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

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND**
**SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4044/MUM/2016**
**Assessment Year: 2010-11**
**&**
**ITA No. 4045/MUM/2016**
**Assessment Year: 2011-12**
**&**
**ITA No. 4046/MUM/2016**
**Assessment Year: 2012-13**

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| J.M. Baxi& Co.,<br>16, Bank Street, Fort,<br>Mumbai-400001. | Vs. | The Deputy Commissioner of Income Tax, Central Circle-6(4), Room No. 1925, 19th floor, Air India Building, Nariman Point, Mumbai-400021. |
| **PAN No. AAAFJ51698E**<br>**Appellant** | | **Respondent** |

**ITA No. 4242/MUM/2016**
**Assessment Year: 2010-11**
**&**
**ITA No. 4246/MUM/2016**
**Assessment Year: 2011-12**
**&**
**ITA No. 4249/MUM/2016**
**Assessment Year: 2012-13**

| | | |
|---|---|---|
| The Deputy Commissioner of Income Tax, Central Circle-6(4),<br>Room No. 1925, 19th floor, Air India Building, Nariman Point, Mumbai-400021. | Vs. | J.M. Baxi& Co.,<br>16, Bank Street, Fort,<br>Mumbai-400001. |
| **Appellant** | | **PAN No. AAAFJ51698E**<br>**Respondent** |

Assessee by : Mr. Y.P. Trivedi., Senior Advocate
Revenue by : Ms. S. Padmaja, CIT(DR)

Date of Hearing : 02/04/2018
Date of pronouncement : 25/04/2018

ORDER

PER BENCH

The captioned cross appeals- three by the assessee and the three by the Revenue – are directed against the order of the Commissioner of Income Tax (Appeals)-54, Mumbai [in short 'CIT(A)']and arise out of the assessment completed u/s 143(3) r.w.s. 153A of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to dispose them off by this consolidated order for the sake of convenience. We begin with the assessment year (AY) 2010-11.

***The Assessee's Appeal***

2. Before us, the Ld. counsel of the assessee submits that he would not press the I & II grounds of appeal. Accordingly, the above grounds of appeal are dismissed as not pressed.

3. We now deal with the 1st & 2nd grounds of appeal of III which read as under:

1. The Learned CIT (A) erred in confirming disallowance of Rs.26,20,720/- being 0.5% of average investment of Rs.52,41,43,990/- without appreciating the fact That it has been held in the case of M/s Magna Publishing Co. Ltd. vs. ITO in ITA No. 5536/Mum/2014 and also in the case of ACIT vs. Punjab state Coop & Marketing Fed Ltd in ITA Nos.

548/Chd/2011 that no disallowances under section 14A of the Act can be made where no exempt income is earned.

2. Without prejudice to above, the Learned CIT (A) failed to consider that appellant on its own disallowed Rs.40,000/- under section 14 A of the Act.

4. Briefly stated, the facts of the case are that the assessee has not earned any exempt income during the year under consideration. The Assessing Officer (AO) observed that even if no exempt income is actually earned or received during the year in any form whatsoever, the provisions of section 14A shall apply, where any such investment is made wherefrom such type of income might be generated either in the past or in the future year(s). In this regard, the AO placed reliance on the decision in the case of *Cheminvest Ltd. v. ITO* 317 ITR 86 (AT)(SB). In view of the above, the AO asked the assessee *vide* show cause letter dated 01.01.2014 to explain as to why disallowance u/s 14A should not be made. The assessee filed a reply before the AO on 29.01.2014, which has been extracted at page 17-20 of the assessment order dated 07.03.2014. However, the AO was not convinced with the above explanation of the assessee and relying on the provisions of section14A r.w. Rule 8D, made a disallowance of Rs.48,33,299/-.

5. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) deleted the disallowance of Rs.22,52,579/- made by the AO under Rule 8D(2)(ii). However, he confirmed the disallowance of Rs.26,20,720/- made by the AO under Rule 8D(2)(iii).

6. Before us, the Ld. counsel of the assessee submits that no exempt income was earned by the assessee during the year under consideration and therefore, it is not a fit case for resorting to disallowance u/s 14A r.w. Rule 8D either by the AO or the Ld. CIT(A).

On the other hand, the Ld. DR relies on the order of the Ld. CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. The issue whether disallowance u/s 14A r.w. Rule 8D can be made in a case when there is no exempt income is no longer *res integra.* In the case of *CIT v. Shivam Motors (P) Ltd.* (2015) 55 taxmann.com 262 (All), it has been held that in absence of any tax free income earned by the assessee, disallowance u/s 14A could not be made. In a similar vein, it has been held in *Cheminvest Ltd. v. CIT* (2015) 61 taxmann.com 118 (Del) that section 14A will not apply if no exempt income is received or receivable during the relevant previous year. In *CIT vs. Chettinad Logistics (P) Ltd*. (2017) 80 taxmann.com 221 (Mad), the Hon'ble Madras High Court has held that section 14A cannot be invoked where no exempt income was earned by the assessee in the relevant assessment year.

In view of the above position of law, we delete the disallowance of Rs.26,20,720/- confirmed by the Ld. CIT(A). Thus the 1st and 2nd of the III grounds of appeal filed by the assessee are allowed.

8. The 3rd to 8th of III grounds of appeals read as under:

> 3. The Learned CIT(A) erred in confirming part disallowance in respect of Miscellaneous Expenses which are in the form of Business Promotion Expenses, Gift Expenses, Diwali Pooja Expenses and Chandla Expenses.

4. The Learned CIT (A) has erred in abruptly allowing only part relief to the aforesaid expenses without appreciating the fact that the same were incurred for the purpose of appellant's business only. More so, major expenses were allowed by the Hon'ble ITAT in earlier years on the basis of the same set of facts.
5. The Learned CIT(A) erred in confirming disallowance of a sum of Rs.12,44,930/-being 41.55% of Rs.29,96,221/- disallowed by the assessing officer under the head business promotion expenses of Rs.5,25,000/-, gift expenses of Rs.19,00,000/-, Diwali Pooja Expenses of Rs.2,70,000/- and Chandla Expenses of Rs.3,01,221/- (totaling to Rs.29,96,221/-) on an ad hoc basis by alleging that the same were not incurred wholly and exclusively for the business.
6. The Learned CIT (A) ought to have appreciated that the Diwali Pooja Expenses incurred by the Appellant firm were recognized custom in the trade and they can be regarded as necessary expenses for the purposes of the Appellant's business activities.
7. The Learned CIT (A) ought to have appreciated that the Appellant firm incurred expenses on presentation of Gift Articles not bearing the logo of the Appellant firm and therefore the same would be deductible in view of the ratio laid down by the Hon'ble Bombay High Court in the case of CIT vs. Allans Sons Pvt. Ltd. reported in216 ITR 690.
8. The Learned CIT (A) ought to have appreciated that the expenses like Gift, Diwali, Chandla and Business Promotion could never be described as Capital expenses nor were personal expenses of appellant firm and hence same are admissible expenses having been laid out wholly and exclusively for the purposes of the business of the Appellant.

9. During the course of assessment proceedings, the AO observed that the assessee had claimed business promotion expenses amounting to Rs.1,01,83,216/-. In response to a query raised by the AO, the

assessee submitted that it distributes gifts amongst customers and associates on auspicious occasions like Diwali and stated that the expenses incurred were out of commercial expediency and thus allowable u/s 37 of the Act. As the involvement of personal/non-business element in these expenses cannot be ruled out, the AO made a disallowance of Rs.5,25,000/- out of the above expenses.

The assessee has claimed expenses of Rs.37,94,322/- on account of gifts. The AO observed that some of these expenses include such expenses which are not wholly and exclusively for the business purpose. As the assessee failed to bring complete verifiable documentary evidence, the AO made a disallowance of Rs.19,00,000/- on estimated basis.

The assessee had claimed expenses of Rs.19,01,684/- on account of Diwali/Puja expenses. The AO found that (i) the assessee failed to file complete verifiable documentary evidence on record, (ii) most of the payments in respect of these expenses were stated to the made in cash and supported by only self-made vouchers.

In view of the above, the AO made a disallowance of Rs.2,70,000/- on estimated basis.

The assessee had claimed a sum of Rs.3,01,221/- on account of Chandla expenses. The AO found that (i) the assessee has not brought any evidence on record to substantiate the allowability of these expenses, (ii) the assessee has also not explained the nexus of these

expenses with the business carried on by it and the income earned during the year.

In view of the above, the AO made a full disallowance of the above sum of Rs.3,01,221/-.

10. In appeal, the Ld. CIT(A) noted that similar disallowances out of business promotion, gift expenses, Diwali Pooja expenses and Chandla expenses were made and part relief was allowed by the CIT(A), having considered such expenses for AYs 2007-08, 2008-09 and 2009-10. The Ld. CIT(A) also observed that in AYs 2007-08, 2008-09 and 2009-10, the ITAT has restricted the disallowance to 50% of the disallowance sustained by the CIT(A). The Ld. CIT(A) thus held at para 9.4:

> "9.4.1 I have considered the submissions of the appellant and perused the materials available on record. The appellant has requested to delete the disallowances of Rs.5,25,000/- out of Business promotion expenses, Rs.19,00,000/- out of Gift expenses, Rs.2,70,000/- out of Diwali Pooja Expenses and Rs.3,01,221/- out of Chandla Expenses, aggregating to Rs.29,96,221/-. The main contention of the appellant is that the Ld. AO has erred in making ad-hoc disallowance, as the same is not permitted as per provisions of the Act. It has also been argued that these expenses were incurred for the business purposes and hence allowable u/s 37 of the Act. The appellant has also submitted that similar disallowances were made in its own case in earlier years and the CIT(A) gave part relief and the Hon'ble ITAT allowed further relief. The appellant has submitted details of such disallowances made by the Ld. AO, part relief allowed by the Ld. CIT(A) and further relief allowed by the Hon'ble ITAT in earlier years as under.

STATEMENT SHOWING DISALLOWANCE OF EXPENSES AND RELIEF GRANTED

| Particulars | Addition by the AO (Rs.) | Relief Granted by CIT(A) (Rs.) | Addition Confirmed by CIT(A) (Rs.) | Relief Granted by ITAT (Rs.) | Addition confirmed by ITAT (Rs.) |
|---|---|---|---|---|---|
| **Assessment Year 2006-06** | | | | | |
| Diwali Pooja Expense | 1091128 | 891128 | 200000 | 100000 | 100000 |
| Gift Expenses | 979311 | 679311 | 300000 | 150000 | 150000 |
| Chandla Expenses | 257390 | ---------- | 257390 | 128695 | 128695 |
| | 2327829 | 1570439 | 757390 | 378695 | 378695 |
| **Assessment Year 2007-08** | | | | | |
| Diwali Pooja Expense | 200000 | Ad-hoc relief in total | | | |
| Gift Expenses | 468475 | | | | |
| Chandla Expenses | 403497 | | | | |
| Business Promotion | 500000 | 300000 | 1271972 | 635986 | 635986 |
| | 1571972 | 300000 | 1271972 | 635986 | 635986 |
| **Assessment Year 2008-09** | | | | | |
| Diwali Pooja Expense | 300000 | Ad-hoc relief in total | | | |
| Gift Expenses | 500000 | | | | |
| Chandla Expenses | 341127 | | | | |
| Business Promotion | 600000 | 300000 | 1441127 | 720564 | 720564 |
| | 1741127 | 300000 | 1441127 | 720564 | 720564 |
| **Assessment Year 2009-10** | | | | | |
| Diwali Pooja Expense | 400000 | Ad-hoc relief in total | | | |
| Gift Expenses | 700000 | | | | |
| Chandla Expenses | 238927 | | | | |
| Business Promotion | 750000 | 300000 | 1788927 | 894464 | 894464 |

| | | | | | |
|---|---|---|---|---|---|
| | 2088927 | 300000 | 1788927 | 894464 | 894464 |

9.4.2 From the above it is observed that similar disallowances out of Business promotion expenses, Gift expenses, Diwali Pooja expenses and Chandla expenses were made and part relief was allowed by the CIT(A), considering all such expenses together in A.Ys. 2007-08, 2008-09 and 2009-10. In such years the Hon'ble ITAT has allowed further relief by restricting the disallowances to 50% of amount confirmed by the CIT(A). The facts and circumstances on these issues in present appeal remain similar as that of A.Ys. 2007-08, 2008-09 and 2009-10. In A.Y. 2007-08 out of total disallowance of Rs.15,71,972/-, out Business promotion expenses. Gift expenses, Diwali Pooja expenses and Chandla expenses, the Hon'ble ITAT has finally confirmed the disallowance of Rs.6,35,986/-, i.e. confirmed 40.45% of disallowances. Similarly, in A.Ys. 2008-09 out of total disallowance of Rs.17,41,127/-, out Business promotion expenses, Gift expenses, Diwali Pooja expenses and Chandla expenses, the Hon'ble ITAT has finally confirmed the disallowance of Rs.7,20,564/-, i.e. confirmed 41.39% of disallowances. In A.Y. 2009-10 out of total disallowance of Rs.20,88,927/-, out Business promotion expenses, Gift expenses, Diwali Pooja expenses and Chandla expenses, the Hon'ble ITAT has finally confirmed the disallowance of Rs.8,94,464/-, i.e. confirmed 42.82% of disallowances. Hence, in A.Ys. 2007-08, 2008-09 and 2009-10, the average percentage of disallowance confirmed by the Hon'ble ITAT works out to be 41.55%. Respectfully fallowing the decisions of the Hon'ble ITAT in appellant's own case for A.Ys. 2007-08, 2008-09 and 2009-10, the disallowances made by the Ld. AO out of Business promotion expenses, Gift expenses, Diwali Pooja expenses and Chandla expense is CONFIRMED to the extent of Rs.12,44,930/-(being 41.55% of aggregate of such disallowances at Rs.29,96,221/-) and the balance of disallowance at Rs.17,51,291/- (Rs.29,96,221 - Rs.12,44,930) is DELETED."

11. Before us, the Ld. counsel of the assessee submits that the aforesaid expenses were made out of commercial expediency and for the purpose of business. It is stated that there was no personal element involved and these expenses were incurred wholly and exclusively for the purpose of business.

On the other hand, the Ld. DR relies on the order passed by the Ld. CIT(A).

12. We have heard the rival submissions and perused the relevant materials on record. In the instant case, the assessee failed to file before the AO evidence to substantiate the allowability of the above expenses. The assessee also failed to establish that these expenses were incurred wholly and exclusively for the business purpose. As mentioned hereinbefore at para 10, the Ld. CIT(A), having examined (i) the addition made by the AO, (ii) addition confirmed by the CIT(A), (iii) addition confirmed by the ITAT for AYs 2006-07, 2007-08, 2008-09 and 2009-10 has confirmed a disallowance of Rs.12,44,930/- (Rs.29,96,221/- *minus* Rs.12,44,930/-). Thus the Ld. CIT(A) has given a relief of Rs.17,51,291/-. As the above order of the Ld. CIT(A) is based on a comparative analysis being contextual, we confirm the same and uphold the disallowance of Rs.12,44,930/-. Accordingly, the above grounds of appeal are dismissed.

13. Facts being identical, our decision for the AY 2010-11 applies *mutatis mutandis* to AY 2011-12 and AY 2012-13.

14. In the result, the appeals filed by the assessee for aforementioned assessment years are partly allowed.

***The Revenue's Appeal***

15. The 1st and 2nd grounds of appeal filed by the Revenue for the AY 2010-11 read as under:

I. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition u/s 14A of the Income Tax Act, 1961 relying on the decision of the Hon'ble Bombay High Court in the case of CIT Vs Continental Warehousing Corporation (Nhava Sheva) Ltd., by ignoring the fact that the Department has not accepted the decision of the Hon'ble High Court and SLP is already filed before the Handle Supreme Court.

II. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition u/s 14A of the Income Tax Act, 1961 ignoring the fact that the provisions of Section 14A apply even if no exempt income is actually earned or received during the year in any form whatsoever.

16. As mentioned at para 4 hereinbefore, the assessee has not earned any exempt income during the year under consideration. Therefore, our decision at para 7 is equally applicable while deciding the above two grounds of appeal. Accordingly, the above two grounds of appeal filed by the Revenue are dismissed.

17. The 3rd ground of appeal reads ad under:

Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in holding that only a part of the expenditure prohibited by law can be disallowed u/s 37(1) of the Income Tax Act, 1961 contrary to the fact that the entire expenditure ought to be disallowed in terms of Section 37(1), as the payment is admittedly in the nature of "speed money" paid in cash and illegal as per law as also against the public policy.

18. During the course of assessment proceedings, the AO noticed that the assessee collects certain fees or service charges from its clients. A portion of this is spent for making payments to Port employees, and other such payments which are otherwise not sanctioned as per law. These amounts are neither credited nor debited in the profit and loss account but routed through the balance sheet. In the return of income filed on 28.08.2012, in response to notice u/s 153A, the assessee has disallowed Rs.82,27,656/- (being 25% of Rs.3,29,10,623/-) on account of sundry expenses u/s 37(1) and added the same which was not offered in the original return of income filed u/s 139 dated 23.09.2010. By doing so, the assessee submitted before the AO that it has followed the order dated 11.02.2011of the ITAT, Mumbai in the case of M/s N. Jamnadas & Co., which is a group concern, for AY 1997-98 and AY 1998-99.

During the course of assessment proceedings, the assessee had enclosed copies of certain jobs in respect of its various clients which include copy of quotations given to the clients, copy of invoices/disbursement accounts raised to the clients and certain supporting documents (bills/invoices) in respect of various expenses shown in such bills/invoices and copy of the agreement with the Principal/Client on sample basis. The AO found that (i) such 'sundries/sundry expenses/miscellaneous expenses' do not have any supporting documents e.g. bills/invoices etc., (ii) such expenses have been claimed only on the basis of self-made cash vouchers and there are no supporting documents, viz. bills, invoices, etc. in this respect, (iii) these quotations and copy of invoices raised to clients do not suggest or do not even indicate that the assessee would incur or has incurred such

illegal expenses/speed money payments on behalf of its clients and would claim the same, (iv) the assessee's claim that its clients were aware of such speed money payments/illegal expenses is not based on any evidence and it is merely the assessee's assumption.

The AO on perusal of certain self-made cash vouchers produced by the assessee on sample basis noticed that even name of persons were not mentioned on many vouchers and wherever some names were appearing, the assessee failed to furnish any further details about such persons in respect of which such money payments/sundry expenses have been claimed.

The AO held that the assessee has made payments of speed money etc. at various ports. These expenses were made to various government agencies, and the assessee failed to prove that these are in the nature of business expenses. The AO observed that there is no provision under the Act to partially allow any expenditure incurred by the assessee. Referring to section 37(1), the AO held that the expenditure incurred by the assessee should be wholly and exclusively for the purpose of business and should not be for the purpose which is an offence prohibited by law. The assessee has disallowed in its return of income an amount of Rs.82,27,656/- (being 25% of Rs.3,29,10,623/-). Therefore, the AO made a disallowance of the balance amount of Rs.2,46,82,967/-.

19. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) observed that for the AYs 2004-05, 2005-06 and 2006-07, similar disallowance was made by the AO and the

CIT(A) following the order of the Tribunal in assessee's own case directed the AO to restrict the disallowance to 25%. Against the said order of the CIT(A), the Revenue filed an appeal before the ITAT, Mumbai in ITA No. 8190, 8191 and 8192/Mum/2011 and the Tribunal vide its order dated 27.11.2011 dismissed the appeals. The Ld. CIT(A) further noted that in AY 2009-10, the CIT(A) had restricted such allowances to the extent of 25% of such expenses. Against the decision of the Ld. CIT(A), the Revenue filed an appeal before the ITAT. The Tribunal vide its order dated 03.01.2014 upheld the order of the Ld. CIT(A) and dismissed the appeal of the Revenue. In the present case, the Ld. CIT(A) followed the order of the Ld. CIT(A) and ITAT for the above assessment years and directed the AO to accept Rs.82,27,656/- (25% of the disallowance of Rs.3,29,10,623/-) and delete the balance amount of Rs.2,46,82,967/-.

20. Before us, the Ld. DR relies on the decision dated 05.12.2008 of the Hon'ble Madras High Court in the case of *CIT v. K. Thangamani* in T.C.(A) Nos. 391 & 392 of 2004.

On the other hand, the Ld. counsel of the assessee relies on the order of the Tribunal in assessee's own case for the AYs 1998-99, 2002-03 and 2003-04 (ITA No. 750, 751 and 752/Mum/2010); AY 2007-08 (ITA No. 2474/Mum/2011); AY 2008-09 (ITA No. 5606/Mum/2011); AYs 2004-05, 2005-06 and AY 2006-07 (ITA No. 8190, 8191 & 8192/Mum/2011); AY 2009-10 (ITA No. 4414/Mum/2012).

21. We have heard the rival submissions and perused the relevant materials on record. In *Thangamani* (supra), relied on by the Ld. DR

there was a clear factual finding recorded by the AO as well as the CIT(A) to the effect that the assessee had indulged in filing bogus TDS certificate and got refund of the amount from the Income Tax Department. It was also the admitted case of the assessee before the Income Tax Department as well as before the Central Bureau of Investigation during the course of investigation into the offence that the assessee had indulged in the act of fabricating TDS certificates and collecting refund from the Income Tax Department. It was only on account of the said factual matrix that the AO assessed the income received by the assessee, by getting refund from the Income Tax Department. The Hon'ble High Court held that "however, the Income Tax Appellate Tribunal without any basis set aside the order of the assessing authority as well as Commissioner (Appeals) and as such we are of the considered view that the Tribunal committed a serious error by holding that the booty received by the assessee can under no circumstances be the income of the assessee".

In contrast, in the instant case, the expenditure incurred by the assessee is in the nature of 'speed money'. The same issue arose before the Tribunal in assessee's own case for AY 1998-99 and from AY 2002-03 to AY 2009-10. In all these years the Tribunal has directed the AO to restrict the disallowance to 25% of such expenses.

Facts being identical, we follow the order of the Co-ordinate Bench in the case of the assessee for the above assessment years and uphold the order of the Ld. CIT(A).

22. In the result, the appeals filed by the Revenue for the aforementioned years are dismissed.

23. To sum up, the appeals filed by the assessee are partly allowed, whereas the appeals filed by the Revenue are dismissed.

**Order pronounced in the open Court 25/04/2018.**

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

Mumbai;
Dated: 25/04/2018
*Rahul Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

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

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
**ITAT, Mumbai**