5,20,865/-
2. Sterling Strips - Rs.1,23,812/-
3. Reliance Slope - Rs. 74,411/-

i) The Ld. Counsel submits that in respect of payment to Praweg Conveyor, the amount was paid in 2002 for the project of Rock Conveyor system in Ambernath plant which lifts rock phosphate material from ground and to carry in Silo (storage tank) system. The Ld. Counsel submits that rock conveyor system was not functioning properly and unit was not able to support the service and therefore the service was under dispute. He submits that inspite of several requests invoices were not sent to the Assessee and therefore this amount was written off.

ii) With regard to the payment to Sterling, it was submitted that in 2003 this amount was paid for the study of improvement in operations of gasifier run on coal in Ambernath plant and since project study was not conducted properly, it was under dispute.

iii) In respect of payment to Reliance Slope Oil, it was submitted that slope oil raw material was purchased from Reliance by making advance payments. It was submitted that since the balance was lying since 2000 it was written off.

17. Therefore, the Ld. Counsel submits that the aforesaid balances were on account of advances made to creditors for the purchases / services made in the

course of the Assessee's business, therefore, the said expenses were allowable u/s 37(1) of the Act. Alternatively, the same should be allowed as business loss u/s 28 of the Act. The Ld. Counsel further submits that since the write off made by the Assessee was itself due to the Assessee company by the creditors and not the credit balances payable to the creditors, the question of applicability of Section 41 (1) of the Act does not arise.

18. Ld Counsel in support of his above contentions placed reliance on the following cases

1. CIT Vs. Woodward Governor India (P) Ltd. [312 ITR 254]
2. CIT Vs. Mysore Sugar Co-Ltd [46 ITR 649]
3. Sterling Agro Products Processing Pvt. Ltd. Vs. ACIT [48 SOT 80]

19. The Ld. DR on the other hand vehemently supported the orders of the authorities below.

20. We have heard the rival submissions, perused the orders of the authorities below. The Assessing Officer disallowed this amount as the Assessee in the assessment proceedings did not give proper explanation as to how this amount is allowable deduction and further why it should not be treated as cessation of liability. The Assessing Officer disallowed this amount twice while completing the assessment i.e. once by adding back this amount to the income and secondly by separately making addition u/s 41(1) of the Act.

The Ld. CIT (Appeals) held that these expenses were on capital account and therefore not allowable u/s Section 37(1) of the Act. Further, he accepted the submission of the Assessee that the addition should not be made twice and directed the Assessing Officer to verify the submission of the Assessee and if this amount is disallowed twice relief should be granted.

21. The nature of services for which advances were made by the Assessee in all these cases is explained by the Ld. Counsel and also extracted by Ld. CIT (Appeals) in Para 8.3 at page 17 of the order suggests that in respect of payments to Praweg Converyor and Sterling Strips they relates to rendering of particular services by the parties which they have failed because of the disputes. The nature of services also does not appear to be on capital account. In the third case i.e. Reliance Industries advance payment was made for supply of raw material. All the above payments were made in the years from 2000 to 2003 and since the services could not be rendered by the parties, the Assessee written off these amounts as allowable expenditure u/s 37(1) of the Act. These expenses cannot be held to be capital expenditure but allowable as revenue expenses. Even otherwise the advances were made for purchases of raw materials and services for the purpose of business only. Since they could not be recovered they are allowable as business loss u/s 28 of the Act.

22. The Chennai Bench in the case of Sterling Agro Products Processing Pvt. Ltd (supra) considering the decision of Supreme Court in the case of Woodward

Governor India Pvt. Ltd. (supra) held that losses on account of irrecoverable amounts which were advanced to parties for supply of raw materials, agricultural produce etc. would result in definitely to be a loss to Assessee and such loss would lie in revenue field. Therefore, following the decisions of Supreme Court and also the Chennai Bench referred to above, we hold that the write off of all advances made to parties for rendering services / supply of material it is a revenue expenditure allowable u/s 37(1) or u/s 28 of the Act.

23. Further, we hold that since the Assessee has written off only the advances made to parties for supply of materials / services, and it is not actually credit balances written off, the provisions of Section 41(1) are not attracted. Thus ground nos. 4 and 5 are allowed.

24. Coming to ground no.6, the Assessee is challenging the order of the Ld. CIT (Appeals) in upholding the action of the Assessing Officer in disallowing infrastructure service management fees and smart SMS fees amount to Rs.14,77,863/- u/s 40(a)(i) of the Act for non deduction of TDS u/s 195 of the Act.

25. Briefly stated the facts are that the Assessing Officer while completing the assessment, noticed that the Assessee paid a sum of Rs.8,41,184/- and Rs.6,36,679/- to Rhodia Asia Pacific Pte Ltd. (for short, RAP), Singapore towards infrastructure service management fees and smart SMS fees. The

Assessing Officer noticed that the Assessee did not deduct TDS, therefore required the Assessee to explain why no TDS was deducted. The Assessee submitted that it had paid Rs.8,41,184/- as management/professional fee to RAP who provides advice and guidelines in security practices, operations management on IT infrastructure, ensures compliance to corporate policies on usage of IT services etc. every year for which Assessee is required to pay. It was submitted that no income has accrued or arisen in India to RAP and hence income is not liable to tax in India. Consequently, no tax is required to be deducted at source. The Assessing Officer not convinced with the explanation of the Assessee treated the payment made by Assessee to non-resident holding the Assessee made payment towards services charges to non-resident, services used in Assessee's business in India and used for earning income in India. The Assessing Officer held that the same being in the nature of technical fees paid to non resident, this is income deemed to accrue or arise in India u/s 9(i)(vii) attracting TDS u/s 195. The Ld. CIT (Appeals) referring to various decisions and the various clauses of services listed in Appendix I of the agreement entered between Assessee and RAP concluded that RAP is providing technical services to the Assessee and therefore the Assessee is liable to deduct TDS on the fees paid towards FTS which is taxable in India.

26. The Ld. Counsel for the Assessee before us submits that during the remand proceedings it was submitted that Assessee had received services from 'Rhodia Asia Pacific Pte. Ltd (RAP) a tax-resident of Singapore under the Supply

of Service Agreement (SSA) effective, from 1st January. 2009 between Assessee Co. and RAP whereby RAP agreed to provide certain services. Further it was stated that Chapter IX of the Act deals with Double Taxation Relief, section 90 thereof deals with cases where the Indian Government has entered into Double Tax Avoidance Agreement (DTAA) with foreign countries. Sub section (2) of section 90 of the Act provides that where there is DTAA, the provisions of the Act are to apply only if they are more favorable to the taxpayer and India has a Double Taxation Avoidance Agreement with Singapore and under the said DTAA the aforesaid payments are not chargeable to tax in India. As per Indo-Singapore treaty, fee for technical services is taxable in India if such services make available technical knowledge, experience, skill, know-how or process which enable the person acquiring the services to apply the technology contained therein. In support of the above contention, assessee placed reliance on following decisions.

1. Dy CIT v ITC Ltd.(82 1TD 239) (Kol).
2. Mckinsey & Co.,Inc.(Phillippines) v Asstt.Dirèctor of IT(284 ITR 227)(Mum) (AT)
3. Motoroloa Inc. v Dy.CIT(2005)(96 TTJ 1)(Del)(SB).
4. DIT vs Guy Carpenter & Co. Ltd (346 ITR 504)
5. CIT vs De Beers India Minerals Pvt. Ltd (21 Taxmen.com 214)
6. Bharat Petroleum Corpn Ltd. Vs Joint Director of Income Tax (14 S0T 307)

Thus assessee pleads that the services rendered by RAP of IT, Admn and Security support services cannot be covered within the ambit of Fees for technical services under Article 12 of the Indo-Singapore DTAA because the

aforesaid service does not make available any technical knowledge, skills, process to assesee. Further it is stated that issue was not examined by the Assesssing Officer with the reference to Article 12 of the Indo-Singapore DTAA as the same was never asked for and hence was never submitted.

27. The Ld. Counsel for the Assessee further submits that TDS cannot be fastened on a retrospective amendment to Section 9(i)(vii). He places reliance on the decision of the Mumbai Bench in the case of Ashok Piramal Management Corporation Lt. Vs. ACIT [161 ITD 234].

28. The Ld. DR strongly places reliance on the orders of the Ld. CIT (Appeals)/AO.

29. We have heard the submissions, perused the orders of the authorities below. The Ld Counsel drew out attention to a note submitted which reads as under :

> "Rhodia Asia Pacific Pte Ltd. (RAP) is a Singapore based company in the business of operational services in Singapore. RAP is a tax resident of A certificate to that effect from Inland Revenue Authority of Singapore is enclosed.
>
> Under the Supply of Service Agreement (the agreement), effective 01.01.2009, between RAP and Albright & Wilson Chemicals India Ltd. (AWCI), RAP agreed to render services defined in Appendix I of the said agreement to AWC). The defined services are broadly providing advice and guidelines on security practices, operations management on IT infrastructure, ensuring compliance policies on usage of IT services such as mail, network, Internet and intranet, perform application support, organize and perform training for users, regular

maintenance of data administration issues with SMART keys users, update-documentation database etc.

Under the said agreement, services will be rendered to AWCI by RAP from its office in Singapore for which an invoice of USD 12,440/- has been raised vide invoice dated 31.03.2009.

As the technical services have been rendered by RAP in Singapore (outside India), its business income has not accrued or arisen in India and accordingly it is not liable to pay tax in India under Article 7 of the Indo - Singapore Treaty. We may add here that RAP does not have a permanent establishment in India in terms of Article 5 of the said Treaty. A certificate to that effect from RAP is enclosed.

The technical services rendered by RAP to AWCI cannot also be categorised as Fees for technical services .(FTS) under Article 1ef the said Treaty. Article 12(4) reads as under

4. The term “fees for technical services' as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provisions of such services through technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein; or

(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person.

It would be noted that under the said article the term FTS is defined as services of a managerial, technical or consultancy nature provided such services Make

available technical knowledge, experience, skill, know how or processes which enables the person acquiring the services to apply the technology contained therein.

The term "Make available" is narrower than the term "Rendering or used in section 9(1)(vii) of the Income Tax Act 1961, because "Make available" excludes any technical service that does not make. the technology / wherewithal available to the person acquiring the service; "make available" would mean that the person acquiring the service is itself enabled to apply. the technology / knowledge in future.

The term "Make Available" has been judicially interpreted. in many cases; a few of them are listed below:

- Raymond Ltd. V. DCIT 86 lTD 791 (Mumbai)

  Wherein the Hon'ble Tribunal held that the services rendered abroad by overseas lead managers in connection managerial GDR issue did not "make available" the services to the person receiving it.

- In CESC Ltd. v. DCIT 80 TTJ 806 (Cal) (TM), the Hon'ble Tribunal held that the services rendered abroad for opining and reviewing the project details did not "Make available" services to the person receiving it.

Hence, the technical services fee paid to RAP by AWCI is not FTS under Article 12 of the said Treaty."

30. In the course of assessment proceedings, the Assessee did not furnish the agreement which was furnished only in the course of appellate proceedings, therefore a remand was called for. Considering the remand report and submission of the Assessee, the Ld. CIT (Appeals) concluded that the payment made by the Assessee to RAP falls under fees for technical services, therefore liable for TDS even though there is no PE of the recipient company. RAP in India

which is a Singapore resident. The Ld. CIT (Appeals) also held that the Assessee has utilized the operation of the process developed by RAP and this by itself does not take the Assessee out of the scope of royalty. He concluded that the consideration being the use and the right to use of process is royalty within the meaning of clause (iii) of Explanation-2 to Section 9(i)(vii) of the IT Act. Therefore, he concluded that applying the ratio of the decision of Madras High Court in the case of Verizone Communications, the amount paid by the Assessee to RAP is taxable as royalty under Article 12(3) of India Singapore DTAA.

31. In the case of Ashok Pyramal Corporation (supra), the Coordinate Bench of the Tribunal held that withholding tax obligations are to be discharged in the light of law as it stands at that point of time i.e. relevant to the assessment year. Retrospective amendment made by Finance Act 2010 w.e.f. 01.06.1976 in Explanation-2 to section 9(2) does not create any liability upon Assessee for deduction of tax u/s 195 since payment was made much earlier in period relevant to assessment year 2009-10. The Coordinate Bench after elaborate discussion and considering various decisions held as under :

> "4.3.1 We have heard the contentions of both the parties and perused and carefully considered the material on record, including the judicial pronouncements cited. There is no dispute with regard to the fact that the said remittance of professional fees of Rs. 26,05,239/- made by the assessee to 'OBT' was towards rendering of services in respect of due diligence of 'DIAM Group of France. The assessee was of the view that since these services were rendered by 'OBT' outside India, the same was not taxable in India and therefore the assessee did not have any obligation to deduct tax at source under section 195 of the Act while making the said payment. It was thus contended that since there was no obligation on the part of the assessee to

deduct tax at source, the disallowance under section 40(a)(i) of the Act could not be made. The learned CIT (A), however, being of the view that the said remittances made to 'OBT', a non resident, was in the nature of fees for technical services, ('FTS'), held that the assessee was under obligation under section 195 of the Act to withhold tax at source from this payment and proceeded to uphold the disallowance made under section 40(a)(1) of the Act. According to the learned AR of the assessee, even if by any stretch of imagination, the remittance was considered as 'FTS', no TDS was required to be made at the time of remittance as per the law existing at that time (i.e. in the period relevant to Financial year 2008-09) because the said services were not rendered in India. The learned A.R. submitted, by virtue of amendment to Explanation to section 9(2) by Finance Act, 2010 w.e.f. 01.06.1976 even income received from services rendered outside India is to be treated as FTS. However, he submitted, by virtue of such retrospective amendment liability of TDS cannot be fastened upon the assessee under section 195, since as per the existing provision at the relevant period the income was not taxable, hence, assessee was not required to deduct tax at source. The learned D.R., though, supported the order of the CIT (A), however, he agreed that the legal issue raised by the assessee is covered by the decisions of ITAT cited by learned 4 A.R.

4.3.2 We may observe, the aforesaid legal issue argued by the learned A.R. was not raised either before the AO or before the CIT (A). However, as per the submissions counsels of both the parties that the appeal can be decided on this limited issue, we proceed to deal with the same. The question for consideration before us is whether or not the disallowance under section 40(a)(i) of the Act can be made based on the effect of the retrospective amendment in Explanation to section 9(2) of the Act which was inserted by Finance Act, 2010 w.e.f. 01.06.1976. In the decision of the Agra Bench of ITAT in VIrola International's case (supra) the Bench was of the view that the legal position was that unless the services are rendered in India, the same cannot be brought to tax as 'FTS' under section 9 of the Act, but that this legal position did undergo a change when the Finance Act, 2010 received the assent of the President of India on 08.05.2010. The Tribunal further observed at para 8 thereof that till 08.05.2010, the prevailing legal position was that unless technical services were rendered in India, the fees for such services could not be brought to tax under section 9 of the Act. Though the law was amended retrospectively, but as far as tax withholding liability was concerned, it would depend on the law as it existed at that point of time when the payments, from which tax was to be deducted, was made. A retrospective amendment in law

does change the tax liability in respect of an income, but it cannot change the withholding tax liability. In our view, the legal maxim lex non cogit ad impossibilia' would apply, meaning thereby that law cannot possibly compel a person to do something which is impossible to perform Withholding tax ('TDS') obligations are to be discharged in the light of the law as it stands at that point of time. In the case on hand, in our view, the disallowance under section 40(a)(1) of the Act can be effected only if and when the assessee had an obligation to deduct tax at source on the remittance to 'OBT' and the assessee fails to comply with such obligation. In this view of the matter, so far as the payments/remittances were made before 08.05.2010, me assessee did not have any liability to deduct tax on remittance to 'OBT' which were rendered outside India and therefore in our view no disallowance under section 40(a)(1) of the Act can be made or was "stainable since the assessee made the remittances to 'OBT' in the period relevant to AY 2009-10 which s before 08.05.2010.

4.3.3 In similar circumstances, on similar facts, Panaji Bench of the ITAT in the case of Ajit Ramakant Phatarpekar (supra) has held as under at para 5 and 6 thereof.

> '5 We heard the rival submissions and carefully considered the same alongwith the order of the tax authorities below. The issue before us is whether any disallowance can be made u/s. 40(a)(1). The AO during the course of the assessment proceedings noted that the Assessee has made payment amounting 9 ITA NOS. 145 & 146/PNJ/2014 (A.Y 2010-11) to Rs. 28,87,983/- to Hongkong and Singapore parties, Rs. 17,43,033/- to Zhao Long (Asia) Ltd. for monitoring, supervision of discharged cargo, draft survey, joint sampling of discharged cargo, photographs, sample preparation and sealing of samples, analysis of the grades etc. Copies of the bills were placed at pg. 134-140 of the paper book. From all the bills it is apparent that these services were rendered in the People's Republic of China. Similarly, the Assessee has paid a sum of Rs. 11,44,950/- to De Long Minerals and Logistics Pte Ltd., Singapore for supervision of the vessel at the discharge port. The payment has been made through DBS Bank Ltd., Singapore. Details of the payments made are given at pg. 133 of the paper book. From these payments, it is apparent that the payment of Rs. 2,58,506/- does not relate to the impugned assessment year. Rest of the payments was made prior to 31.3.2010. The Revenue was

of the opinion that due to retrospective amendment made by the Finance Act, 2010 w.e.f. 1.6.1976 the income of the non-resident shall be deemed to accrue or arise in India under clause (v) or (vi) or (vii) of sub-section (1) and shall be included in the total income of the non-resident whether or not the non-resident has residence or place of business or business connection in India or the nonresident has rendered services in India. The destination sample charges are consultant/technical charges paid for gradation of the iron ore exported and due to explanation-2 to Sec. 9(1)(vii) fee for technical services means any consideration including any lump sum consideration for rendering of any managerial, technical or consultancy services (including the provisions of services of technical or other personnel). The technical services rendered in the case of the Assessee, according to the id. DR, was taxable in the hands of the party who received it outside India as the said income is deemed to accrue or arise in India. In view of the provisions of Sec. 40(a)(i) any interest or fee for technical services which is payable outside India on which tax is deductible at source under Chapter 17B is not allowable unless TDS is deducted. This is an undisputed fact that in this case the Assessee has not deducted the tax. We are 10 ITA NOS. 145 & 146/PNJ/2014 (A.Y 2010-11) not going on the merits of the taxability of the payments made by the Assessee to the non-resident company as, in our opinion, once the payments made by the Assessee to the non-residents are of the nature of technical fee, the legal position in view of the retrospective amendment w.e.f. 1.6.1976 in Sec. 9 brought out by the Finance Act, 2010 is indisputably that the said income will be deemed to accrue and arise in India whether or not the non-resident has residence or place of business or business connection in India or the non-resident has rendered services in India. Under the amended explanation to Sec. 9(1) as it exists today it is specifically stated that the income of non-resident shall be deemed to accrue or arise in India under clause (v) or (vi) or (vii) of Sec. 9(1) and shall be included in the total income whether or not (a) the non-resident has residence or place of business or business connection in India or (b) the non-resident has rendered services in India. Similar view has been taken by the co-ordinate Mumbai bench of this Tribunal in the case of Ashapura Minichem Ltd. v. ADI7 40 SOT 220 (Mum.) in which it was observed as under:

"9. The legal proposition canvassed by the learned counsel, however, does no longer hold good in view of retrospective amendment with effect from 1-6-1976 in section 9brought out by the Finance Act, 2010. Under the amended Explanation to section 9(1), as it exists on the statute now, it is specifically stated that the income of the non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of section 9(1), and shall be included in his total income, whether or not (a) the non-resident has a residence or place of business or business connection in India; or (b) the non-resident has rendered services in India. It is thus no longer necessary that in order to attract taxability in India, the services must also be rendered in India. As the law stands now, utilization of these services in India is enough to attract its taxability in India To that effect, recent amendment in the statute has virtually negated the judicial precedents supporting the proposition that rendition of services in India is a sine qua non for its taxability in India.

10. The concept of territorial nexus, for the purpose of determining the tax liability, is relevant only for a territorial tax system in which taxability in a tax jurisdiction is confined to the income within its borders. Under this system, any foreign income that is earned outside of its borders is taxed by the tax jurisdiction, but then apart from tax heavens, the only prominent countries that are 11 ITA NOS. 145 & 146/PNJ/2014 (A.Y 2010-11) considered territorial tax systems are France, Belgium, Hong Kong and the Netherlands, and in those countries also this system comes with certain anti abuse riders. In other major tax systems, the source and residence rules are concurrently followed. On a conceptual note, source rule of taxation requires an income sourced from a tax jurisdiction to be taxed in this jurisdiction, and residence rule of taxation requires income, earned from wherever, to be taxed in the tax jurisdiction in which earner is resident. In the US tax system, this residence rule is further stretched to cover US taxation of all its citizens irrespective of their domicile, and the source rule is also concurrently followed. It is this conflict of source and residence rules which has been the fundamental justification of mechanism to relieve a taxpayer, whether under a bilateral treaty or under domestic legislations, of

the double taxation either by way of exclusion of income from the scope of taxability in one of the competing jurisdictions or by way of tax credits. Except in a situation in which a territorial method of taxation is followed, which is usually also a lowest common factor in taxation policies of tax heavens, source rule is an integral part of the taxation system and any double jeopardy, due to inherent clash of source and residence rule, to a taxpayer is relieved only through the specified relief mechanism under the treaties and the domestic law. It is thus fallacious to proceed on the basis that territorial nexus to a tax jurisdiction being sine qua non to taxability in that jurisdiction is a normal international practice in all tax systems. This school of thought is now specifically supported by the retrospective amendment to section 9."

6. It is an undisputed fact that the Finance Act, 2010 received the assent of the President on 8.5.2010 and all the payments have been made by the Assessee to the non-resident party prior to receiving of assent of the President making the retrospective amendment by adding explanation to Sec.. 9(1). At the time when the Assessee made the payment there was no provision u/s. 9(1) making the technical fees deemed to accrue or arise in India whether or not (a) the non-resident has residence or place of business or business connection in India or (b) the non-resident has rendered services in India. It is not disputed by the Id. DR that the non-resident did not have residence or place of business or business connection in India. The non-resident has also not rendered services in India. The source of the income in the hands of the non-resident was outside India. Even the place of business which earned the income was also outside India. Since the technical fees was not deemed to accrue or arise in India at the time when the Assessee made the payment as there was no provision under Sec. 9(1), 12 ITA NOS. 145 & 146/PNJ/2014 (A.Y 2010-11) the income received by the non-resident as per the existing law at the time when the Assessee made the payment, in our opinion, was not taxable in India under the Income Tax Act. We are not going through the tax treaty which under Article 12 provides that any fees for technical/consultancy services arising in a contracting state and paid to a resident of other contracting state may be taxed in that other state. This article also provides

that such royalty and technical/consultancy fees may also be taxed in the contracting state in which they arise or accrue according to the laws of the state. Prior to the insertion of explanation to Sec. 9(1) by the Finance Act, 2010 with retrospective effect, the professional and consultancy services even though rendered outside India were not deemed to accrue or arise in India irrespective of the fact whether the party who rendered the services is having place of residence or place of business in India. It is only due to the retrospective amendment made by the Finance Act, 2010 that the position has become clear. If the income was not taxable in India it cannot be made taxable in view of the tax treaty. This is a fact that as argued by the Id. AR the retrospective amendment brought by the Finance Act, 2010 was not in existence at the time when the Assessee had made the payments. The Id. AR submitted that the Assessee cannot be penalized for performing an impossible task of deducting TDS in accordance with the law which was brought into the statute book much after the point of time when the tax deduction obligation was to be discharged. In this regard, we perused the decision of the coordinate bench in the case of Channel Guide India Ltd. v. ACIT, 139 lTD 49 (Mum.) as relied by the Id. AR. We noted that in this decision the co-ordinate bench of ITAT held as under:

"25. In our opinion, the issue involved in the present case however, is relating to disallowance made u/s.40(a)(1) for non-deduction of tax-at-source from the payment made by the assessee to SSA and as held by Ahmedabad Bench of this Tribunal in the case of Sterling Abrasives Ltd. by its order dated 23.12.2010 cited by the Ld. Counsel for the assessee, the assessee cannot be held to be liable to deduct tax at source relying on the subsequent amendments made in the Act with retrospective 13 ITA NOS. 145 & I46/PNJ/2014 (A.Y 2010-11) effect. In the said case, Explanation to sec. 9(2) was inserted by the Finance Act, 2007 with retrospective effect from 1 .6.1976 and it was held by the Tribunal that it was impossible for the assessee to deduct tax in the financial year 2003-04 when as per the relevant legal position prevalent in the financial year 2003-04, the obligation to deduct tax was not on the assessee. The Tribunal based its decision on a legal Maxim lex non cogit ad impossiblia meaning thereby that the law cannot possibly compel a person to do something which is

impossible to perform and relied on the decision of Hon'ble Supreme Court in the case of Krishna Swamy S. PD and Another v. Union of India and others 281 ITR 305 wherein the said legal Maxim was accepted by the Hon'ble apex court.

26. In view of the above discussion, we are of the view that the amount in question paid by the assessee to SSA was not taxable in India in the hands of SSA either uls.9(1)(vi) or 9(1)(vii) as per the legal position prevalent at the relevant time and the assessee therefore was not liable to deduct tax at source from the said amount paid to M/s. SSA and there was no question of disallowing the said amount by invoking the provisions of sec.40(a)(i). In that view of the matter, we delete the disallowance made by the AO uls.40(a)(1) and confirmed by Ld.. CIT (A) and allow ground no. I of the assessee's appeal."

The ld. DR even though vehemently contended but did not deny that the Finance Act, 2010 got the assent of the President on 8.5.2010 much later than the date when the Assessee had made the payment to these parties. Even the id. DR could not site any contrary decision. Therefore, we hold that the aforementioned amendment does not create any liability against the Assessee as the legal position prevailing at the relevant time has to be considered when the payment was made by the Assessee to the non-resident party. Accordingly, we hold that the Assessee was not liable for deduction of tax u/s. 195 of the Income Tax Act. Since the Asses see was not liable at that time to deduct the tax, the disallowance u/s. 40(a)(1) cannot be made. We accordingly confirm the order of CIT (A) deleting the addition though on a different ground pleaded by the id. AR. Thus, this ground stands dismissed.'

4.3.4 Following, inter alia, the decisions of the ITAT Panaji Bench in the case of Ajit Ramakant Phatarpekar (supra), of the ITAT Agra Bench in the case of Virola International (supra), we hold that the retrospective amendment made by Finance Act, 2010 w.e.f. 01.06.1976 in Explanation 2 to section 9(2) of the Act, which received the assent of the President of India on 08.05.2010, does not create any liability to the assessee in the case on hand for deduction of tax under section 195 of the Act on the remittance to 'OBT' since the payment was made much earlier; in the period relevant to Financial Year 01.04.2008 to

> 31.03.2009. Since the assessee was not liable at that point in time to deduct tax at source in respect of the remittance e to 'OBT' the disallowance made thereof under section 40(a)(i) could not have been made and being factually and legally unsustainable, we direct the AO to delete the same. It is accordingly ordered. On this short point, we allow the assessee's appeal."

32. As could be seen from the above decision, it was held that so far as the payments/remittances made before 08.05.2010 which is the date, the assent of the President of India was given to the amendment in Explanation to section 9(2) by Finance Act, 2010 w.e.f. 01.06.1976. The Assessee did not have any liability to deduct the tax on remittances abroad for services rendered outside India.

33. On a perusal of the assessment order as well as the Ld CIT (Appeals) order, we find that the lower authorities have not thoroughly examined the nature of services rendered by RAP to the Assessee and also whether they are rendered outside India or rendered in India. No such finding is given by the lower authorities. We find from the orders of the authorities below that the services were rendered by RAP to the Assessee and RAP is a resident of Singapore but it is not clear as to the detailed services rendered by RAP vis-à-vis the agreement and where such services were rendered to Assessee whether in abroad or in India and how they were rendered. These findings of fact are necessary to examine as to whether RAP has rendered technical services to the Assessee within the meaning of the provisions of section 9(1)(vii) r.w.s. 195 of the Act. In such circumstances, we are of the considered view that the

Assessing Officer should examine thoroughly this issue with reference to the nature of services rendered by RAP, by calling complete details from the Assessee and ascertaining whether these services were rendered outside India or in India to the Assessee and how they were rendered and also to examine the applicability of the decision of this Tribunal in Ashok Pyramal Management Corporation Ltd (supra) and decide the issue in accordance with law after providing adequate opportunity to the Assessee. Hence, we restore this issue to the file of the Assessing Officer for denovo consideration.

34. Ground No.7 of the grounds of appeal of the Assessee is in respect of disallowance of prior period expenses of Rs.1,28,331/- incurred on survey fees and maintenance charges.

35. The Assessing Officer while completing the assessment disallowed Rs.1,28,331/- observing that these expenses were not incurred during the assessment year under consideration, but were incurred in the prior years and therefore they cannot be allowed as deduction in the year of actual payment as Assessee is following mercantile system of accounting. He placed reliance on the decision in the case of CIT Vs. Travancore Titanium [198 ITR 458]. On appeal, the Ld.CIT (Appeals) sustained the disallowance, however, accepted the alternative claim of the Assessee that expenses should be allowed for the period to which it pertains to after proper verification and a direction was given to the

Assessing Officer to allow the expenses for the period to which the expenses relate to.

36. The Ld. Counsel for the Assessee submits that during the year under consideration the Assessee had incurred expenditure on survey fees and maintenance charges and debited these expenses to Profit & Loss account in the audited financial statements for the assessment year under consideration. The Ld. Counsel for the Assessee submits that these expenses were in the nature of legal and professional fees paid to consultant for various professional works and they were incurred for the purpose of business. He submits that the expenditure is crystalized and quantified in the current year and hence the same should be allowed as deduction in the current year. It is further submitted that it is settled legal position that the expenses should have crystalized and quantifiable during the year and they should be incurred for the purpose of the business. For this he relied on the decision of Bombay High Court in the case of Phalton Sugar Works Ltd. [162 ITR 622]. Further placing reliance on the decision of Bombay High Court in the case of CIT Vs. Nagri Mills Co. Ltd [33 ITR 681], the Ld. Counsel submits that the Hon'ble High Court held that "the question as to the year in which deduction is allowable may be material when the rate of tax chargeable on the Assessee in two different years is different. But in the case of income of a company, tax is attracted at a uniform rate and whether the deduction in respect of bonus was granted in assessment year 1952-53 or in the year corresponding to the accounting year 1952 i.e. in the

assessment year 1953-54 should be a matter of no consequence to the department and one should have thought that the department would not fritter away its energies in fighting matters of this kind."

37. The Ld. DR supported the orders of the authorities below.

38. We have heard the rival submissions, perused the orders of the authorities below. We find that the Assessing Officer disallowed these expenses stating that they relate to prior years and not relate to the assessment year under consideration. The Ld. CIT (Appeals) though sustained the disallowance directed the Assessing Officer to allow in the year to which the expenditure pertains to.

39. On hearing both the parties, we are of the considered view that in view of the decisions of the jurisdictional High Court referred to above if there is no difference in the rate of tax in the year in which the expenditure pertains to and the year in which the Assessee has claimed the expenditure as prior period expenses we do not see any reason not to allow such expenditure. Therefore, we direct the Assessing Officer to verify as to whether there is rate difference in tax or not and if there is no difference in rate of tax apply the decision of the jurisdictional High Court in the case of CIT Vs. Nagri Mills Co. Ltd. (supra) and allow the claim of the Assessee. The Assessing Officer shall also examine the ratio of decision in the case of Phalton Sugar Works Ltd (supra) and find out

whether the expenses have crystalized and quantifiable during the year under consideration and allow the expenditure during this year accordingly. This ground is allowed for statistical purpose.

40. The 8th ground in the grounds of appeal is relating to disallowance under 40(a)(ia) in respect of the provisions amounting to Rs.85,000/-. The Ld. Counsel submits that this ground is not pressed. Therefore this ground is dismissed as not pressed.

41. Coming to the Revenue's appeal, the first ground is relating to the assessability of income on account of insurance claim, rent recovery, scrap sale and miscellaneous income as business income instead of income from other sources.

42. The Assessing Officer while completing the assessment treated the above said incomes under the head income from other sources and not as business income. The Ld. CIT (Appeals) accepted the contention of the Assessee that the said incomes are forming part of business income and not income from other sources.

43. The Ld. DR vehemently supported the orders of the Assessing Officer and the Ld. Counsel for the Assessee supported the orders of the Ld. CIT (Appeals). Counsel for Assessee also placed reliance on the decision in the case of CIT Vs.

Sadhu Forging Ltd. [336 ITR 444 (Delhi)] in support of his submissions that scrap sale and other miscellaneous receipts are income from business. As regards insurance claim, the Ld. Counsel for Assessee submits that because of theft of raw materials insurance claim was received by the Assessee. Counsel for Assessee submits that in the case of Mazda Colours Ltd. Vs. DCIT in ITA No.5135/Mum/2008 and in the case of Grauer and MEIL (India) Ltd. Vs. ACIT in ITA No.782/Mum/2010, it was held that insurance claims are forming part of income from business only. As regards rent recovery, he placed reliance on the decision in the case of Penta Media Graphics Ltd and Ors. Vs. DCIT in ITA No.1780/MDS/2009.

44. We have heard the rival submissions, perused the orders of the authorities below. The Ld. CIT (Appeals) after elaborate discussion and consideration of the submissions of the Assessee and the findings of the Assessing Officer held that on examination of facts on record, receipts on account of insurance claim, rent recovery, scrap sale & miscellaneous income have to be treated as business income as they are inextricably linked with the business. The Revenue could not rebut the findings of the Ld. CIT (Appeals) and the submissions of the Assessee before the Ld. CIT (Appeals). In our view insurance claim and scrap sales are income from business. Rent recovered and miscellaneous income cannot be business income of the Assessee. Thus we direct the AO to treat the receipt from insurance claim and scrap sales as

business income and rent recovered and miscellaneous income as income from other sources. This ground is partly allowed.

45. Coming to ground nos. 2 and 3 of the grounds of appeal, the Revenue is challenging the order of the Ld. CIT (Appeals) in deleting the addition on account of repairs and maintenance treating them as revenue expenditure.

46. The Assessing Officer while completing the assessment disallowed certain expenditures listed out in pages 24 to 27 of the assessment order amounting to Rs.96,27,579/- stating that this expenditure was incurred for renovation of building for which construction materials, tiles etc. were purchased and therefore, such expenditure is capital in nature. On appeal, the Ld. CIT (Appeals) following the decision of the Coordinate Bench in Assessee own case for the earlier years held that the said expenditure is of revenue in nature and deleted the addition.

47. The Ld. DR vehemently supported the orders of the Assessing Officer.

48. Ld. Counsel for the Assessee submits that in Assessee's own case for the assessment years 2004-05 to 2008-09 in ITA Nos. 55/Mum/2008, 1222/Mum/2009, 1777/Mum/2011, 5762/Mum/2012, the Tribunal allowed similar claims of the Assessee. He further placed reliance on the following the decisions in support of his submissions.

1. CIT Vs. Mewar Oil and General Mills Ltd. [216 CTR 65] (Raj)
2. Gunter Merchant Cotton Press Co. Ltd. Vs. ITO [108 ITR 620](A.P.)
3. CIT Vs. Bhupinder Flour Mills P. Ltd [206 Taxman 123] (P&H)
4. CIT Vs. Bharat Suryodaya Mills Co. Ltd [202 ITR 942] (Guj)
5. New Shorrock Spinning and Manufacturing CO. Ltd. Vs. CIT [30 ITR 338] (Bom)
6. CIT Vs. Chogule and Co. Ltd. [214 ITR 523] (Bom)
7. Mahalakshmi Textile Mills [66 ITR 710] (SC)

49. We have heard the rival submissions, perused the orders of the authorities below. The Assessee before the Ld. CIT (Appeals) made detailed submissions along with details of expenditure incurred by it and submitted that the expenses incurred by the Assessee during the year are similar to that of expenses incurred in earlier years. The expenses were incurred for maintenance of assets of the company already in existence and such expenditure has not resulted in bringing into existence any new asset or any permanent or enduring benefit to the Assessee. It was submitted before the Ld. CIT (Appeals) that in the Assessee's own case, the Tribunal in the assessment year 2004-05 held that the expenses on repairs to building, plant and machinery is revenue expenditure and similar expenditure was incurred during this assessment year as was incurred in earlier years. Therefore, it was submitted that the said expenditure be allowed as revenue expenditure. Before us, it was submitted that the Assessee is into chemical business and there will be a continuous corrosion of assets which need constant repairs. The Ld. Counsel also referring to page 305 of the Paper Book, submitted that from

assessment year 2004-05 to 2009-10, the Assessee is continuously incurring expenses for repairs to plant and machinery and repairs and maintenance to building.

50. The Ld. CIT (Appeals) after considering various submissions and following the order of the Tribunal in Assessee's own case held that the expenditure is current repairs observing as under :

> "10. I have considered the facts of the case, submission of the appellant and the assessment order, the order of my Ld Predecessor and Hon'ble ITAT in appellant's own case cited supra. The A.O. has not brought out anything on record to depict that the expenditure -Incurred, endowed enduring benefit to the assesseë or that the value of capital asset has increased or any new asset has been created. Further, the assessee manufactures chemical. Therefore, its building, plant and machinery require high degree of maintenance, due to constant corrosion suffered by them. Therefore, in my considered opinion, the facts remaining the same, respectfully following the decision of Hon'ble ITAT and my Ld. Predecessor, the expenditure of Rs.96,27,579/- is held to be in the nature of current repairs. Hence, the addition of Rs.96,27,579/- stands deleted."

On a careful consideration of the facts and the submissions of the Assessee and going through the findings of the lower authorities and the Coordinate Bench of the Tribunal, we are of the considered view that since similar expenditures were allowed as revenue expenditure for preserving and maintaining the existing assets by the Tribunal in Assessee's own case which the Ld. CIT (Appeals) followed, we do not find any valid reason to interfere with the reasoning and the decision of the Ld. CIT (Appeals). Hence order of the Ld.

CIT (Appeals) is sustained. Grounds raised by the Revenue on this issue are rejected.

51. Coming to ground no. 4 of the grounds of appeal, the issue is related to deletion of disallowance of Rs.1,85,465/- made u/s 40(a)(ia) of the Act.

52. The Assessing Officer while completing the assessment disallowed Rs.3,15,486/- being payment made for rendering of service for e-mail activity for non deduction of TDS u/s 194(H) of the Act. The Ld. CIT (Appeals) in so far as Rs.1,85,465/- is concerned which is the provision for payment to Equant Technology Service (I) Private Limited directed the Assessing Officer to verify whether the excess provision reversed is shown as income in the next year and if not to take remedial action in view of the decision of the Madras High Court in the case of CIT Vs. Armour Consultants Pvt. Ltd. [355 ITR 418]. Before us the Ld. Counsel submits that this is only a year end provision which was reversed in the next year and offered excess provision to tax. He therefore submitted that no disallowance is attracted u/s 40(a)(ia) of the Act. He placed reliance on the decision of Mumbai Bench in the case of Industrial Development Bank of India Vs. ITO [107 ITD 45 (Mum)].

53. We have heard the rival submissions, perused the orders of the authorities below. The Ld. CIT (Appeals) deleted the addition observing as under :

> " I have considered the facts of the case, submission of the appellant and the assessment order, the order of my Ld. Predecessor and Hon'ble ITAT in

> appellant's own case cited supra. The A.O. has not brought out anything on record to depict that the expenditure incurred endowed enduring benefit to the assessee or that the value of capital asset has increased or any new asset has been created. Further, the assessee manufactures chemical. Therefore, its building, plant and machinery require high degree of maintenance, due to constant corrosion suffered by them. Therefore, in my considered opinion the facts remaining the same, respectfully following the decision of Hon'ble ITAT and my Ld. Predecessor, the expenditure of Rs.96,27,579/- is held to be in the nature of current repairs. Hence the addition of Rs.96,27,579/- stands deleted."

54. As could be seen from the above, the Assessee has made only a provision which was reversed in subsequent year and therefore there is no liability to deduct TDS on such provision. It is also submitted that excess provision reversed so offered to tax in the subsequent year. Therefore, we do not find infirmity in the order passed by the Ld. CIT (Appeals). This ground is dismissed.

55. Coming to ground no.5, this ground is relating to deletion of addition of Rs.1,16,248/-on account of the software expenses by treating them as revenue expenditure by CIT (Appeals) instead of capital expenditure by AO. The Assessing Officer while completing the assessment treated the cost of software amounting to Rs.1,16,248/- as capital expenditure holding that the Assessee is deriving long term benefit of enduring nature by purchasing this software. On appeal, the Ld. CIT (Appeals) deleted the addition treating the cost of software as revenue expenditure.

56. The Ld. Counsel reiterating the submissions made before the lower authorities submits that the acquisition of software did not result in any advantage of enduring in nature and it had not acquired the absolute ownership of the software but only the right to use of the software. The expenditure constitutes recurring operational expenses and are necessary for the efficient day to day functioning of the assets of the company and hence are in the nature of revenue expenditure. It is also submitted that the application software purchased i.e excise and service tax software and e-TDS software was only to facilitate proper accounting and other functions within the organization and it did not result in any enduring benefit or profitability to the Assessee. Therefore, such software applications do not help in increasing the business of the Assessee and only helps in efficient and effective conduct of the business placing reliance on the decision of the Bombay High Court in the case of CIT Vs. Raychem RPG Ltd. [346 ITR 138] and CIT Vs. Kotak Securities Ltd. [346 ITR 349]. The Ld. Counsel submits that the software expenses should be allowed as revenue expenditure.

57. We have heard the rival submissions, perused the orders of the authorities below. In the case of CIT Vs. Raychem RPG Ltd (supra), Bombay High Court confirmed the order of the Tribunal and held that software expenditure incurred by the Assessee is not part of profit making apparatus of Assessee and therefore expenditure is revenue expenditure. In this case, the Tribunal followed the special bench decision in the case of Amway India Enterprises Vs.

DCIT [301 ITR (AT) 1] and held that since the software does not form part of profit making apparatus of the Assessee, the same is to be allowed as revenue expenditure. In the case of CIT Vs. Kotak Securities Ltd. (supra), it was held that no substantial question of law will arise on a question raised by the revenue as to whether the software expenditure is capital expenditure or revenue expenditure. The Tribunal held that expenditure on purchase of software is revenue in nature. Respectfully following the above said decisions, we uphold the order of the Ld. CIT (Appeals). This ground of appeal is dismissed.

58. The last issue in ground nos. 6 and 7 of the Revenue appeal is with regard to allowing depreciation on Ambernath Unit by the Ld. CIT (Appeals).

59. Briefly stated the facts are that the Assessee had two units one situated at Roha and the other at Ambernath. The operations in Ambernath unit was discontinued from July 2008. The Assessing Officer observed that on September 3, 2007, the business purchase agreement was entered into by the Assessee with *Nilefo* Chemicals India Pvt. Ltd for sale of Ambernath Unit including land, factory, plant and machinery. The Assessing Officer held that thought the Ambernath factory was run upto July 2008, the depreciation was claimed on the entire block of assets for the full year. The Assessing Officer was of the view that since the Assessee by virtue of entering into business purchase agreement discontinued the business permanently, Assessee is not entitled for

depreciation on Ambernath Unit. On appeal, the Ld. CIT (Appeals) allowed the claim for depreciation observing that it is admitted by the Assessing Officer that the operation of the Ambernath unit was closed only from July 2008, that means, the unit was in operation from April to June 2008 and therefore, the unit was used in the previous year. Since the unit was used in the previous year relevant to the assessment year under consideration, depreciation has to be allowed. While holding so, he has considered the detailed submissions of the Assessee wherein various case laws were relied on by the Assessee.

60. The Ld. Counsel for the Assessee submits that the shut down unit of Ambernath was used for part of the year and it is forming part of block of assets. Therefore, Assessee is entitled for depreciation. Placing reliance on the following decisions of the Delhi and Gujarat High Courts in the cases of Capital Bus Service Pvt. Ltd Vs. CIT [123 ITR 404] and ACIT vs. Ashima Syntex [251 ITR 133], the counsel submits that in these decisions, it was held that even if asset was used for part of the year, depreciation is allowable. The Ld. Counsel for the Assessee also submits that depreciation is allowable even if unit remains closed during the entire year. For this he places reliance on the decision of the Mumbai Bench in the case of Swati Synthetics Ltd. Vs ITO [38 SOT 208] and the Delhi High Court in the case of CIT Vs. Oswal Agro Mills Ltd. [238 CTR 113].

61. The Ld. DR placed reliance on the assessment order.

62. We have heard the rival submissions, perused the orders of the authorities below. It is undisputed fact that the assets of Ambernath Unit were put to use by the Assessee during April to July 2008 during the assessment year under consideration. Therefore, when once the assets of a block are put to use during the year depreciation cannot be denied on the ground that they are subsequently sold by the Assessee. Even if the Assessee sold the Ambernath unit subsequently at least till the period of the asset put to use i.e. July 2008 depreciation is allowable.

63. In the case of Swati Synthetics Ltd. (supra), the Coordinate Bench of the Tribunal following the decision of the Jurisdictional High Court in the case of GR Shipping Ltd. in ITA No.598/2009 dated 28.07.2009 held that once the assets are entered into block of assets, the individual identity of the assets will loose and depreciation should be allowed on the entire block of assets as the existence of an individual asset in the block of assets itself amounts to use for purpose of business. Therefore depreciation is allowable on such assets even though the said asset is not actually used in course of business during the relevant assessment year. The Hon'ble Bombay High Court in the case of GR Shipping Ltd (supra) dismissed the appeal of the revenue holding that no substantial question of law would arise on the question as to whether depreciation would be allowable on the asset not used by the Assessee during the year which is part of block of assets observing as under :

"1. Heard learned counsel for the parties.

> 2. The question sought to be raised in this appeal is based on the ground of non-user of the Barge in the subject assessment year though they were used in the previous assessment year. According to revenue, depreciation would not be available under section 32 of the Income-tax Act. The question sought to be canvassed is squarely covered by two judgments of this Court one in the case of Whittle Anderson Ltd v. C1T 79 ITR 613 and another in the case of CIT Vs. G.N. Agrawal (Individual) 217 ITR 250.
>
> In this view of the matter, appeal stands dismissed for want of substantial question of law."

No contrary decisions were brought to our notice by the revenue. Hence, following the above decisions, we affirm the order of the Ld. CIT (Appeals) in allowing depreciation on Ambernath plant. The grounds of revenue on this are dismissed.

Order pronounced in the open court on the 24th day of April 2017.

Sd/-	Sd/-
(SHAMIM YAHYA)	**(C.N.PRASAD)**
लेखा सदस्य /	**न्यायिक सदस्य /**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई / Mumbai; दिनांक / Dated 24.04.2017

LR, SPS

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), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mum**