आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.670/PUN/2015
निर्धारण वर्ष / Assessment Year : 2010-11

M/s. Rajmal Lakhichand,
169, Balaji Peth, Johari Bazar,
Jalgaon – 425001

PAN : AACFR8609L

.......अपीलार्थी / Appellant

बनाम / V/s.

The Jt. Commissioner of Income Tax,
Range – 1, Jalgaon

......प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.832/PUN/2015
निर्धारण वर्ष / Assessment Year : 2010-11

Dy. Commissioner of Income Tax,
Circle – 1, Jalgaon

.......अपीलार्थी / Appellant

बनाम / V/s.

M/s. Rajmal Lakhichand,
169, Balaji Peth, Johari Bazar,
Jalgaon – 425001

PAN : AACFR8609L

......प्रत्यर्थी / Respondent

Assessee by	: Shri Sunil Pathak
Revenue by	: Shri Rajeev Kumar

सुनवाई की तारीख / Date of Hearing	: 07-12-2017
घोषणा की तारीख / Date of Pronouncement	: 28-02-2018

आदेश / ORDER

PER VIKAS AWASTHY, JM :

These cross appeals by the assessee and the Revenue are directed against the order of Commissioner of Income Tax (Appeals)-2, Nashik dated 31-03-2015 for the assessment year 2010-11.

2. The brief facts of the case as emanating from records are: The assessee is a partnership firm engaged in the business of making gold and silver ornaments and sale of bullion. The assessee filed its return of income for the impugned assessment year on 26-09-2010 declaring total income as Nil. The case of the assessee was selected for scrutiny under CASS. Accordingly, statutory notice u/s. 143(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") was issued to the assessee on 23-09-2011. During the course of scrutiny assessment proceedings, the Assessing Officer made additions/disallowances on various counts which inter alia includes :

i.	Addition u/s. 2(22)(e)	Rs.10,16,06,967/-.
ii.	Disallowance of interest u/s. 36(1)(iii)	Rs.3,08,889/-.
iii.	Disallowance u/s. 40A(2)(a)	Rs.33,31,94,731/-.
iv.	Disallowance u/s. 14A	Rs.6,21,87,068/-.
v.	Disallowance of Advertisement Expenses	Rs.37,70,543/-.
vi.	Disallowance of Remuneration to partners	Rs.17,50,000/-.
vii.	Disallowance of interest paid to partners	Rs.38,61,612/-.

Aggrieved by assessment order dated 26-09-2013, the assessee filed appeal before the Commissioner of Income Tax (Appeals). During the First Appellate Proceedings, the Commissioner of Income Tax (Appeals) apart from making GP addition of Rs.5,65,54,895/- @1.20% on sales, confirmed,

addition u/s. 2(22)(e) and disallowance of interest u/s. 36(1)(iii). Further, the Commissioner of Income Tax (Appeals) deleted disallowance u/s. 40A(2)(a), disallowance u/s. 14A, disallowance of advertisement expenses, disallowance of remuneration to partners, and disallowance of interest paid to partners. Against the findings of Commissioner of Income Tax (Appeals), both, the assessee and the Revenue are in appeal before us.

3. The assessee in its appeal has raised 5 grounds of appeal. Shri Sunil Pathak appearing on behalf of the assessee stated at the Bar that the assessee does not wish to press ground No. 1 relating to time barred assessment. The ground No. 2 raised in the appeal is general in nature.

3.1 In respect of ground No. 3 relating to GP addition of Rs.5,65,54,895/-, the ld. AR submitted that that the GP addition has been made by Commissioner of Income Tax (Appeals) in respect of bullions/ornaments purchased by assessee from its sister concerns allegedly at higher rates. The ld. AR contended that the assessee purchased bullions/ornaments from sister concerns located at Jalgaon at the rates prevailing at the time of purchase at Jalgaon. The assessee also purchases bullions/ornaments form parties situated outside Jalgaon depending upon its requirements at the rates prevailing at the time and place of purchase. Purchase rates of gold ornaments from sister concerns are inclusive of making charges, whereas the gold ornaments sold by sister concerns to third parties are excluding making charges. Making charges are separately charged by sister concerns from third parties. The assessee has been consistently following this method of transacting with sister concerns for a long time. The ld. AR pointed that identical issue had travelled up to the Tribunal in assessee's own case in assessment year 2009-10 in ITA Nos. 532 & 663/PN/2013 decided on 16-01-2015. The

Tribunal estimated GP of the assessee at 1.20% instead of 1.13% declared by assessee. Thus, the Tribunal made addition of 0.07% in the GP declared by assessee. In the assessment year under appeal, the assessee has declared GP of 0.61%, the Commissioner of Income Tax (Appeals) estimated GP at 0.90%. The addition of 0.29% in the assessment year 2010-11 by Commissioner of Income Tax (Appeals) is very much on higher side. The turnover of assessee in assessment year 2010-11 is Rs.1961 crores as compared to Rs.955 crores in assessment year 2009-10. Since, the turnover in the assessment year under appeal is higher than the turnover in immediately preceding assessment year, the GP would go down. Thus, the addition made by Commissioner of Income Tax (Appeals) is not justified. The ld. AR referred to trading account (at page 42 of the paper book) for the assessment years 2009-10 and 2010-11 taking into consideration sale to third parties only. The ld. AR pointed that the GP for the assessment year 2009-10 from sales to third party is 0.41%, whereas in assessment year 2010-11 the GP from sale to third parties is 1.52%.

3.2 The ld. AR contended that the sales/purchases with sister concerns are made on cost to cost basis, therefore, there is no element of profit in such transactions. The ld. AR further pointed that for assessment year 2012-13 on turnover of Rs.3110 crores, the assessee has declared GP of 0.55%. The Assessing Officer made addition of only 0.02%. In assessment year 2013-14 the assessee declared GP at 0.28% against the turnover of Rs.3535 crores. The Assessing Officer accepted the GP declared by assessee. The ld. AR pointed that in view of the decision of Tribunal in assessment year 2009-10 and the trend of reducing GP with increase of turnover, the addition made by Commissioner of Income Tax (Appeals) in the assessment year under appeal is not justified.

3.3 In respect of ground No. 4 with regard to addition of Rs.10,16,06,967/- u/s. 2(22)(e), the ld. AR submitted that the provision of section 2(22)(e) are not attracted. It has been alleged that the assessee has received deemed dividend by way of loans/advances from the group companies as under :

a. Manraj Jewellers Pvt. Ltd. Rs.1,11,16,372/-.
b. Manvi Holdings Pvt. Ltd. Rs.53,89,319/-.
c. Rajmal Lakhichand Jewellers Pvt. Ltd. Rs.8,51,01,276/-.

3.4 The ld. AR pointed that the transactions with the aforesaid group concerns are on trading account of sales and purchases. To support his submissions the ld. AR referred to page 116 of the paper book indicating purchases and sales made by assessee from/to Manraj Jewellers Pvt. Ltd., Manvi Holdings Pvt. Ltd. and Rajmal Lakhichand Jewellers Pvt. Ltd. The ld. AR pointed that similar transactions are placed on record at pages 167 to 176, 217 to 225, 264 to 269 and 310 to 331 of the paper book. All these transactions indicate that they are on account of normal business trading account and not loans/advances. Hence, these closing balances of sales and purchases do not constitute deemed dividend. In support of his contentions the ld. AR placed reliance on the following decisions :

i. Commissioner of Income Tax Vs. Creative Dyeing and Printing P. Ltd., 318 ITR 476 (Delhi);
ii. Commissioner of Income Tax Vs. Nagindas M. Kapadia, 177 ITR 393 (Bom.);
iii. Assistant Commissioner of Income Tax Vs. Smt. Lakshmikutty Narayanan, 105 ITD 558 (Cochin-Trib.);

3.5 The ld. AR further placed reliance on CBDT Circular No. 19/2017 dated 12-06-2017 to contend that trade advances in the nature of

commercial transactions do not fall within the ambit of provisions of section 2(22)(e) of the Act.

3.6 The ld. AR contended that without prejudice to his submissions already made on the issue of deemed dividend, the earlier years accumulated profits should have been ignored on the ground that they could not be taxed in the assessment year under appeal. If at all they were to be taxed, it could have been taxed in relevant years. In the earlier years also there were such trading transactions of the assessee with the group companies. The advances given in the last year were much more than the accumulated profits of the last year, therefore, the question of including accumulated profits of last year in the present year for the purpose of deemed dividend does not arise. The ld. AR referred to page 310 of the paper book to show that the opening balance as on 01-04-2009 is Rs.61,96,13,348/- as against the accumulated profits of the last year of Rs.5,01,44,572/- (at page 300 of the paper book). The ld. AR to support this alternate argument placed reliance on the decision of Tribunal in the case of P. Satya Prasad Vs. Income Tax Officer reported as 141 ITD 403 (Visakhapatnam).

3.7 The ld. AR finally submitted that the assessee is a partnership firm and thus, is not a separate legal entity. The assessee cannot be a shareholder in any of the companies. For attracting the provisions of section 2(22)(e) it is necessary to be a registered shareholder holding 10% or more shares in any of the group companies. Hence, the provisions of section 2(22)(e) of the Act are not attracted.

3.8 In respect of ground No. 5 regarding disallowance of interest of Rs.3,08,889/- u/s. 36(1)(iii), the ld. AR submitted that during the course of

day-to-day business the assessee has provided funds to various unrelated parties. These parties have neither paid interest nor refunded the loans. Since, the loans have not been given by the assessee to related parties, therefore, disallowance of interest is not justified.

4. On the other hand Shri Rajeev Kumar representing the Department vehemently supported the findings of Assessing Officer and Commissioner of Income Tax (Appeals) on the issues raised by assessee in appeal. The ld. DR prayed for dismissing the appeal of assessee.

5. The Revenue in its appeal has assailed the findings of Commissioner of Income Tax (Appeals) by raising following grounds of appeal :

> *"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A)-2, Nashik has erred in deleting the addition u/s 40A(2) without appreciating the fact that the books of accounts are not reliable and special audit u/s 142(2A) was therefore carried out. The Ld. CIT(A) has relied on ITAT Pune's decision in the assessee's own case on the similar facts for AY. 2009-10. However, the basis of adoption of GP percentage has not been mentioned by the Hon'ble ITAT in the assessee's own case for A.Y. 2009-10.*
>
> *2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A)-2, Nashik has erred in deleting the addition of Rs.6,21,87,028/- made on account of disallowance u/s 14A read with rule 80. From the facts of the case, it can be seen that assessee has invested interest bearing funds and has deliberately diverted its interest bearing funds into the shares of its own sister concerns and the sole purpose of this transaction was to avoid payment of taxes.*
>
> *3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A)-2, Nashik has erred in deleting the addition on a/c of Advertisement expenses of Rs.37,70,543/- without appreciating the fact that the assessee does not have any business outlet at Surat and Thane for which the assessee has shown Advertisement expenses.*
>
> *4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A)-2, Nashik has erred in deleting the disallowance of excess remuneration paid to partners without appreciating the fact that as per Chapter IV-D, the book profit is determined after deduction of depreciation. In the assessee's case there would be loss after deduction of unabsorbed c/fd depreciation. Therefore, remuneration to the extent of Rs.1,50,000/- only is allowable to the assessee.*

5. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A)-2, Nashik has erred in deleting the addition made on a/c of disallowance on account of interest paid on gold deposit scheme to the partner without appreciating the fact that the assessee has paid excess interest to the partner, which has been deliberately adopted. This method of showing gold deposit as a capital of the partner is nothing but an arrangement and colourable device used to reduce taxable income.*

6. *On the facts and circumstances of the case and in law, the order of the Ld. CIT(A)-2, Nashik be cancelled on the above issues and that of the A.O. be restored.*

7. *The appellant craves leave to add, alter, modify, delete amend any of the grounds at any stage of appellate proceedings.*

8. *The appellant prays to file any of the additional evidence appropriate to the grounds taken in appeal."*

6. The ld. DR submitted that a special audit was carried out in the case of assessee. During the course of audit it transpired that the assessee has entered into various transactions with its sister concerns. The assessee has inflated purchase price of gold ornaments from sister concerns. Accordingly, excess purchase price paid by assessee to its sister concerns amounting to Rs.33,31,94,731/- was disallowed by Assessing Officer. The Commissioner of Income Tax (Appeals) by placing reliance on the decision of Tribunal in assessee's own case in assessment year 2009-10 deleted the addition made u/s. 40A(2) and estimated GP rate of 0.9%. The ld. DR submitted that the Commissioner of Income Tax (Appeals) has erred in adopting GP at 0.9%. No basis has been given by Commissioner of Income Tax (Appeals) for estimating GP at 0.9%. During special audit it was found that the assessee has carried out purchases at higher rate from the sister concerns and thus, suppressed the taxable profits.

7. In respect of ground No. 2 relating to disallowance u/s. 14A r.w. Rule 8D, the ld. DR submitted that the Commissioner of Income Tax (Appeals) has deleted disallowance on the basis of decision of Hon'ble

Supreme Court of India in the case of S.A. Builders Ltd. Vs. Commissioner of Income Tax (Appeals) & Anr. reported as 288 ITR 1. During the course of assessment proceedings, the Assessing Officer has recorded the fact that the assessee has diverted its interest bearing funds for investment in its sister concerns. There is a direct nexus of borrowings and investments made in subsidiary companies from borrowed funds. The assessee has not been able to show that the funds have been invested by assessee in subsidiary/group companies out of any business exigencies. The assessee has deliberated diverted its interest bearing funds for investment in the shares of sister concerns with the sole objective to avoid payment of tax. Thus, the diversion of interest bearing funds is a colourable device adopted by assessee to reduce its tax liability.

8. In respect of ground No. 3 relating to advertisement expenditure amounting to Rs.37,70,543/- the ld. DR submitted that the assessee has purportedly incurred expenditure on advertisement in cities like Surat and Thane, where the assessee has no business outlet. Moreover, the expenditure has been incurred in respect of M/s. Rajmal Lakhichand Jewellers Pvt. Ltd., therefore, the expenditure is not allowable in the hands of assessee.

9. In respect of ground No. 4 relating to disallowance of remuneration paid to partners, the ld. DR submitted that the Commissioner of Income Tax (Appeals) while allowing such expenditure has held that the remuneration to the partner is based on current year's book profits and therefore, it is to be deducted first before allowing the set off of brought forward losses. The findings of Commissioner of Income Tax (Appeals) are not accepted for the reason that the unabsorbed carry forward depreciation becomes the part of current year depreciation under the provisions of

section 32(2) of the Act. As per Chapter IV-D, the book profits are determined after deduction of depreciation. In the assessee's case, there would be loss after deduction of unabsorbed carry forward depreciation to the tune of Rs.10,84,75,430/-, therefore, remuneration to the extent of Rs.1,50,000/- would only be allowable. The ld. DR to support his submissions placed reliance on the decision of Vikas Oil Mills Vs. Income Tax Officer reported as 95 TTJ 1126 (Jaipur).

10. In respect of ground No. 5 relating to disallowance of interest paid on gold deposit scheme to the partners, the ld. DR submitted that the assessee has accepted gold deposit as capital of the partner and interest Rs.58,58,221/- is paid on partner's capital. The ld. DR submitted that the partners have paid interest of Rs.19,96,609/- to the depositors of gold deposit scheme as against interest of Rs.58,58,221/- received on capital from assessee. Thus, the assessee has paid excess interest of Rs.38,61,612/-. The assessee has deliberately shown gold deposit as capital of the partner to reduce taxable income. The ld. DR concluding his submissions prayed for upholding the findings of Assessing Officer and reversing the findings of Commissioner of Income Tax (Appeals).

11. In respect of grounds raised by the Department in its appeal, the ld. AR submitted that there are several inter-group purchase and sale transactions. The transactions between the assessee and sister concerns are made on cost to cost basis, therefore, there is no element of profits in this transaction. The ld. AR referred to detailed chart at pages 363 to 385 of the paper book to show that the assessee has not paid higher rate to its sister concerns. The ld. AR pointed that the assessee adopted Jalgaon rates for the transactions with its sister concerns, whereas the Assessing Officer compared the rate with the rate at Bombay Bullion exchange at the

time of transaction. The ld. AR pointed that similar disallowance was made by Assessing Officer in assessee's case in assessment year 2009-10. The issue travelled up to the Tribunal. The Tribunal held that no disallowance u/s. 40A(2)(a) is warranted in the light of facts of the case. The nature and manner of transactions in the assessment year under appeal is identical to the transactions carried out by the assessee with its sister concerns in assessment year 2009-10. Thus, the findings of Tribunal in assessment year 2009-10 would apply in the assessment year 2010-11, as well.

12. In respect of disallowance made u/s. 14A the ld. AR submitted that the assessee has invested a sum of Rs.1,00,44,00,800/- in shares of group companies. The details of investments made by assessee in group companies are as under :

a.	R.L. Gold Pvt. Ltd.	Rs.10,54,19,900/-.
b.	Manvi Holdings Pvt. Ltd.	Rs.15,22,50,000/-.
c.	Manraj Jewellers Pvt. Ltd.	Rs.12,75,05,900/-.
d.	Rajmal Lakhichand Jewellers P. Ltd.	Rs.45,25,00,000/-.
e.	R.L. Jewels Pvt. Ltd.	Rs.15,49,00,000/-.
f.	Manraj Motors Pvt. Ltd.	Rs.1,18,25,000/-.
		Rs.1,00,44,00,800/-.

The assessee has not received any dividend from any of these companies, therefore, no exempt income has been earned by assessee from investments made in group concerns. The ld. AR placing reliance on the decision of Special Bench of Tribunal in the case of Assistant Commissioner of Income Tax Vs. Vireet Investments (P) Ltd. reported as 188 TTJ 1 (Del) (SB) and Goyal Ishwarchand Kishorilal Vs. JCIT in ITA No. 422/PN/2013 for assessment year 2009-10 decided on 26-06-2014

submitted that where no exempt income has been earned, no disallowance u/s. 14A is warranted.

13. In respect of ground No. 3 relating to advertisement expenses, the ld. AR submitted that though the assessee has business outlet in Jalgaon but the assessee has customers coming from other cities as well such as Surat, Thane etc. The assessee has well established market in Jalgaon, therefore, no advertisement is required in the local area. The assessee intends to expand its business at other places, therefore, advertisements were made in other towns. The advertisement expenditure is debited for the group in Rajmal Lakhichand Jewels Pvt. Ltd. and the same is distributed to the other group concerns in proportion of turnover. In earlier years, advertisement expenditure has been incurred and the same was allocated to the group concerns in similar manner. The Assessing Officer never raised any objection or disallowed the expenditure. To support his contentions the ld. AR referred to assessment order for assessment year 2009-10 at pages 386 to 421 of the paper book and Advertisement Expenditure Account in Ledger for Financial Year 2008-09 at pages 663 to 682 of the paper book.

14. In respect of ground No. 4 relating to remuneration paid to the partners, the ld. AR submitted that remuneration paid to the partners is based on current year's book profits. The set off of unabsorbed losses and depreciation is governed by section 72 of the Act. The unabsorbed business losses are to be set off first and then the unabsorbed depreciation is to be considered. Therefore, the question of setting off of unabsorbed depreciation from book profits of the current year which are governed by section 40(b) does not arise. In support of his arguments, the ld. AR draws strengthen from the decision of Ahmedabad Bench of Tribunal in the case

of M/s. Shree Yogeshwar Developers Vs. Income Tax Officer in ITA No. 1173/AHD/2014 for assessment year 2005-06 decided on 13-04-2017.

15. In respect of ground No. 5 relating to disallowance of interest paid to partners, the ld. AR submitted that the partners had accepted gold deposits on interest @ 6-9%. The partners handed over these deposits to the assessee firm for which the assessee is paying interest @ 9%. The Assessing Officer disallowed the excess interest paid to the partners. Similar disallowance was made by Assessing Officer in assessment year 2009-10. The Tribunal deleted disallowance by holding that it is immaterial as to what rate of interest the partner pays to the customers. As long as the interest paid to the partner on the gold under gold deposit scheme is within permissible limit, no disallowance is warranted.

16. We have heard the submissions made by representatives of rival sides at length and have perused the orders of authorities below. The ground No. 1 raised in the appeal by assessee is with respect to time barred assessment. The ld. AR of assessee stated at the Bar that he is not pressing ground No. 1. Accordingly, ground No. 1 and sub-grounds raised there under are dismissed as not pressed.

17. The ground No. 2 in the appeal is general in nature. Hence, requires no adjudication.

18. The ground No. 3 raised in appeal by the assessee relating to GP addition and ground No. 1 raised in appeal by the Department assailing deleting of addition u/s.40A(2) of the Act and substituting the addition on estimated GP by Commissioner of Income Tax(Appeal) are taken up together for adjudication. During the course of scrutiny assessment

proceedings, the Assessing Officer made disallowance of Rs.33,31,94,731/- u/s.40A(2)(a) of the Act in respect of purchase of gold ornaments and gold bullion by assessee from sister concerns at higher rate. The findings of the Assessing Officer were assailed by the assessee before the Commissioner of Income Tax (Appeal) and the First Appellate authority following the decision of Tribunal in assessee's own case for assessment year 2009-10 deleted the disallowance u/s.40A(2)(a) of the Act made by the Assessing Officer and estimated the addition by adopting GP at 0.90% on the total sale of Rs.1961,54,11,702/- as per the audited accounts.

19. A perusal of the orders of Authorities below show that during the assessment year under consideration, the assessee had purchased gold bullion to the tune of Rs.842 crores from sister concerns and to the tune of Rs.65 crores from the third parties. Further, the assessee had purchased gold ornaments of Rs.933.15 crores from group concerns and Rs. 8.32 crore from unrelated parties. The Assessing Officer compared the assessee's purchase rates of gold bullion with the rates prevailing at the Bombay Bullion Market. The Assessing Officer on the basis of special audit report and by applying rates of Bombay Bullion Market came to the conclusion that the assessee had paid excessive or unreasonable payments to the tune of Rs.33,31,94,731/- to its sister concerns. Thus, the Assessing Officer made disallowance of the same under the provisions of section 40A(2) (a) of the Act.

20. The case of the assessee is that assessee has purchased gold bullion and gold ornaments from sister concerns at Jalgaon rates. The details furnished by assessee before the Commissioner of Income Tax (Appeal) with regard to differences on comparison of Bombay rates and local rates in respect of gold bullion and gold ornaments are as under:

Summary	*Actual purchase price*	*Purchase price as per Jalgaon rate*	*Excess amount paid*	*Less amount paid*
New Ornaments	*9,33,15,10,878*	*9,58,20,15,231*	*1,80,76,773*	*26,85,81,126*
Bullion	*8,42,16,13,900*	*8,55,01,42,600*	*2,14,52,300*	*14,99,81,000*
Total	*17,75,31,24,778*	*18,13,21,57,831*	*3,95,29,073*	*41,85,62,126*
Net less paid		*37,90,33,053/-*		*37,90,33,053*

The Commissioner of Income Tax (Appeal) worked out the difference between the Bombay rates adopted by the Assessing Officer and Jalgaon rates applied by the assessee with respect to purchase of gold bullion and jewellery. The relevant extract of the findings of Commissioner of Income Tax (Appeal) are as under:

> *"7.7 If we take and compare the excess payments worked out by the Auditors and the A.O. applying the purchase rates prevailing at the Bombay Bullion Association and the excess or less payments worked out by the appellant using the purchase rates prevailing at Jalgaon, then the picture that emerges is under:*

Excess payment to sister concerns worked out by the A.O. applying Bombay Bullion Association Rates	*Excess payment to sister concerns worked out by the appellant applying Jalgaon purchase rates*	*Less payment to sister concerns worked out by the appellant applying Jalgaon purchase rates.*
Rs.33,31,94,731/-	*Rs.3,95,29,073/-*	*(-) Rs.37,90,33,053/-*

> *As seen above, there is a huge gap between the excess payments arrived at by the auditors and the A.O. applying Bombay Bullion Association purchase rates and the appellant applying Jalgaon local purchases rates."*

The Commissioner of Income Tax (Appeal) finally following the order of Tribunal in assessee's own case for assessment year 2009-10 discarded the addition made by Assessing Officer under section 40A(2)(a) and estimated GP @0.90% of the total sale as per audited accounts.

21. We find that identical disallowances u/s.40A(2)(a) was made by the Assessing Officer in assessee's own case in assessment year 2010-11. The

Co-ordinate Bench of the Tribunal, after taking into consideration entire facts of the case concluded that the average price formula adopted by Assessing Officer and Commissioner of Income Tax (Appeal) is not correct. The Tribunal made the addition by estimating GP. The Commissioner of Income Tax (Appeal) in the impugned order has extracted the findings of the Tribunal on this issue. For the sake of brevity, we are not reproducing the same here. However, the gist of observations made by Tribunal on the issue in assessment year 2009-10 are as under:

(a) The sale and purchase of gold bullion and gold ornaments within a group concerns are only paper transactions without involving any real transfer of bullion/ornaments.

(b) The assessee entered into fictitious transactions within the group to inflate purchases and sales to obtain higher bank finance. This fact is evident from increase in turnover of the assessee in the last two years by 11.5 times. The turnover of assessee increased from Rs.82.55 crore in assessment year 2007-08 to Rs.955.78 crores in assessment year 2009-10.

(c) The books of account of the assessee do not reflect the correct picture of its true state of financial affairs, therefore, the same are to be rejected.

(d) Both the Authorities below i.e. Assessing Officer/ Commissioner of Income Tax (Appeal) have failed to understand the trading transactions in gold bullion and gold ornaments in right perspective. The method of average price of the year is not correct method to determine reasonableness of the amount paid for purchasing gold bullion from sister concerns. There are certain

instances where the assessee had paid lesser price as compared to the local market and Bombay market to the sister concerns. This fact has not been considered by both the Authorities below.

(e) There are mistakes in the recasted trading account prepared by the Commissioner of Income Tax (Appeal) as the total turnover of the assessee as shown in the recasted trading account is Rs.1065.32 crores whereas the actual turnover is Rs.955.78 crores. Similarly, transactions with the third parties including gold bullion and gold ornaments as per recasted trading account is Rs.679.66 crores as against cost of actual transaction Rs.435.37 crores. Therefore, no reliance can be placed on recasted trading account.

(f) While making addition in respect of sale of gold ornaments to group concerns/ sister concerns, both the Authorities below have adopted comparison formula based on the sale of ornaments to the unrelated parties and sale of ornaments to the related parties. The average price method adopted by the Assessing Officer and Commissioner of Income Tax (Appeal), as far as the issue of ornaments is concerned; the price may vary from design to design, item to item, purity of gold etc. Therefore, average price method of ornaments cannot be taken to the entire sale of the year as different factors are involved in the price of ornaments. Apart from difference in design, purity of gold, there is variation in the labour charges as well. Thus, method adopted by the Authorities below on account of lower price charge from sister concerns were rejected by the Tribunal.

(g) For invoking the provisions of section 40A(2)(a), the Assessing Officer has to establish that the payments made to the related

parties is not reasonable. Both the Authorities below have not considered the local conditions of the gold market. The average price method adopted by both the authorities is erroneous considering the market conditions of the bullion. Thus, the basis for computing excess payments made to sister concerns by assessee is faulty, therefore, provisions of section 40A(2)(b) cannot be applied.

22. The Co-ordinate Bench of the Tribunal after taking into consideration various facets of the transaction in sale/purchase of gold ornaments/bullion with related/unrelated parties concluded as under:

> "*8.35 In the light of our above discussion, we are of the opinion that approach of both the authorities below is not correct for making high pitch additions in the hands of the assessee by invoking provisions of section 40A(2)(b) and for alleged selling of the ornaments to the related entities at a lower price. As per the financial accounts of the assessee, the GP worked out at 1.13%. The possibility of purchasing the bullion and ornaments from the group entities at a higher price cannot be ruled out even though there is no strict proof against the assessee. Even the exercise done by both the authorities below is not based on any scientific method. We therefore are of the opinion that adoption of GP rate of 1.20% as against 1.13% disclosed by the assessee will meet the ends of justice. We hold and direct accordingly. We accordingly set-aside the order of the Ld. CIT(A) and direct the AO to work out the GP @1.20% on the total sale of Rs.955,78,81,767/- as per audited accounts. After reducing the GP declared by the assessee at Rs.10,79,15,449/-, the balance GP is to be added to the total income of the assessee. This covers the grounds on the addition made by invoking provisions of section 40A(2) (b) i.e. purchase of bullion from the sister concerns/related entities by paying higher price as well as sale of the ornaments at lower price. Accordingly, the relevant grounds taken by the assessee are partly allowed and the grounds of appeal No. 1 and 2 by the Revenue are dismissed.*"

23. Both sides are unanimous in admitting that the transactions carried out by the assessee during the assessment year under appeal are similar in nature and their accounting has also been done in similar manner. The Commissioner of Income Tax (Appeals) while estimating GP at the rate of 0.90% has taken cue from the decision of the Tribunal in assessment year 2009-10. The relevant extracts of the findings of Commissioner of Income Tax (Appeal) in this regard are as under:

> "*7.17 There is substantial increase in the turnover of the appellant during the year as compared to the last year. However, there is huge fall in G.P. and N.P in this year. The appellant continues to be engaged in the same business and the market conditions remain the same. The appellant has no convincing explanation for such steep fall of G.P. for the year.*
>
> *7.18. Thus, following the decision of the Hon'ble ITAT, the adoption of G.P. rate of 0.90% as against the G.P. rate of 0.61% disclosed by the appellant will be fair and meet the ends of justice. Therefore, the A.O. is directed to work out the G.P at 0.90% on the total sale of Rs.1961,54,11,702/- as per the audited accounts. The revised G.P. comes to Rs.17,65,38,705 as against G.P. shown by the appellant at Rs.11,99,83,810/-. After reducing the G.P. shown by the appellant at Rs.11,99,83,810/-, the balance G.P. is to be added to the total income of the appellant which comes to Rs.5,65,54,895/-. This covers the grounds on the addition made by invoking provisions of section 40A(2)(a) i.e. purchase of gold bullion and gold ornaments from the sister concerns by paying higher price. The other income shown by the appellant will remain unchanged. The other confirmed additions will not be affected.*"

24. The assessee has assailed the G.P. estimated by Commissioner of Income Tax (Appeal) being very much on the higher side. As against the addition of 0.07% made by the Tribunal in assessment year 2009-10, the Commissioner of Income Tax (Appeal) has enhanced G.P. rate by 0.30% (approximately). The assessee in the assessment year under appeal has disclosed G.P. @ 0.61%. Taking into consideration entirety of facts, we are of considered view that increase in G.P. rate by 0.09% would meet the ends of justice. Thus, G.P. is enhanced from 0.61% to 0.70% of the total sale of Rs.1961,54,11,702/- as per audit accounts.

In so far as disallowance made by the Assessing Officer u/s.40A(2)(a) in respect of purchase of gold bullion and gold ornaments is concerned, the same is rejected for the reasons given by the Tribunal in assessment year 2009-10. Thus, in view of our above findings, **the ground No. 3 raised in appeal by assessee is partly allowed and ground No. 1 raised in appeal by Department is dismissed**.

25. In ground No.4, the assessee has assailed addition of Rs.10,16,06,967/- u/s. 2(22)(e) of the Act. The ld. AR of assessee has made two fold submissions against invoking of provisions of section 2(22)(e) of the Act. The first contention of ld. AR is that the assessee is a partnership firm and thus cannot be a registered shareholder in the group companies. The second contention of ld. AR is that the provisions of section 2(22)(e) are not attracted as debit balances standing in the name of assessee is on account of business transactions. The assessee firm is regularly engaged in sale and purchase of gold bullion and gold ornaments from group companies/sister concerns.

26. Examination of documents on record reveal that the assessee is a flagship concern of Rajmal Lakhichand group. The assessee firm has three partners namely Shri Ishwarlal S. Lalwani, Shri Amrish I. Lalwani and Smt. Neetika M. Lalwani sharing profit and loss in the ratio of 40%, 30% and 30%, respectively in the assessee firm. Shri Ishwarlal S. Lalwani is the main person behind the group. The assessee firm controls the closely held private companies of the group. The assessee is a beneficial shareholder in the group companies through Shri Ishwarlal S. Lalwani. It is an un-rebutted fact that the assessee has purchased shares in the group companies through Shri Ishwarlal Lalwani Jain, partner. The shareholding of the assessee in the group companies is as under :

Sr. No.	*Name of the Company*	*The percentage of shareholding of the appellant firm as beneficial share holder*
1.	*Rajmal Lakhichand Jewellers Pvt. Ltd.*	*87.51%*
2.	*R L Jewells Pvt. Ltd.*	*100%*
3.	*Manraj Jewellers Pvt. Ltd.*	*87%*
4.	*Manvi Holdings Pvt. Ltd.*	*99%*
5.	*R.L Gold Pvt. Ltd.*	*100%*

We do not find merit in the contention of ld. AR that the assessee being a partnership firm cannot be a shareholder of a company, thus, the provisions of section 2(22)(e) are not attracted. The Hon'ble Supreme Court of India in the case of Gopal and sons (HUF) Vs. Commissioner of Income Tax reported as 391 ITR 1 has held that the provisions of section 2(22)(e) get attracted even in case of 'beneficial shareholder'. Here it would be relevant to refer to provisions of section 2(22)(e) and Explanation 3 to section 2(22)(e) of the Act. The same are reproduced here-in-below :

"(22) dividend includes –

(a) ....
(b) ....
(c) ....
(d) ....
(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987 , by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern, in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern)] or any payment by any such company on behalf, or for- the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits.

[Explanation 3– For the purposes of this clauses, -

(a) "concern" means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company;

(b) a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the income of such concern;]"

Thus, from bare perusal of clause (e) and Explanation 3 it is unambiguously clear that provisions of section 2(22)(e) get attracted not only in the case of registered share holder but also in the case of concern

in which such shareholder is a member or partner having substantial interest. In the present case as pointed earlier the assessee firm is holding share in group companies through Shri Ishwarlal S. Lalwani, who is having 40% share in the assessee firm. Hence, Shri Ishwarlal S. Lalwani has substantial interest in the assessee firm. The assessee is a beneficial shareholder of group companies and is amenable to provisions of section 2(22)(e) of the Act.

Our view is further supported by the judgment of Hon'ble Supreme Court of India in the case of National Travel Services Vs. Commissioner of Income Tax reported as 401 ITR 154. Referring to Explanation 3 inserted by the Finance Act, 1987 w.e.f. 01-04-1988 the Hon'ble Apex Court held :

> *"18) This being the case, we are of the view that the whole object of the amended provision would be stultified if the Division Bench judgment were to be followed. Ankitech's case, in stating that no change was made by introducing the deeming fiction insofar as the expression "shareholder" is concerned is, according to us, wrongly decided. The whole object of the provision is clear from the Explanatory memorandum and the literal language of the newly inserted definition clause which is to get over the two judgments of this Court referred to hereinabove. This is why "shareholder" now, post amendment, has only to be a person who is the beneficial owner of shares. One cannot be a registered owner and beneficial owner in the sense of a beneficiary of a trust or otherwise at the same time. It is clear therefore that the moment there is a shareholder, who need not necessarily be a member of the Company on its register, who is the beneficial owner of shares, the Section gets attracted without more. To state, therefore, that two conditions have to be satisfied, namely, that the shareholder must first be a registered shareholder and thereafter, also be a beneficial owner is not only mutually contradictory but is plainly incorrect. Also, what is important is the addition, by way of amendment, of such beneficial owner holding not less than 10% of voting power. This is another indicator that the amendment speaks only of a beneficial shareholder who can compel the registered owner to vote in a particular way, as has been held in a catena of decisions starting from R. Mathalone vs. Bombay Life Assurance Co. Ltd., [1954] SCR 117."*

[Emphasized by us.]

In view of Explanation 3 to section 2(22)(e) of the Act which has been elucidated by Hon'ble Apex Court, we are of view that the provisions of section 2(22)(e) would be applicable to the assessee firm.

27. The second limb of argument of ld. AR is that the advances received by assessee are in the normal course of business and are trade advances.

The term 'loans and advances' has not been defined under the provisions of Act. Therefore, they have to be understood in the commercial sense. It is true that all advances received from group companies cannot be treated as deemed dividend within the meaning of section 2(22)(e) of the Act. The Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs. Creative Dyeing and Printing P. Ltd. (supra) has held that the amount advanced for business transactions do not fall within the definition of deemed dividend u/s. 2(22)(e) of the Act. However, the ratio of said case would not apply in the facts of the present case.

In the instant case, the assessee has received advances from group companies which are being carried forward year after year. During the financial year there are substantial purchases and sales of gold bullion and ornaments between the group concerns. However, a distinguishing feature of the transactions is that there has been substantial opening and closing debit balances. As per details furnished by assessee the opening balances, sales, purchases and closing balances of assessee firm in the books of closely held private companies is as under :

(Amount in Rs.)

Particulars	*Manraj Jewellers Pvt. Ltd.*	*R.L Gold Pvt. Ltd.*	*Manvi Holdings Pvt. Ltd.*	*R.L. Jewellers Pvt. Ltd.*
Opening Balance	*608307009 Debit*	*502623665 Debit*	*49403793 Debit*	*619613348 Debit*
Sales	*3684902212*	*3133737291*	*120431807*	*6691643010*
Payments	*37544345*	*422118810*	*415377380*	*1434729333*
Total	*4668663566*	*4058479766*	*1669099244*	*8745985691*
Purchases	*2888386386*	*2162285566*	*225020216*	*4556279833*
Receipts	*1403552939*	*1168526430*	*1504234372*	*2987045332*
Closing Balance	*376724241 Debit*	*4276677770 Debit*	*60155344 Debit*	*1202660526 Debit*

A perusal of above table clearly indicates that closing balances in the case of all group companies except Manraj Jewellers Pvt. Ltd. is much more than the opening balances. In other words during the financial year

the assessee has received further advances from group companies. It is an undisputed fact that the debit balances at the end of the year has swollen in assessee's accounts in the books of group concerns except M/s. Manraj Jewellers Pvt. Ltd. The settled legal position qua the provisions of section 2(22)(e) of the Act is that the transactions in the current accounts are outside the purview of section 2(22)(e) of the Act. However, this is a peculiar case where the advances received by the assessee from the group concerns are substantially higher. It is repeatedly submitted by the assessee during the assessment/appellate proceedings that the payments received by the assessee from the group concerns constitutes trade advances on current account. The authorities below having considered the submissions of the assessee but have not rebutted the claim of the assessee in order to treat the excess payments received by the assessee as non-trade advances and not on current account. In our view, this is the case where certain questions are left unanswered which are vital for adjudication of the issue under consideration. The key question is whether the excess funds received by the assessee constitute trade advance or otherwise.

The question as to why group companies paid advances much higher than the transactions, i.e. on account of purchases and sales is also unanswered. Ancillary to the same, there is requirement for the Assessing Officer to probe the treatment of such advances in the earlier and subsequent assessment years, whether, the provisions of section 2(22)(e) of the Act were invoked on similar set of facts, i.e. excess payments received the assessee? Both the sides have failed to provide information on this aspect.

The exclusion of advance business transactions by way of trade advances from the purview of section 2(22)(e) of the Act are required to be

examined, if the advances so given are substantially higher than the normal business requirements. In other words, if the payments received by the assessee is say Rs.100/-, in what circumstances the assessee receives Rs.200/-, should that be construed as business advances and extend the benefits to the assessee without invoking the provisions of section 2(22)(e) of the Act which are otherwise interpreted by applying the principles of literal interpretation.

The provisions of section 2(22)(e) constitutes deemed provisions. Thus, the provisions need to be interpreted strictly. The initial onus is on the Assessing Officer to demonstrate that the excess payments received by the assessee from the group concerns constitute non-trade advances and not on account of current account to record the business transactions between or among the group concerns. Merely rejecting the explanation of the assessee is not sufficient to invoke the provisions of section 2(22)(e) of the Act. The Assessing Officer is under statutory obligation to demonstrate the use of excess funds or advances received by the assessee on account of non-business purposes.

28. The ld. AR has submitted that if at all provisions of section 2(22)(e) are to be invoked, the current year business profits should not be considered as part of accumulated profits for the purpose of section 2(22)(e) of the Act. To support his submissions, the ld. AR placed reliance on the decision in the case of P. Satya Prasad Vs. ITO (supra). We find merit in this submission of ld. AR of assessee. The Visakhapatnam Bench of the Tribunal in the aforesaid case while dealing with the issue of deemed dividend has held that accumulated profits for the purpose of section 2(22)(e) do not include current year's business profit, since it accrues only at the end of year. Further, loan or advance treated as deemed income up to date of fresh loan is to be reduced from accumulated profits. The

relevant extract of the observations of the Tribunal in para 15 of the order are as under:

> *"Accordingly, the loan given by the company in the immediately preceding year, i.e., assessment year 2006-07, should have been assessed as deemed dividend in accordance with the provisions of sec. 2(22)(e) in that year. The deemed dividend so assessable in that year is liable to be deducted from the amount of "accumulated profits" for the purpose of computing the deemed dividend during the year under consideration."*

We further find that similar view has been taken by Ahmedabad Bench of the Tribunal in the case of M.B. Stock Holding (P) Ltd. Vs. Assistant Commissioner of Income Tax (supra). The Tribunal held that business profits of the company accrue only at the end of the year and therefore, the current year's business profits are not to be included in the accumulated profits for computation of deemed dividend.

29. In view of the facts of the case, we are of considered view that this issue needs revisit to the file of Assessing Officer. The Assessing Officer shall decide the issue de novo in the light of our above observations after affording opportunity of hearing to the assessee, in accordance with law. Accordingly, **ground No. 4 raised by assessee in appeal is partly allowed for statistical purposes**.

30. The ground No. 5 raised in appeal by assessee relates to disallowance of interest Rs. 3,08,889/- u/s.36(1)(iii) of the Act. The assessee has sought deletion of above disallowance on the ground that advances were given to unrelated parties during the course of business. The Commissioner of Income Tax (Appeal) has confirmed the addition by observing as under:

> "*10.1 In para 8.3 of the assessment order, the A.O. has stated the entire source of fund in interest bearing. However, the appellant had not charged interest on the advance given to the seven parties amounting to Rs.25,74,071/-. When asked by the A.O., the appellant had taken the plea that the said parties are not traceable or in financial difficulties, but not a single evidence was furnished to the*

> *A.O. in support of its claim. Therefore, the A.O. had disallowed the proportionate interest at the rate of 12% on the interest free advances of Rs.25,74,071/- which comes to Rs. 3,08,889/-. Now the appellant has submitted that certain loans given in earlier years have become doubtful of recovery and therefore, no interest was charge on the same. The appellant's submission is not supported by any evidence. The said loans have not been written off from its books of account during the year under consideration. Therefore, I am of the view that the A.O. is justified in making the addition of Rs.3,08,889/- and the same is confirmed."*

The ld. AR of assessee has neither furnished any document nor any meaningful submissions to controvert the findings of Commissioner of Income Tax (Appeal). Thus, we do not find any reason to interfere with the findings of Commissioner of Income Tax (Appeal) in confirming addition of Rs. 3,08,889/-. Accordingly, **ground No. 5 raised in appeal by assessee is dismissed**.

31. In the result, appeal of the assessee is partly allowed in the aforesaid terms.

32. Now we proceed on to decide the remaining grounds raised in appeal by the Revenue.

In ground No. 2 of the appeal, the Revenue has assailed the deletion of disallowance Rs.6,21,87,028/- made u/s. 14A r.w.Rule 8D of the Act. As per the contention of the assessee, the assessee had invested Rs.1,00,44,15,900/- over a period of time in its group companies. The assessee has not received any dividend from the said companies in the period relevant to the assessment years under appeal. This fact has not been re-butted by the Revenue. The Special Bench of the Tribunal in the case of ACIT Vs. Vireet Investment (P) Ltd.(supra) has held that no disallowance u/s.14A r.w. Rule 8D(2)(iii) can be made where no exempt income from investment is received during the year. In other words, only

those investments are to be considered for computing average value of investments under Rule 8D(2)(iii) which yield exempt income during the year. Similar view has been taken by Pune Bench of the Tribunal in the case of Shri Goyal Ishwarchand Kishorilal Vs. JCIT in ITA No. 422/PN/2013 decided on 26.06.2014. The Tribunal after placing reliance on the decisions in the case of CIT Vs. Shivam Motors Pvt. Ltd. in ITA No.88/2014 decided on 05.05.2014 by Hon'ble Allahabad High Court and CIT Vs. Lakhani Marketing in ITA No.970/2008 decided on 02.09.2014 by the Hon'ble Punjab & Haryana High Court, held as under:

> "*9.4 Since in the instant case the assessee has not received any dividend income out of the shares held as investment and since no disallowance u/s. 14A has been made in the preceding as well as succeeding assessment years, therefore, we agree with the contention of the Ld. Counsel for the assessee that no disallowance u/s.14A can be made under the facts and circumstances of the case. Accordingly, the order of the CIT(A) is set aside and the Assessing Officer is directed to delete the disallowance of Rs.5,86,962/- made u/s.14A. Ground raised by the assessee is accordingly allowed.*"

Thus, in view of the undisputed fact that the assessee has not received any tax free income during the assessment year under appeal and decisions referred above, we hold that no disallowance u/s. 14A r.w.Rule 8D is called for during the assessment year under appeal. We do not see any infirmity in the findings of Commissioner of Income Tax (Appeal) in deleting the said disallowance. **Accordingly, ground No. 2 raised in appeal by the Department is dismissed.**

33. In ground No. 3 of appeal, the Department has assailed deleting of advertisement expenses Rs.37,70,543/-. Advertisement expenditure has been disallowed to the assessee merely for the reason that advertisement hoardings were put up in Surat and Thane where the assessee was not having any of its business outlets. It is an undisputed fact that the assessee has incurred expenditure on advertisement for promoting its

business and such expenditure in principle is allowable. The ld. AR has drawn our attention to Ledger extracts at pages 663 to 682 of the paper book to show that similar nature of advertisement expenditure was incurred in assessment year 2008-09 as well, however, no disallowance was made by the Assessing Officer in assessment year 2008-09. We observe that the Assessing Officer has not disputed genuineness of expenditure. The primary objection raised by Assessing Officer is that there is no branch of assessee in Surat and Thane, therefore, no advertisement was required in those cities. The reason given by Assessing Officer to disallow advertisement expenditure is without any merit. In so far as objection raised by the Assessing Officer that the advertisement expenditure should have been debited in the P & L account of M/s. Rajmal Lakhichand Jewellers Pvt. Ltd. is concerned, the assessee has explained that proportionate advertisement expenditure on turnover basis is shared by all the group concerns. This fact has not been disputed by the Assessing Officer. Thus, we find no error in the order of Commissioner of Income Tax (Appeal) in deleting the disallowance made by the Assessing Officer on account of advertisement expenditure. **In the result, ground No. 3 raised in appeal by the Department is dismissed**.

34. In ground No. 4 of appeal, the Department has assailed deleting of disallowance of excess remuneration paid to partners. The Commissioner of Income Tax (Appeal) allowed the claim of assessee by observing as under:

> *"12.1 The remuneration to partner is based on current year's "Book profits" and therefore it is to be deducted first before allowing the setoff of brought forward losses. The computation of Book Profit is as per section 40(b) while the setoff of brought forward losses is to be granted in terms of section 72. Therefore, while arriving at the business income, the deduction of section 40(b) is to be given first and then if at all there remains positive income, the brought forward losses are to be set off. The appellant had rightly claimed the deduction in the computation of income and therefore, the addition*

made on this score is deleted. The appellant gets a relief of Rs.17,50,000/-."

The findings of Commissioner of Income Tax (Appeal) are well reasoned in deleting the aforesaid disallowance u/s.40(b) of the Act. We find that identical issue had come up before Ahmedabad Bench of Tribunal in the case of M/s. Shree Yogeshwar Vs. Income Tax Officer (supra). The Tribunal deleted the addition by observing as under:

> "*10. We have given a thoughtful consideration to the orders of the authorities below qua the issue. The book profit has been defined in Explanation* 3 *below section 40(b) of the Act and the same reads as under:*
>
> *"Explanation - 3 - For the purpose of this clause, "book profit" means the net profit, as shown in the profit and loss account for the relevant previous year, computed in the manner laid down in Chapter IV-D as increased by the aggregate amount of remuneration paid or payable to all the Partners of the firm if such amount has been deducted while computing the net profit" Only from the business income of the firm* ".
>
> *11."A perusal of the above clearly shows that the book profit as shown in the Profit and Loss account has to be computed in the manner laid down in Chapter IV-D. Therefore, in our considered opinion, both the lower authorities have erred in setting off brought forward losses first in computing the book profit for the allowability of remuneration to Partners. In our understanding of the law, the remuneration to Partners should be first allowed and thereafter brought forward business losses should be set off. We, therefore, set aside the findings of the learned CIT(A) and direct the A.O to delete the disallowance of Rs.5,13,714/-."*

Thus, in view of the facts of case and unambiguous reading of the provisions of Explanation 3 to section 40(b), we do not find any error in the findings of Commissioner of Income Tax (Appeal) in deleting addition. **Accordingly, ground No. 4 raised in appeal by the Department is dismissed.**

35. The ground No. 5 raised in appeal by the Department is with regard to interest paid on gold deposit scheme to the partners. We find that

similar ground was raised by Department in its appeal for assessment year 2009-10. The Tribunal deleted the addition by observing as under:

> *"12.6 We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We find in the instant case the Assessing Officer made addition of Rs.18,92,421/- being the difference between the interest paid by the firm to the partner at Rs.45,31,460/- and the interest paid by the partner Shri Ishwarlal I. Lalwani to the customers on GDS. According to the Assessing Officer, if the gold would have been directly routed through the firm, the firm would have saved Rs.18,92,421/-. Although the firm has paid interest @9%, however, indirectly it has benefitted the partner and therefore this is a colourable device and the firm gave excess interest of Rs.19,82,421/- to the partner. It is the submission of the Ld. Counsel for the assessee that since the assessee firm had given interest @9% on the gold deposit by the partner which is below the prescribed limit of 12% as per the partnership deed, therefore, there should not be any disallowance u/s.40A(2)(b). Further, according to the Ld. Counsel for the assessee, the assessee firm could receive additional gold deposit than what it could have received under its own gold deposit scheme on account of gold deposit scheme started by one of its partner. It is also the submission of the Ld. Counsel for the assessee that the firm would have paid higher amount of bank interest by getting that much quantity of gold than it paid to the partner on account of such quantity of gold.*
>
> *12.7 We find merit in the above submission of the Ld. Counsel for the assessee. There is no bar for the partner to obtain the gold under the gold deposit scheme which was simultaneously done by the assessee firm also. As long as the interest paid to the partner on such gold under the gold deposit scheme is within the permissible limit, there should not be any disallowance. Since in the instant case the firm has paid interest @9% on the gold deposited by the partner obtained from the customers under the gold deposit scheme account, therefore, it is immaterial as to at what rate of interest the partner has paid to the customers. In this view of the matter, we set-aside the order of the CIT(A) on this issue and direct the Assessing Officer to delete the addition. This ground by the assessee is accordingly allowed."*

No material has been placed on record by the ld. DR to distinguish the findings of Tribunal in assessee's own case for assessment year 2009-10 or to show that the facts in the present appeal are at variance. Following the decision of Co-ordinate Bench of Tribunal in assessment year 2009-10, **the ground No. 5 raised in appeal by the Department is dismissed**.

36. The ground No. 6 in appeal by the Revenue is general in nature and hence, requires no adjudication.

37. In the result, appeal of the Department is dismissed.

38. To sum up, appeal of the assessee is partly allowed and appeal of the Department is dismissed.

Order pronounced on Wednesday, the 28th day of February, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 28th February, 2018
RK/SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-2, Nashik
4. The Pr. Commissioner of Income Tax-2, Nashik
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune