



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"L" BENCH, MUMBAI**  
**BEFORE SHRI JASON P. BOAZ, ACCOUNTANT MBMER, AND**  
**SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA no.3949/Mum./2009  
(Assessment Year : 2001-02)

Afcons Infrastructure Limited  
Afcons House, 16 Shah Indl. Estate  
Veera Desai Road, Azad Nagar P.O.  
Andheri (E), Mumbai 400 058  
PAN – AAACA9067G

..... Appellant

v/s

Addl. Commissioner of Income Tax  
Range-8(1), Aayakar Bhawan  
101, M.K. Road, Mumbai 400 020

..... Respondent

ITA no.4269/Mum./2005  
(Assessment Year : 2001-02)

Asstt. Commissioner of Income Tax  
Range-8(1), Aayakar Bhawan  
101, M.K. Road, Mumbai 400 020

..... Appellant

v/s

Afcons Infrastructure Limited  
Afcons House, 16 Shah Indl. Estate  
Veera Desai Road, Azad Nagar P.O.  
Andheri (E), Mumbai 400 058

..... Respondent

C.O. no.56/Mum./2006  
Arising out of ITA no.4269/Mum./2005  
(Assessment Year : 2001-02)

Afcons Infrastructure Limited  
Afcons House, 16 Shah Indl. Estate  
Veera Desai Road, Azad Nagar P.O.  
Andheri (E), Mumbai 400 058

..... Cross Objector  
(Original Respondent)

v/s

Asstt. Commissioner of Income Tax  
Range-8(1), Aayakar Bhawan  
101, M.K. Road, Mumbai 400 020

..... Respondent  
(Original Appellant)

ITA no.3645/Mum./2006  
(Assessment Year : 2001-02)

Dy. Commissioner of Income Tax  
Range-8(1), Aayakar Bhawan  
101, M.K. Road, Mumbai 400 020

..... Appellant

v/s

Afcons Infrastructure Limited  
Afcons House, 16 Shah Indl. Estate  
Veera Desai Road, Azad Nagar P.O.  
Andheri (E), Mumbai 400 058  
PAN - AAACA9067G

..... Respondent

Assessee by : Shri J.D. Mistry a/w  
Shri Nitesh Joshi  
Revenue by : Shri Jasbir Chauhan

Date of Hearing - 23.06.2016

Date of Order - 08.07.2016

**ORDER**

**PER BENCH**

These bunch of appeals and cross objection are against two separate orders passed by the learned Commissioner (Appeals)-8, Mumbai, for the assessment year 2001-02. While the set of cross appeal and cross objection are against the common order passed by the learned Commissioner (Appeals) on quantum, there is one more appeal being ITA no.3645/Mum./2006, which arises out of consequential order passed by the Assessing Officer.

**ITA no.3949/Mum./2005 - Assessee's Appeal**

Grounds raised in the aforesaid appeal are as under:-

"Interest on loans

1. The learned Commissioner (Appeals) erred in confirming the disallowance of interest to the extent of an amount computed at the rate of 15.44% on the borrowings of Rs. 793.25 lakhs.
2. The learned Commissioner (Appeals) erred in not deleting the entire disallowance of interest attributed on loans and advances made to subsidiary companies, a partnership firm in which the appellant is a partner and to a sister concern.
3. The learned Commissioner (Appeals) erred in presuming that the whole of the borrowings of Rs. 793.25 lakhs had been utilised for making advances to subsidiaries, a partnership firm and a sister concern.
4. Without prejudice, the learned Commissioner (Appeals) erred in considering the average rate of interest at 15.44%.  
Disallowance under section 14A
5. The learned Commissioner (Appeals) erred in confirming the disallowance of proportionate interest expenses as incurred towards earning income that does not form part of the total income.
6. The learned Commissioner (Appeals) erred in confirming the action Assessing Officer in estimating and disallowing interest expenses \ establishing any nexus between investments generating tax-free income and borrowed funds.
7. The learned Commissioner (Appeals) erred in holding that the provisions of section 14A are applicable in respect of investments made by the appellant in the shares of the company and in the partnership firm.
8. Without prejudice, the learned Commissioner (Appeals) erred in considering the average rate of interest at 15.44%.

Depreciation on leased assets

9. The learned Commissioner (Appeals) ought to have directed the Assessing Officer to allow depreciation on leased assets in the event the lease transaction entered into by the appellant is ultimately held as finance transaction and the lease rental payments are not allowed as a deduction.

Payments to contractors

10. The learned Commissioner (Appeals) ought to have directed the Assessing Officer to delete the disallowance of Rs.3 1.66 lakhs in respect of labour charges paid to Mr. Sukhdev Singh Dhiman.

11. The learned Commissioner (Appeals) erred in confirming the disallowance of ₹ 14,76,291 being payment made to Ocean Tech.

12. The learned Commissioner (Appeals) ought to have directed the Assessing Officer to delete the disallowance in respect of payments made to the following / parties :

a. Usha Martin Ltd.	Rs. 15,01,286
b. SC Biswas	Rs. 1,862,204
c. Niketu Enterprises	Rs. 1,26,748
d. Zenith Motors	Rs. 23,825
e. Amison Enterprises	Rs. 1,29,125
f. Ganesh Trading Co.	Rs. 92,998
g. AAbbaGami& Sons	Rs. 21,650
h. Mehta Steels	Rs. 78,649
i. Indian Iron and Steel Co.	Rs. 1,72,444
Total	Rs. 40.08.929

*Consultation fees paid to Meteo Consult, Netherlands*

13. The learned Commissioner (Appeals) erred in confirming disallowance of consultation fees of Rs.7.57 lacs paid to Meteo Consult, B. V., Netherlands under section 40(a)(i).

14. The learned Commissioner (Appeals) erred in holding that the weather forecast report provided by Meteo Consult is in the nature of information concerning industrial experience and hence covered by Article 12 of the Tax Treaty between India and the Netherlands.

'Deduction for expenses of Rs.7.97 lacs.

15. The learned Commissioner (Appeals) erred in not allowing deduction for sales tax liability to the extent of Rs.7.97 lacs.

16. Without prejudice to the above, the learned Commissioner (Appeals) ought to have directed the Assessing Officer to allow deduction for sales tax liability of Rs.7.97 lacs in the previous year relevant to the assessment year 2002-2003.

Interest under section 234D

17. The learned Commissioner (Appeals) erred in confirming the action of the Assessing Officer in charging interest under section 234D. The appellant denies liability to pay interest under section 234D.

18. Without prejudice to the above, the learned Commissioner (Appeals) erred in not deleting the interest charged under section 234D for the period prior to June 1, 2003.

General

19. Each one of the above grounds of appeal is without prejudice to the other.

20. The appellant reserves the right to amend, alter or add to the grounds of appeal."

2. Grounds no.19 and 20, being general in nature, do not require any adjudication.
3. Insofar as grounds no.10 and 12 are concerned, at the outset, Shri J.D. Mistry, Senior Counsel appearing for the assessee submitted, on the instruction of the assessee, he does not want to press these grounds, as the assessee has been given relief in giving effect to order passed by the Assessing Officer in pursuance to order passed by the first appellate authority. Hence, grounds no.10 and 12 are dismissed as "*not pressed*".
4. As far as grounds no.15, 16, 17 and 18, learned Sr. Counsel submitted, on the instruction of the assessee, he does not want to press these grounds due to smallness of the amount. Hence, grounds no.15, 16, 17 and 18 are dismissed as "*not pressed*".
5. Grounds no.1, 2, 3 and 4, relate to disallowance of interest on loans advanced to the subsidiaries.
6. Brief facts are the assessee a company is in the business of developing infrastructure projects like roads, bridges, canals, etc. For

the assessment year under consideration, the assessee filed its return of income on 31<sup>st</sup> October 2001, declaring total income of ₹ 130.38 lakh. In the course of assessment proceedings, the Assessing Officer while examining the balance sheet of the assessee for the year under consideration noticed that the assessee has borrowed funds from banks and financial institutions on which it has paid interest of ₹ 1174 lakh at the average rate of 19% per annum, whereas, it has advanced loans to its subsidiaries / sister concerns without charging any interest. He, therefore, called upon the assessee to explain why interest paid on borrowed funds which were diverted to subsidiary companies should not be disallowed as such interest payment was not for the purpose of its business. In response to the query raised, the assessee submitted that the loans advanced to subsidiary companies were not interest free but the assessee has charged interest @ 11%. It was further submitted, the subsidiary companies are in fact business partners of the assessee and the loans advanced to them were in normal course of carrying on the business to meet the objects of the company and in the long term interest of the company. The Assessing Officer, however, was not convinced with the same. He observed, while the assessee is borrowing funds at higher rate of interest, it is advancing loans to the subsidiary companies by charging lesser rate of interest for which there is no reasonable explanation. The Assessing Officer was of the opinion that the difference between the interest

charged on the funds borrowed by the assessee and the interest charged by the assessee from its subsidiary has to be disallowed. Accordingly, computing the average rate of interest paid by the assessee on the funds borrowed at 19% he worked out the total interest paid by the assessee at ₹ 474.18 lakh as against interest recovered by the assessee from subsidiary companies @ 11% at ₹ 219.42 lakh. He, therefore, disallowed the differential amount of ₹ 254.76 and added to the income of the assessee. Being aggrieved of such disallowance, the assessee preferred appeal before the learned Commissioner (Appeals).

7. Before the first appellate authority, the assessee challenging the disallowance of interest submitted, it had borrowed funds for specific purpose and also utilised for that purpose. Therefore, as the funds borrowed were utilised for the purpose of business, no disallowance out of interest expenditure should have been made. It was submitted, the loans advanced to subsidiary companies were out of assessee's own funds in the form of share capital and reserves, besides, loans given were for the purpose of business. Therefore, no disallowance of interest can be made. It was submitted, while confirming the disallowance of interest for the assessment year 1997-98 to 2000-01, the first appellate authority had directed the Assessing Officer to re-work out interest disallowance by taking into account the advance

made to the subsidiary companies after 31<sup>st</sup> March 1996. Therefore, as an alternative argument, it was submitted by the assessee that interest disallowance should be restricted to incremental advances given after 31<sup>st</sup> March 1996. In this context, assessee also submitted, a statement showing the loans advanced to subsidiary companies after 31<sup>st</sup> March 1996, which amounted to ₹ 793.25 lakh. Assessee also challenged the computation of average rate of interest @ 19% by the Assessing Officer as high and excessive, as according to assessee, the average rate of interest on the funds employed by the assessee is 7.69% only. Further, it was submitted, the assessee has borrowed funds for the following specified purpose; (i) working capital requirement; (ii) hire purchase finance for equipment; and (iii) interest for delayed payment for supplies and services. It was submitted, as far as items no.(ii) and (iii) are concerned, the funds borrowed were utilised for the specific purpose, hence, cannot be attributed to loans advanced to subsidiary companies. Therefore, no disallowance of interest expenditure should be made. The learned Commissioner (Appeals), after considering the submissions of the assessee in the light of the facts and material brought before him, was of the view that since the disallowance of interest in preceding assessment years were upheld by his predecessor-in-office, no departure can be made in the impugned assessment year. However, following the view expressed by the first appellate authority in the earlier assessment years, he held

that no disallowance on interest can be made on loans advanced to subsidiary companies up to 31<sup>st</sup> March 1996. He held that disallowance is to be restricted only in respect of incremental advance made after 31<sup>st</sup> March 1996 which was worked out at ₹ 793.25 lakh. As far as the rate of interest to be applied for disallowance, learned Commissioner (Appeals) observed that the average rate of borrowing by assessee is 15.44% per annum. Accordingly, he directed the Assessing Officer to apply the interest rate of 15.44% to loans advanced of ₹ 793.25 lakh to work out quantum of interest payable and thereafter reduce therefrom interest received by the assessee from subsidiary companies to disallow the balance amount. Being aggrieved of the disallowance sustained by the learned Commissioner (Appeals), assessee is in appeal whereas, against partial relief granted by the learned Commissioner (Appeals), the Revenue has also preferred appeal.

8. Learned Authorised Representative submitted, loans advanced to Afcons Pauling (India) Ltd., amounted to ₹ 778.72 lakh. He submitted, the assessee has deep interest in all the subsidiary companies to which loans were advanced, therefore, such loans advanced was out of commercial expediency. Hence, no disallowance of interest expenditure can be made. In this respect, he relied upon the decision of the Hon'ble Supreme Court in S.A. Builders v/s CIT, [2007] 288 ITR 001 (SC). The learned Authorised Representative submitted, in

assessment year 1997-98, the issue of disallowance of interest in respect of loans advanced to Afcons Pauling (I) Ltd., was subject matter of dispute before the Hon'ble Jurisdictional High Court and the High Court taking note of the fact that the issue was covered by the decision of the Tribunal in assessee's own case for assessment years 1998-99, 1999-2000 and 2000-01, directed the Assessing Officer to decide the issue of disallowance of interest by applying the principle laid down by the Hon'ble Supreme Court in S.A. Builders (supra). Learned Authorised Representative submitted, while implementing the direction of the High Court for the assessment year 1997-98, the Assessing Officer after examining in detail the nature and purpose of loan advanced by the assessee to Afcons Pauling (India) Ltd. in course of assessment ultimately concluded that such loan is for commercial reasons, hence, applying the principle laid down in S.A. Builders (supra), no disallowance of interest can be made on advancement of such loans. The learned Authorised Representative submitted, even in the assessment years 1998-99 to 2000-01, the Tribunal has granted similar relief to the assessee holding that loans advanced to Afcons Pauling (India) Ltd., is for business purpose. He, therefore, submitted, no disallowance can be made on account of loans advanced to Afcons Pauling (India) Ltd. In this regard, he relied upon the following decisions:-

*i) Hero Cycle Pvt. Ltd. v/s CIT, [1997] 63 Taxmann.com 308 (SC); and*

*ii) S.A. Builders v/s CIT, [2007] 288 ITR 001 (SC)*

9. Insofar as loans advanced to other subsidiary companies are concerned, the learned Sr. Counsel submitted, apart from the fact that they were for the purpose of assessee's business, it is also a fact that the assessee was also having own interest free funds including share capital and reserve which is more than the aggregate loans given to the subsidiary companies. In this regard, he drew the attention of the Bench to the fund flow statement for the financial years 1996-97 to 2000-01. He, therefore, submitted, as the assessee was having own surplus interest free funds which is more than the loans advanced to subsidiary companies, no disallowance on account of interest attributable to such loans advanced can be made as the Assessing Officer has failed to establish a nexus between the borrowed funds and loans advanced. In this regard, he relied upon the decision of Hon'ble Jurisdictional High Court in CIT v/s Reliance Utilities and Powers Ltd., [2009] 313 ITR 340 (Bom.). Without prejudice to the aforesaid submissions, learned Authorised Representative contended, the average cost of fund should be considered for the purpose of computing disallowance under section 36(1)(iii). He submitted, the Assessing Officer has not proved that only borrowed funds were utilised for advancing loans to the subsidiary companies and sister

concerns. Therefore, the average rate of cost of fund computed by the assessee at 7.69% should be applied to the incremental advance of ₹ 793.25 lakh for determining the disallowance, if at all, it is to be made. Finally, the learned Sr. Counsel submitted, the assessee has recovered interest @ 11% on the loans advanced to the subsidiary companies and such interest has been assessed under the head "*Business*". He submitted, only because the interest charged to the subsidiary is lesser than the interest paid by the assessee on borrowed capital, no disallowance can be made once it is accepted that capital was borrowed for the purpose of assessee's business. In this context, he relied upon the decision of the Hon'ble Madras High Court in CIT v/s Pudukottai Co. Pvt. Ltd., [1972] 84 ITR 788 (Mad.).

10. Learned Departmental Representative on the other hand while supporting the disallowance sustained by the learned Commissioner (Appeals) also argued for restoration of the disallowance made by the Assessing Officer while pressing the corresponding ground raised by the Department on the same issue.

11. We have considered the submissions of the parties and perused the material available on record in the light of the case laws relied upon. The loans of ₹ 793.25 lakh which was considered for computing disallowance of interest were advanced to the following subsidiary companies:—

<i>Hazarat &amp; Co. Ltd.</i>	<i>₹ 0.65 lakh</i>
<i>Afcons Pauling (India) Ltd.</i>	<i>₹ 778.72 lakh</i>
<i>SSS Electricals India Ltd.</i>	<i>₹ 9.66 lakh</i>
<i>Afcons Dressing and Marine</i>	<i>₹ 4.22 lakh</i>
<i>TOTAL:-</i>	<i>₹ 793.25 lakh</i>

12. As could be seen from the figures noted above, the major portion of the loan amounting to ₹ 778.72 lakh was advanced to Afcons Pauling (India) Ltd. It is brought to the notice of the Bench and not controverted by the learned Departmental Representative, similar disallowance of interest on loans advanced to Afcons Pauling (India) Ltd. was subject matter of dispute in assessment year 1997-98 before the Hon'ble Jurisdictional High Court. The Hon'ble Jurisdictional High Court while disposing off assessee's appeal in Income Tax Appeal no.44 of 2006, in order dated 16<sup>th</sup> June 2008, directed the Assessing Officer to decide the issue afresh by applying the principle laid down by the Hon'ble Supreme Court in S.A. Builders (supra). The Assessing Officer while giving effect to the aforesaid direction of the Hon'ble Jurisdictional High Court examined the nature of loans advanced to Afcons Pauling (India) Ltd. in detail and thereafter came to a conclusion that loans given to Afcons Pauling (India) Ltd. was for commercial reasons, hence, as per the principle laid down by the Hon'ble Supreme Court in S.A. Builders (supra), no disallowance of interest can be made on account of loans advanced Afcons Pauling (India) Ltd. It is also a fact on record in assessee's own case for

assessment years 1998–99, 1999–2000 and 2000–01, Tribunal had issued directions to the Assessing Officer to decide the issue by applying the principles laid down by the Hon'ble Supreme Court in S.A. Builders (supra). Thus, when the Assessing Officer in assessment year 1997–98 has already accepted in principle that loans advanced to Afcons Pauling (India) Ltd. is on commercial reasons, there is no reason why disallowance of interest attributable to such loans is to be made. This is, keeping in view the principle laid down by the Hon'ble Supreme Court in S.A. Builders (supra) and Hero Cycles Pvt. Ltd. (supra). Therefore, the assessee having established on record that the loans advanced to Afcons Pauling (India) Ltd. is for the purpose of its business, no disallowance of interest expenditure can be made at least in respect of loans advanced of ₹ 778.72 lakh to Afcons Pauling (India) Ltd. As far as loans advanced to other subsidiaries are concerned, it is the plea of the assessee that it had sufficient own interest free funds available to advance the loan to subsidiary companies and no borrowed funds were utilised. In this context, he has referred to the fund flow statement for the assessment year 1996–97, 1997–98, 1997–98, 1998–99, 1999–2000 and 2000–01 to demonstrate that the assessee had sufficient interest free funds available to make the investment in the subsidiary companies. On a perusal of the fund flow statement placed at Page–335 to 339 of the paper book, we are convinced that the assessee had sufficient interest free funds available

with it to advance loans to its subsidiary companies. That being the factual position, in our view, no disallowance of interest attributable to such loans advanced can be made in view of the principle laid down by the Hon'ble Jurisdictional High Court in Reliance Utilities and Powers Ltd. (supra). In the aforesaid view of the matter, we delete the addition made on account of disallowance of interest on loans advanced to subsidiary companies. Thus, grounds no.1 to 4 are allowed.

13. We may add here, since we have granted relief to the assessee on the basis of the reasoning as aforesaid, we do not feel it necessary to deal with other propositions advanced by the learned Sr. Counsel for the assessee.

14. In grounds no.5 to 8, the assessee has challenged disallowance made under section 14A of the Act.

15. Brief facts are, during the assessment proceedings, the Assessing Officer on verifying the balance sheet of the assessee found that it has invested funds in equity shares of its subsidiary companies and other companies on which the assessee has earned dividend income which is exempt under the Act. He, therefore, called upon the assessee to explain why disallowance under the provisions of section 14A, should not be made. Though, the assessee objected to the proposed disallowance, however, the Assessing Officer rejecting the claim of the

assessee disallowed the amount of ₹ 86.28 lakh on account of interest expenditure calculated @ 19% p.a. on the interest bearing funds of ₹ 454.11 lakh alleged to have been utilised for making investment. Being aggrieved of such disallowance, assessee preferred appeal before the first appellate authority.

16. The learned Commissioner (Appeals), though, agreed with the Assessing Officer that disallowance under section 14A of the Act has to be made as the assessee has made investment in exempt income yielding assets, however, he agreed with the assessee that in the assessment years where there is overall reduction in the loan liability the investment made in those years should be excluded to work the amount of borrowing that has been utilised for the purpose of making disallowance under section 14A. He also directed the Assessing Officer to apply the rate of interest of 15.44% on the funds utilised for investment for working out the disallowance under section 14A.

17. Learned Sr. Counsel for the assessee submitted, disallowance under section 14A relates to interest expenditure only. Referring to the observations of the learned Commissioner (Appeals) that in the financial year wherein the borrowing decreased there should not be any disallowance under section 14A, learned Sr. Counsel submitted, disallowance under section 14A was in respect of dividend income earned on two investment aggregating to ₹ 5,70,37,000 out of which

investment in Unit Trust Of India is ₹ 5,65,57,000. Learned Sr. Counsel for the assessee referring to a statement showing year-wise investment and increase / decrease of loans at Page-373 of the paper book submitted, investment in UTI was made in the financial year 1985-86, wherein there is a decrease in loans to the tune of ₹ 16.54 lakh. He, therefore, submitted, applying the reasoning of the learned Commissioner (Appeals) in directing the Assessing Officer to exclude the investment made in the financial year 1985-86, 1988-89, 1990-91 and 1991-92 on account of decrease in loans, the investment in UTI should not have been considered for the purpose of disallowance under section 14A, as it pre-supposed utilisation of own funds. The learned Sr. Counsel submitted, even otherwise also, the relevant financial year wherein investment were made in exempt income yielding assets, the assessee had sufficient interest free own funds available with him to make the investment. Therefore, no disallowance of interest expenditure can be made. In this context, he referred to the fund flow statement for the F.Y. 1996-97 to 2000-01. In support of his contention, he relied upon the following decisions:-

- i) *HDFC Bank v/s DCIT, 383 ITR 529 (Bom.);*
- ii) *CIT v/s HDFC Bank Ltd., 49 Taxmann.com 335; and*
- iii) *CIT v/s Reliance Utilities & Power Ltd., 313 ITR 340 (Bom.).*

18. As far as the investment in SSS Electricals India Ltd. amounting to ₹ 4.80 lakh is concerned, the learned Sr. Counsel referring to the

statement showing year-wise investment and increase / decrease in loan submitted that in the financial year 1986-87, when this investment was made the assessee had own funds of ₹ 8.47 crore as against total investment made during the year of ₹ 3.39 crore. He, therefore, submitted, there being sufficient interest free fund available with the assessee, no disallowance under section 14A can be made on account of interest expenditure. Without prejudice to the aforesaid submission the learned Sr. Counsel contended even otherwise also the disallowance under section 14A has to be restricted to the aggregate investment on which the assessee had actually earned exempt income during the relevant previous year and not to the entire investment of ₹ 12,24,38,000. For such proposition, he relied upon the following decisions viz. (i) CIT v/s Delite Enterprise, ITA no.110 of 2009 (Bom.); (ii) Cheminvest Ltd. v/s CIT, [2015] 61 Taxmann.com 118 and various other decisions.

19. Learned Departmental Representative on the other hand, relied upon the reasoning of the Assessing Officer and the learned Commissioner (Appeals).

20. We have considered the submissions of the parties and perused the material available on record. The first contention of the learned Sr. Counsel is assessee had enough surplus funds available with it to make the investment. On a perusal of the statement of investment

made and increase and decrease of loans a copy of which is at Page-373 of the paper book, it is noticed that in the financial year 1985-86, when the assessee invested the amount of ₹ 5,65,57,000, in UTI there was over all decrease in loan liability of the assessee to the tune of ₹ 16.54 lakh. In fact, in Para-73 of his order the learned Commissioner (Appeals) has referred to financial year 1985-86 as one of the years in which loan liability has decreased. In our view, the direction of the learned Commissioner (Appeals) to exclude the investment made in the financial years wherein there is a decrease in loan liability is logical as it pre-supposes, assessee had sufficient interest free funds available with him to make the investment. In fact, the assessee through the fund flow statement for the financial year 1996-97 to 2000-01, has demonstrated before us that he had enough interest free surplus fund available to make the investments in exempt income yielding assets. Therefore, applying the principle laid down by the Hon'ble Jurisdictional High Court in HDFC Bank Ltd. (supra) and Reliance Utilities & Power Ltd. (supra), we direct the Assessing Officer not to make any disallowance under section 14A of the Act. Grounds no.5 to 8 is allowed.

21. In ground no.9, assessee has raised the issue of disallowance of depreciation of leased assets in case lease rental paid is not allowed as revenue expenditure. Thus, as could be seen this ground is

consequential to ground no.(iii) raised by the Department in ITA no. 4269/Mum./2005. Therefore, we propose to deal with this issue while deciding ground no.(iii) raised by the Department.

22. In ground no.11, the assessee has challenged disallowance of expenditure claimed on account of payment made to Ocean Tech amounting to ₹ 14,76,291.

23. Brief facts are, during the assessment proceedings, the Assessing Officer after verifying the accounts of the assessee found that assessee has claimed deduction on account of sub-contract charges. To verify the authenticity of assessee's claim the Assessing Officer issued letters under section 133(6) to the concerned parties numbering 117. As alleged by the Assessing Officer out of 117 parties, 7 parties denied of having transactions with the assessee and in respect of 7 parties, notices returned back un-served, 46 parties did not respond and in case of 11 parties, accounts needed to be reconciled. He, therefore, called upon the assessee to furnish certain information in respect of 72 parties. As observed by the Assessing Officer, after repeated opportunities being granted, assessee furnished some details in respect of some of the parties, whereas, he could not furnish details in respect of other parties. Accordingly, the Assessing Officer disallowed the payments made to the concerned parties one amongst them being payment of ₹ 14,76,291 made to Ocean Tech.

Being aggrieved of such disallowance, assessee challenged the same before the first appellate authority.

24. In the course of hearing before the first appellate authority, assessee submitted that due to lack of adequate opportunity assessee could not produce the concerned persons, therefore, he sought for opportunity to produce them. Considering the plea of the assessee, learned Commissioner (Appeals) sent the issue on remand to the Assessing Officer for allowing the assessee an opportunity to produce the concerned parties. In the course of remand proceeding, the assessee produced many of the parties, however, some of them could not be produced which included Ocean Tech. In respect of Ocean Tech, it was submitted by the assessee that it has undertaken welding work of Pantoons. To prove such fact, assessee produced copies of measurement books quantifying the work done by it and also copies of invoices raised by the concerned party counter signed by the assessee. The learned Commissioner (Appeals), however, observed that the payment made to Ocean Tech is unverifiable in view of lack of response from the said party. He, therefore, rejected assessee's claim of deduction to the extent of ₹ 14,76,291.

25. Learned Sr. Counsel reiterating the stand taken before the learned Commissioner (Appeals) submitted, relevant and necessary documentary evidences were produced before the Departmental

Authorities to prove the genuineness of the deduction claimed. He submitted, when payments made to all the parties were accepted, it is unbelievable that assessee would be inflating the expenditure only in respect of one of the contractors / parties. He submitted, the very fact that the notice issued by the Assessing Officer was served on Ocean Tech proves the existence of the party. He submitted, when the assessee produced documentary evidence to prove the payment, the disallowance made is unjustified.

26. Learned Departmental Representative on the other hand relied upon the order of the Assessing Officer and the learned Commissioner (Appeals).

27. We have considered the submissions of the parties and perused the material available on record. Undisputedly, out of the sub-contract charges paid to about 117 parties, the dispute at present is only confined to payment of ₹ 14,76,291 to Ocean Tech. As could be seen from the details submitted in the paper book, aforesaid amount was not only paid in cheque but the assessee had also furnished the address of the concerned party before the Departmental Authorities. It is also a fact that the notice issued under section 133(6) was served on the said person. However, he did not respond to the same. It is the contention of the assessee, the concerned party was working as a sub-contractor for fabrication work and as per the quantitative details

mentioned in the invoice raised, it appears that the concerned part in fact has carried out fabrication work on behalf of the assessee. Therefore, only because the party did not respond to the notice under section 133(6), the payment made by the assessee cannot be held to be bogus as the assessee through other documentary evidence has been able to establish the authenticity of the payment. Moreover, when it is not disputed that the payment has been made through cheque, the Department could have enquired from the concerned bank the genuineness of the payment made. Further, when the entire payment to sub-contractors has been accepted as genuine, it is unacceptable that assessee would have inflated the expenditure to the extent of ₹ 14,76,291 in respect of one of the parties. In the aforesaid view of the matter, we delete the addition of ₹ 14,76,291, made by the Assessing Officer. Ground no.11 is allowed.

28. In grounds no.13 and 14, assessee has challenged disallowance of consultation fee of ₹ 7,57,807 to Meteo Consult, B.V., Netherlands.

29. Brief facts are, in the course of assessment proceedings, the Assessing Officer noticed that the assessee had debited an amount of ₹ 7,57,807 to the Profit & Loss account. On further verification, he found that the said amount was paid to Meteo Consult, B.V., Netherlands, without deducting tax at source. He, therefore, called upon the assessee to explain why the payment made should not be disallowed

under section 40(a)(i). In response to the query raised by the Assessing Officer it was submitted by the assessee that the amount was paid to the concerned party towards supply of weather forecast on daily basis. It was submitted, as the payment made was for purchase of an article or information, there is no requirement for deduction of tax at source. The Assessing Officer, however, was not convinced with the submissions of the assessee and concluded that the payment is not allowable as per section 40(a)(i). He further observed even otherwise as per assessee's own admission the amount having been paid for purchase of an article or information which is in the nature of books and periodicals cannot be allowed as revenue expenditure. Accordingly, he disallowed the same. Being aggrieved, the assessee was in appeal before the learned Commissioner (Appeals).

30. Before the learned Commissioner (Appeals), it was submitted by the assessee that the information provided by the Meteo Consult, B.V., Netherlands, on weather situation viz. air pressure, wind situation, tide level is not confidential in nature but was a general data which can be obtained by anybody on payment of requisite fee. It was further submitted, as Meteo Consult, B.V., Netherlands, does not have Permanent Establishment (P.E.) in India, the profit earned is not chargeable to tax in view of Article-7(1) of DTAA between India and Netherlands. It was submitted by the assessee that by supplying

weather forecast report, Meteo Consult, B.V., Netherlands, had not made available to the assessee any technical knowledge, experience, skill, knowhow, or process or information, hence, the payment made cannot be considered as fees for technical services. Similarly, same also cannot be considered as royalty. The learned Commissioner (Appeals), after considering the submissions of the assessee observed that the information provided by Meteo Consult, B.V., Netherlands, in relation to weather condition at various harbours does not amount to sale of product. According to learned Commissioner (Appeals), it is information of technical nature concerning industrial experience. He observed, the claim of the assessee that information provided is of general nature is unacceptable as had it been the case, the assessee could have got it from regular news channel like Door Darshan and should not have approached an entity from Netherlands. Accordingly, he confirmed the disallowance made under section 40(a)(i) of the Act.

31. Learned Sr. Counsel for the assessee, reiterating the submissions made before the Departmental Authorities contended, as the assessee was carrying out certain contract work in the sea it required certain weather information relating to the weather at sea, tide condition, etc. He submitted, by supplying the weather report, Meteo Consult, B.V., Netherlands, has not made available any technical knowledge, experience skill, knowhow, etc. so as to term the payment as "*fees for*

*technical services*". Therefore, such payment will not come within the purview of Article-12 of India-Netherland DTAA. In this context, he referred to the invoice raised by Meteo Consult, B.V., Netherlands, and the weather report submitted by them. He, therefore submitted, the payment made not being in the nature of fees for technical service or royalty, there is no need for deduction of tax at source as business profit is not taxable under the DTAA in the absence of P.E. In support of such contention, he relied upon the following decision:-

- i) *Mahindra & Mahindra v/s DCIT, 30 SOT 374 (Mum.) (SB);*
- ii) *DIT v/s Guy Carpenter & Co. Ltd., 20 Taxmann.com 807 (Del.); and*
- iii) *CIT v/s De Beers (I) Minerals P. Ltd., 21 Taxmann.com 214 (Kar.).*

32. Without prejudice to the aforesaid submissions, it was contended provisions of section 40(a)(ia) of the Act was brought into the statute by Finance Act 2003, therefore, as per Article-24 of the Indo-Netherland DTAA by application of non-discrimination clause, no disallowance under section 40(a)(i) can be made as similar disallowance applicable to resident as per section 40(a)(ia) of the Act was brought into the statute by Finance Act, 2003. He, therefore, submitted in terms of Article-24, no disallowance u/s 40(a)(i) can be made. For such proposition, he relied upon the following decisions:-

- i) *Sandoz Pvt. Ltd. v/s ACIT, 149 ITD 507 (Mum.);*
- ii) *Central Bank of India v/s DCIT, 42 SOT 450 (Mum.); and*
- iii) *Herbalife International India P. Ltd., 101 ITD 450.*

33. Learned Departmental Representative on the other hand relied upon the observations of the Assessing Officer and the learned Commissioner (Appeals).

34. We have considered the submissions of the parties and perused the material available on record. Undisputed facts are, assessee has undertaken a project which required execution of work in sea. Therefore, the assessee to know the condition of sea required daily weather forecast providing data relating to sea condition, tide condition, wave height, wind speed, etc. On a perusal of the weather report, a copy of which is placed at Page-573 of the paper book, we are convinced that the information supplied by Meteo Consult, B.V., Netherlands, is in the nature of general weather forecast related to condition of sea. Therefore, in our considered opinion, the payment made cannot be termed to be towards fees for technical services or royalty. Therefore, we find merit in the submissions of the learned Authorised Representative that in terms of Article 7(1) of Indo-Netherlands treaty, the payment made is not taxable in India as it is in the nature of business profit and the payee has no P.E. in India. That being the case, there was no requirement on the part of the assessee to deduct tax at source on such payment. On a perusal of the order of the learned Commissioner (Appeals), it gives an impression that he has sustained the disallowance being perturbed over the fact that

payment was made to an overseas party. In our view, that should not be the consideration to make disallowance under section 40(a)(i). The decision relied upon by the learned Authorised Representative also supports this view. In the aforesaid view of the matter, we delete the addition made. Grounds no.13 and 14 are partly allowed.

35. In the result, assessee's appeal being ITA no.3949/Mum./2005 is partly allowed.

**ITA no.4269/Mum./2005 – Department's Appeal**

36. In ground no.(i), Department has challenged the decision of the learned Commissioner (Appeals) in directing the Assessing Officer to reduce the rate of interest from 19% to 15.44%.

37. This ground of the Department corresponds to ground no.1 to 4 of assessee's appeal being ITA no.3949/Mum./2005. While deciding this issue in aforesaid appeal of the assessee vide Para-11 and 12 of this order, it has been held that no interest disallowance can be made on the loans advanced to the subsidiary companies. In view of such decision, the ground no.(i) raised by the Department having become infructuous is dismissed.

38. In ground no.(ii), the Department has challenged the direction of the learned Commissioner (Appeals) in respect of disallowance to be made under section 14A.

39. This ground raised by the Department corresponds to grounds no.5 to 8 of assessee's appeal being ITA no.3949/Mum./2005. While deciding the issue raised by the assessee in its appeal, we have held in Para-20 of this order that no disallowance under section 14A is called for. In view of such decision, ground no.(ii) having become infructuous is dismissed.

40. In ground no.(iii), Department has challenged the decision of the learned Commissioner (Appeals) in deleting the addition made by the Assessing Officer on account of lease rental.

41. Brief facts are, the Assessing Officer in the course of assessment proceedings, noticing that the assessee has claimed deduction on account of lease rentals paid and charged for certain assets taken on lease called upon the assessee to furnish necessary details. It was submitted by the assessee that an amount of ₹ 10.28 crore was paid towards lease rent on the basis of lease agreement. On a perusal of lease agreement, the Assessing Officer was of the view that they are more like financial transaction rather than lease transaction. He noticed that the amount of ₹ 10.21 crore was paid to SCICI Ltd., as per lease agreement dated 8<sup>th</sup> June 1996. On going through the terms and conditions of lease agreement, the Assessing Officer was of the view that apart from paying lease rental, the assessee had to ensure maintenance of assets in proper condition. Even in the event of loss or

destruction also assessee has to pay lease rent. In case the assets survives the lease period lessee had the option to acquire the asset at a normal price. The lessor comes into picture at the time of purchase only for making the payment. He, therefore, was of the opinion that for all intent and purpose, lessee is the owner of the asset. The lessor only gets back money advanced and nothing more. Therefore, such an arrangement is not to be treated as genuine lease agreement but a financing transaction. Therefore, only the interest paid on loan taken is an allowable deduction and not the payment of the principle amount. In this context, he relied upon the decision of the Tribunal, Mumbai Bench, in Mid East Portfolio Management Ltd. v/s DCIT, 81 TTJ 37 (Mum.). Accordingly, he concluded that the assessee is not entitled for deduction in respect of principle amount forming part of lease rent. As far as the alternative claim of the assessee for allowing depreciation, the Assessing Officer also rejected the claim, Being aggrieved of the disallowance, the assessee challenged the same before the learned Commissioner (Appeals).

42. Before the first appellate authority, it was submitted by the assessee that in terms of lease agreement entered with SCICI Ltd., the lessor has leased a Pile Top Drilling Rig to the assessee. Pursuant to the agreement SCICI Ltd., had purchased the equipment and leased out to the assessee. The cost of equipment provided on lease is ₹ 8

crore. As per the terms of agreement, assessee had to pay monthly lease rent of ₹ 20.60 lakh to SCICI Ltd. for use of the equipment. The lease was primarily for a period of five years which can be extended on year-to-year basis at the option of the lessor. As the leased asset was used for the purpose of business, the assessee claimed lease rental as revenue expenditure. It was submitted, the transaction entered with SCICI Ltd. is a genuine lease transaction and not a finance transaction and the lease rent paid is in consideration for the right to use the equipment. It was submitted, the agreement was not for sale of assets but as per the terms of the agreement, the ownership in the asset always remained with SCICI Ltd. and the asset was required to be delivered back to the owner on the termination of the lease. Referring to certain clauses of the agreement, it was submitted that the assessee was prohibited from selling, transferring, assigning, mortgaging the equipment taken on lease. Referring to clause 4.7 to 4.10 of the lease agreement, it was submitted that lessor was being shown as the owner and any claim received from insurance company had to be paid over to the lessor. With reference to the clause 4.13 of the agreement, it was submitted that lessee is not permitted to make any alteration, addition or improvement to the equipment or change the conditions thereof without the prior written consent of the lessor. With reference to clause 6.6 to 7.1 of the agreement, it was submitted that the intention of the parties is to deliver back the equipment of the

lessor in good working condition on expiry of the lease agreement. Thus, it was submitted that the lease rent paid is to be allowed as revenue expenditure. Alternatively, it was submitted by the assessee in the event the transaction is held as financial transaction, the assessee should be allowed depreciation on the asset. In support of such contention, assessee relied upon certain judicial precedents. Learned Commissioner (Appeals) after considering the submissions of the assessee in the light of facts and material on record and particularly keeping in view the terms of lease agreement, found that the observation of the Assessing Officer that lease agreement is in the nature of financial transaction is not correct. Applying the parameter laid down by the Tribunal, Mumbai, Special Bench, in Mid East Portfolio Management Ltd. (supra), the learned Commissioner (Appeals) noted that the asset was purchased by the lessor and leased to the assessee. The valuation of asset also is not in dispute as it was acquired directly from the manufacturers / dealers. Therefore, the only issue is whether the arrangement can be said to be one of the operating lease or finance lease. On carefully analyzing the lease agreement, learned Commissioner (Appeals) observed that the asset is not only identifiable but was properly delivered and valued at cost. The payment of rent is also in terms of the agreement. He noted that it is not a case where the full value of lease rent or a major portion thereof was recovered by lessor in advance. He noted that in the earlier years,

the assessee was allowed deduction on account of lease rent paid by the Department treating the arrangement as one of operating lease. Learned Commissioner (Appeals) observed, in all lease arrangement the main beneficiary in the initial year is the lessor. Insofar as lessee is concerned, if the arrangement is one of operating lease it is entitled to get deduction in respect of lease rent paid on the asset taken on lease. Even in the event the arrangement is held as one of financial transaction as long as existence of assets is not in dispute the lessee becomes the owner of the asset for all intent and purpose and thereby is entitled for depreciation. The learned Commissioner (Appeals) observed since the lease arrangements were entered into in the past years and the lease rentals in the past years were claimed and allowed fully a different approach cannot be adopted in the impugned assessment year by only allowing the interest component. He, therefore, concluded that the lease rental paid by the assessee has to be allowed in full. Accordingly, he deleted the addition made by the Assessing Officer.

43. Learned Departmental Representative relied upon the observations of the Assessing Officer.

44. Learned Authorised Representative on the other hand supported the decision of the learned Commissioner (Appeals) and submitted that as the lease agreement between the assessee and lessor is an

operational lease, assessee is entitled to claim lease rental paid as deduction. Alternatively, he submitted in the event the principal component is disallowed assessee should be allowed depreciation. For such proposition, he relied upon the decision of the Apollo Finvest India Ltd., 382 ITR 33 (Bom.) and Development Credit Bank Ltd. v/s DCIT, 40 Taxmann.com 532.

45. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. On a perusal of different clauses of lease agreement, we agree with the observations of the learned Commissioner (Appeals) that the arrangement between the SCICI Ltd. and the assessee is in the nature of operational lease and not financial lease. On a perusal of the assets taken on lease, the details of which were submitted at Page-395 to 399 of the paper book, it is noticed that the assessee had taken on lease various equipments / machineries from different companies for using them in its business activity. It is not disputed that the lease rental paid are on the equipment / machinery taken on lease. Thus, when the assessee has taken equipments on lease for the purpose of using them in its business, the lease rental paid has to be allowed as deduction. The fact that these lease arrangements are continuing from past years and the assessee had been claiming lease rent as deduction and department has allowed them in the past years has not been

controverted by the learned Departmental Representative. Moreover, lease rentals paid to various other entities towards leased assets have been accepted by the Assessing Officer. That being the case, the deduction claimed by the assessee in respect of lease rental is allowable as revenue expenditure. Even otherwise also, in case, the arrangement between the parties is treated as financial transaction then the assessee has to be treated as the owner of the equipment / machinery and will be eligible to claim deduction on account of depreciation on the value of asset. The decision relied upon by the learned Authorised Representative supports this view. In view of the aforesaid, we do not find any reason to interfere with the decision of the learned Commissioner (Appeals) in allowing assessee's claim of deduction. Ground no.(iii) is allowed.

46. In view of our aforesaid decision, ground no.9 raised by the assessee in ITA no.3949/Mum./2005, need not be adjudicated separately.

47. In grounds no.(iv) and (vii), the Department has challenged the direction of the learned Commissioner (Appeals) with regard to addition made on account of payment made to Shri Sukhdev Singh Dhiman.

48. During the assessment proceedings, the Assessing Officer noticed that the assessee has claimed certain deduction on account of payment made to some sub-contractor one of them being Shri Sukhdev Singh Dhiman, to whom an amount of ₹ 15,92,424 was paid. The Assessing Officer noted that as per the information received from the jurisdictional Assessing Officer in assessment order passed in case of Shri Sukhdev Singh Dhiman, it was held that Shri Sukhdev Singh Dhiman, was used by assessee company to inflate their expenditure. Therefore, an assessment on protective basis was made in case of Shri Sukhdev Singh Dhiman. Thus, on the basis of the aforesaid information, the Assessing Officer disallowed the payment made to Shri Sukhdev Singh Dhiman. Challenging the disallowance, it was submitted before the learned Commissioner (Appeals) that an amount of ₹ 15,92,424 was actually paid to Shri Sukhdev Singh Dhiman. In support of the genuineness of payment assessee also produced certain documentary evidences on the basis of evidences produced learned Commissioner (Appeals) called for a remand report. During the remand proceeding, Shri Sukhdev Singh Dhiman was also produced before the Assessing Officer. It was noted by the learned Commissioner (Appeals) that in the remand report, the Assessing Officer has not made any adverse comment against Shri Sukhdev Singh Dhiman and further has not commented upon double addition made of the amount paid by the assessee to Shri Sukhdev Singh

Dhiman. The learned Commissioner (Appeals), after considering these submissions of the assessee in the light of the facts and material on record, held that the amount paid to Shri Sukhdev Singh Dhiman is allowable as deduction. As far as the contention of the assessee that double disallowance was made by the Assessing Officer, learned Commissioner (Appeals) directed the Assessing Officer to verify the fact and if it is found that same disallowance was made twice, then delete the addition.

49. Learned Counsels for both the parties agreed before us, in the consequential order passed by the Assessing Officer he has verified assessee's claim and allowed the deduction. In view of the aforesaid, we dismiss grounds no.(iv) and (vii) raised by the Department.

50. In ground no.(v), Department has challenged the decision of the learned Commissioner (Appeals) in deleting the disallowance of claim of depreciation of ₹ 11.45 lakh.

51. Brief facts are, in the course of assessment proceedings, it was noticed by the Assessing Officer that a German company had given on sub-contract to the assessee the work of execution of Worli-Bandra outfalls project. The said German company had purchased certain assets worth ₹ 45.82 lakh and handed over possession of them to the assessee for utilising in the project, the Assessing Officer was of the

view that the said plant and machinery were not purchased by the assessee, hence, not being owner the assessee is not entitled for depreciation. Accordingly, he disallowed depreciation on such plant and machinery worked out at ₹ 11.45 lakh. Being aggrieved of such disallowance, the assessee challenged the same before the learned Commissioner (Appeals).

52. Before the first appellate authority, it was submitted by the assessee that it had capitalized the above asset in its books of account in financial year 1999–2000 and had claimed depreciation in respect of them in assessment year 2000–01 and 2001–02. It was submitted, though, assets were purchased by the German company but the said company has raised debit note for the concerned assets on the assessee. It was further submitted, the assessee had used those assets for execution of the work. Therefore, the assessee being owner of the asset and having utilised the same for the purpose of its business is entitled to claim depreciation. It was submitted that in respect of movable property, registration is not a condition precedent for legal ownership, unlike immovable property. The learned Commissioner (Appeals) after considering the submissions of the assessee in the light of ratio laid down by the Hon'ble Supreme Court in *Mysore Minerals Ltd. v/s CIT*, [1999] 239 ITR 775 (SC), held that as

the assessee is in possession of assessee and it has utilised them for the purpose of its business, it is logical to claim depreciation.

53. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. As could be seen from the facts on record the machinery / equipments were purchased by the principal but the assessee had been vested with the possession of them and has utilized them for its business. It is also not disputed that the principal has debited the cost of machinery to the assessee's account and the assessee has capitalized it in its books of account. That being the case, applying the ratio laid down by the Hon'ble Supreme Court in Mysore Minerals Ltd. (supra), Varanasi Auto Sales (P) Ltd. [2010] 326 ITR 182 (All.) and CIT v/s Dilip Singh Sardarsingh Bagga [1993] 201 ITR 995, the assessee is eligible for depreciation. Accordingly, we uphold the order of the learned Commissioner (Appeals) on this issue. Ground no.(v) is dismissed.

54. In ground no.(vi), the Department has challenged the deletion of addition made on account of bogus and inflated expenditure.

55. As already discussed elsewhere in the order during the assessment proceedings the Assessing Officer had disallowed payment made to sub-contractors amounting to ₹ 628.44 lakh alleging non-

furnishing of required evidence by the assessee. However, before the first appellate authority, the assessee produced necessary evidence and on the basis of evidence produced, learned Commissioner (Appeals) called for a remand report from the Assessing Officer. As is evident, during the remand proceeding some of these persons to whom payments were made appeared and confirmed of having received the payment. On the basis of the facts and material on record, the learned Commissioner (Appeals) ultimately deleted a major part of the addition except payment made to three persons. As can be seen from the grounds raised, the department has alleged violation of rule 46A. However, on perusal of material on record, it is evident that the Assessing Officer was given full opportunity by the learned Commissioner (Appeals) to examine the evidence produced by the assessee. It is also a fact that the Assessing Officer on remand has examined the genuineness of payment made by the assessee to the sub-contractors by conducting necessary enquiry. Therefore, the allegation of the Department insofar as violation of rule 46A is concerned is unsubstantiated. In fact, in the course of hearing, the learned Departmental Representative was not able to bring to the notice of the bench any specific instance of learned Commissioner (Appeals) entertaining additional evidence to establish violation of rule 46A. That being the case, the ground no.(vi) raised being devoid of merit, is dismissed.

56. In ground no.(viii), Department has challenged deletion of addition made by the Assessing Officer on account of sales tax liability by applying the provisions of section 43B.

57. Before the first appellate authority, the assessee raised a ground that the Assessing Officer did not allow deduction in respect of sales tax liability amounting to ₹ 50.48 lakh. In this context, it was submitted by the assessee that during the financial year 1997-98, the assessee had carried out construction contract in the state of Orissa and was liable to pay Orissa sales tax and in that regard sales tax was deducted at source from the payments received which amounted to ₹ 75,22,118. It was submitted, the assessee had not made provisions in its books of account of sales tax payable in that year. The sales tax officer completed the assessment for financial year 1997-98 and determined the liability of ₹ 42,50,221. The assessment order was passed on 31<sup>st</sup> March 2001 and after adjusting the demand against TDS a refund of ₹ 32,71,897, though, was computed but no refund voucher was actually issued to the assessee. Subsequently, the assessment order was revised by the higher authority determining the sales tax liability at ₹ 15,47,640 vide order dated 29<sup>th</sup> December 2001. It was submitted, since no accounting entries were passed while receiving the assessment order the entire payment of ₹ 50,47,640 was accounted in the books of account in financial year 2001-02 relevant

to assessment year 2002–03. It was submitted by the assessee, the entire payment of ₹ 50,47,640, became payable on 31<sup>st</sup> March 2001 and was adjusted against the TDS on the said date. Thus, it was submitted, the expenditure is allowable as the amount was actually paid. The learned Commissioner (Appeals) after considering the submissions of the learned Commissioner (Appeals) held that sales tax liability of ₹ 42,52,221 has crystallized during the year on the basis of order passed by the sales tax officer on 31<sup>st</sup> March 2001. He, therefore, directed the Assessing Officer to allow deduction to that extent. Being aggrieved, the Department is in appeal before us.

58. We have considered the submissions of the parties and perused the material available on record. As could be seen, it is the stand of the Department that the deduction claimed is not allowable as per section 43B as the assessee has not paid within the time stipulated under the said provision. However, it is the claim of the assessee that the amount has been adjusted on 31<sup>st</sup> March 2001, hence, it is allowable as deduction. Considering the aforesaid submissions of the assessee, we direct the Assessing Officer to allow claim of deduction in case the amount was paid within the stipulated period prescribed under section 43B. Thus, ground no.(viii) is allowed for statistical purposes.

59. In the result, Department's appeal is partly allowed for statistical purposes.

C.O. no.56/Mum./2006

60. In ground no.1 and 2, the assessee has challenged disallowance of deduction claimed under section 14A on the ground that as per the provisions of section 115-O of the Act, a company paying dividend was liable to pay tax on the dividend paid, therefore, it cannot be said that no tax was paid in respect of dividend.

61. At the outset, learned Sr. Counsel appearing for the assessee fairly submitted that the issue has to be decided against the assessee in view of the decision of the Hon'ble Jurisdictional High Court in *Godrej & Boyce Mfg. Co. Ltd. v/s DCIT*, [2010], 328 ITR 081 (Bom.). Considering such submissions of the learned Sr. Counsel, we refrain from going into the details of issue and dismiss the grounds no.1 and 2, raised by the assessee.

62. In ground no.3, assessee has challenged the decision of the learned Commissioner (Appeals) in directing the Assessing Officer to compute disallowance under section 14A on the total investment and not restricting it to investment on which the assessee had earned dividend income.

63. In view of the fact that while deciding the assessee's appeal, we have deleted the disallowance made under section 14A, this ground being merely of academic interest, is not required to be adjudicated upon. Hence, ground no.3, is dismissed.

64. In the result, assessee's cross objection is dismissed.

ITA no.3645/Mum./2006

Department has raised following grounds: -

*"1. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in directing the Assessing Officer to delete the disallowance of ₹ 40,08,929 made in the assessment order passed under section 143(3)."*

65. The Assessing Officer while completing the assessment for the impugned assessment year made disallowance in respect of sub-contract charges.

66. The learned Commissioner (Appeals), while deciding the issue of disallowance in an appeal preferred by the assessee directed the Assessing Officer to delete all disallowance except the disallowance of payment made to Ocean Tech. However, in the order passed by the Assessing Officer while giving effect to the order of the learned Commissioner (Appeals), the Assessing Officer did not delete the disallowance of an amount of ₹ 40,08,929. Being aggrieved, assessee preferred appeal before the first appellate authority.

67. The learned Commissioner (Appeals) after considering the submissions of the assessee in the context of appeal order passed by him earlier found the claim of the assessee to be correct and accordingly directed the Assessing Officer to delete the addition. Being aggrieved of the order of the learned Commissioner (Appeals), Department is in appeal before us.

68. We have considered the submissions of the parties and perused the material available on record. On a careful reading of the appeal order dated 17<sup>th</sup> March 2005 of the learned Commissioner (Appeals) and more specifically his finding in Para-147 to 152, it is observed that except the disallowance made in respect of payment made to Ocean Tech all other disallowances were deleted by him. Therefore, in our view, the Assessing Officer while giving effect to the directions of the learned Commissioner (Appeals) has committed a mistake by not deleting the disallowance of ₹ 40,08,929. That being the case, learned Commissioner (Appeals) was justified in entertaining the appeal of the assessee and directing the Assessing Officer to delete the addition made of ₹ 40,08,929. Thus, grounds no.1 and 2, raised by the Department are dismissed.

69. In the result, Department's appeal is dismissed.

70. To sum up, assessee's appeal in ITA no.3949/Mum./2005 is partly allowed, Department's appeal in ITA no.4269/Mum./2005 is partly allowed for statistical purposes, assessee's cross objection no.56/Mum./2006 is dismissed and Department's appeal in ITA no.3645/Mum./2006 is dismissed.

Order pronounced in the open Court on 08.07.2016

**JASON P. BOAZ**  
**ACCOUNTANT MEMBER**

**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 08.07.2016**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

(Dy./Asstt. Registrar)  
ITAT, Mumbai

		Date	Initial	
1.	Draft dictated on	23-29.06.2016	}	Sr.PS
2.	Draft placed before author	30.06 - 05.07.2016		Sr.PS
3.	Draft proposed & placed before the second member	- -		JM/AM
4.	Draft discussed/approved by Second Member	- -		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	08.07.2016	}	Sr.PS
6.	Date of pronouncement	08.07.2016		Sr.PS
7.	File sent to the Bench Clerk	08.07.2016		Sr.PS
8.	Date on which file goes to the Head Clerk			
9.	Date of dispatch of Order			