IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA

BEFORE SHRI S. S. GODARA, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA Nos.986 & 987/Kol/2017

(निर्धारणवर्ष / Assessment Years: 2011-12& 2012-13)

D.C.I.T, Circle-6(1), Kolkata Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.	**Vs.**	**M/s. National Engineering Industries Ltd.** 9/1, R.N. Mukherjee Road, Kolkata – 700 001.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. :**AAACN 9969 L**		
(Appellant)	**..**	**(Respondent)**

Appellant by :Shri Kapil Mondal, JCIT(Sr. DR)
Respondent by :Shri Asim Choudhury, Advocate

सुनवाईकीतारीख/ **Date of Hearing : 07/09/2018**

घोषणाकीतारीख/**Date of Pronouncement : 12/09/2018**

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned two appeals filed by the Revenue, pertaining to Assessment Years 2011-12and 2012-13, are directed against the separate orders passed by the Ld. Commissioner of Income Tax (Appeals)-22, Kolkata, which in turn arise out of assessment orders passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. Since these two appeals relate to the same assessee, different Assessment Years, common and identical issues are involved, therefore, these have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

3. The grounds of appeal raised by the Revenue in ITA No.986/Kol/2017 for Assessment Year 2011-12,are as follows:

"1. That the ld. CIT(A) has erred in treating the service charges as business income instead of house property income and allowing deduction of expenses and depreciation instead of deduction of 30% of annual rental value.

2. That the ld. CIT(A) has erred in allowing the loss of embezzlement of good of Rs.32,61,237/- without appreciating the facts of the case that the said loss is "not wholly and exclusively for the purpose of the business".

3. That the ld. CIT(A) has erred in deleting the upward adjustment of Rs.6,57,853/- ignoring provisions of section 92CA(3) of the I.T. Act.

4. That the assessee craves for leave to add, delete or modify any of the grounds of appeal before or at the time of hearing."

4. The grounds of appeal raised by the Revenue in ITA No.987/Kol/2017, for Assessment Year 2012-13are as follows:

"1. That the ld. CIT(A) has erred in treating the service charges as business income instead of house property income and allowing deduction of expenses and depreciation instead of deduction of 30% of annual rental value.

2. That the ld. CIT(A) has erred in deleting the upward adjustment of Rs.1,39,69,200/- ignoring provisions of section 92CA(3) of the I.T. Act.

3. That the assessee craves for leave to add, delete or modify any of the grounds of appeal before or at the time of hearing."

5. Ground No.1 raised by the Revenue in ITA No.986/Kol/2017 and in ITA No.987/Kol/2017, are identical and same, which relate to service charges as business income instead of house property income and allowing deduction of expenses and depreciation instead of deduction of 30% of annual rental value. This ground is common in both the assessment years, that is, in A.Y.2011-12 and A.Y. 2012-13, therefore, we take Revenue`s appeal in ITA No. 987/Kol/ 2017, for A.Y. 2012-13, as the lead case.

6. The brief facts qua the issue are that the ld AO assessed the income of Rs.2,40,28,343/- from rendering services at Barakhamba Road Property at New Delhi for providing security, central air conditioning, electricity and other various services as Income from House Property instead of income from business.

The Ld. AO observed that the assessee was providing certain common services for the whole building including their own area and to other owners also for the Barakahamba Property at Birla Tower, New Delhi. The common services include running and maintenance of air conditioners, lifts, pumps, transformers, generators, cleaning and repairing, providing security, water supply etc.

Separate charges were received by the assessee for providing such services. The service charges are being realized from:

(a) Assessee's own tenants,

(b) Other owners in relation to area used by the owners themselves

(c) Tenants of other owners. Those owners have also let out part of the area to others and part is being used for their own purposes.

The net income from such services and maintenance activity has been included by the assessee under the head "business income'. Total amount of service charges realized during the year was Rs.2,40,28,343/- and expenses there against were Rs.1,13,26,603/-.In the past assessment years, service charges realized by the assessee were not assessed as 'business income' but added to the annual value and assessed as house property income. Further the expenses relating to rendering such services plus depreciation on plant and machinery used in Barakhamba Road property for rendering services was disallowed in computing the 'business income'. The ld AO relying on the judgment of the Hon'ble Kolkata High Court in the case of Shambhu investment Pvt. Ltd's case reported in 249 ITR 47, wherein it was held that when rendering services are integral part of the tenancy agreement, it becomes part of income from house property. Therefore, on the same basis the service charges income of Rs.2,40,28,343/-was added to the rental annual value under section 23 of the Act in assessing the house property income. The 30% deduction on such service charges was allowed in computing the house property income.

7. On appeal, the ld. CIT(A) deleted the addition. Aggrieved by the order of the ld. CIT(A), the Revenue is in appeal before us. The ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and is not being repeated for the sake of brevity. On the other hand, ld Counsel for the assessee defended the order passed by the ld CIT(A).

8. We have given a careful consideration to the rival submissions, perused the material available on record, we note that the said ground is covered by the decision of the Assessee's own case for AY 2006-07 passed by the Hon'ble Jurisdictional High Court, Calcutta bearing ITA No.188 of 2010. Further the issued is also covered by the Assessee's own case in the ITAT for AY 2005-06 and AY 2006-07 in the following judgments:

1. ITA No.855/Kol/2008 dated 18 September 2009.
2. ITA No. 1509/Kol/2009 dated 31st March 2010.

We note that in the earlier years, the ld. CIT(A) have adjudicated the matter in favour of the assessee-company, and held that the receipts from service charges were to be assessed as business income. The ITAT has confirmed such view of matters in the A.Ys 2005-05, 2006-07 and 2007-08. The Departmental appeal before the Hon'ble High Court for the A.Y 2006-07 has also been dismissed by the Hon'ble High Court in the assessee`s case [CIT, Kolkata-II Vs National Engineering Industries Ltd ITAT No.188 of 2010 GA No.2777 of 2010]. The relevant portion of the order of the Hon'ble High Court dated 10th September 2010 is as follows:

> *"We have heard Mr. Bhowmick, Learned Counsel for the assessee in this matter, who wants us to admit the appeal on the following substantial questions of law:*
>
> *i) Whether on the facts and circumstances of the case, the Learned Tribunal is Justified in law in deleting the addition of Rs.1,65,46,320/- without considering the provision of Section 23 of the Income Tax Act, 1961 and also the tribunal's own order in the case of NTS (P) Ltd. for the Assessment year*

2004-2005 and also the Judgment of the Hon'ble Apex Court reported in 124 page 31(SC).

ii) Whether on the facts and circumstances of the case, the Learned Tribunal is justified in law in holding service charge received as business income instead of House Property without considering the decision of the latest Judgment reported in 249 ITR 47 (Cal).

We are unable to admit the appeal as it is recorded by the Learned Tribunal that Commissioner of Income Tax (Appeal) has followed the decision of the Hon'ble Jurisdictional High Court in the case of [CIT vs. MODEL MFG. CO.] reported in 175 ITR 374 (CAL) and in the case of [CIT vs. RUSSEL PROPERTIES PVT. LTD.] 137 ITR 473(CAL). This issue was also raised before another coordinate Bench of Learned Tribunal and it was accepted by the same Bench. However, it is recorded that the facts and circumstances of the issue was identically same with that of the assessment year 2005-06. The learned Tribunal while accepting the decision of the coordinate Bench and having found the CIT (A) has followed the decision of the Jurisdictional High Court we do not think the Learned Tribunal has passed any wrong order in any manner, whatsoever. We, therefore, do not find any infirmity in the same, though Mr. Bhowmick urged that the decision of the High Court was not on proper discussion or reason and it was dismissed with one line verdict. But we are of the view when the High Court dismissed an appeal and upheld the action of the learned Tribunal it is an acceptance of the High Court itself. Therefore, this appeal is dismissed accordingly. Certified Photostat copy of this order, be made available to the parties, lf applied for, upon compliance of usual formalities."

As the issue is squarely covered by the judgment of the Hon'ble High Court (Supra) in the assessee's own case, as also the decisions of the ITAT Benches (Supra), and there is no change in facts and law and the ld DR for the Revenue is unable to controvert the findings of the judgment of the Hon'ble High Court (Supra), that being so, we decline to interfere in the order of ld CIT(A), his order on this issue is hereby upheld and the grounds of appeal raised by the Revenue is dismissed.

9. Ground No.3 raised by the Revenue in ITA No.986/Kol/2017 and Ground No.2 raised by the Revenue in ITA No.987/Kol/2017 are identical and relates to upward transfer pricing adjustment of Rs.6,57,853/- for the Assessment Year 2011-12 and to the tune of Rs.1,39,69,200/- for Assessment Year 2012-13. In order to

adjudicate the said transfer pricing issue, we take the lead case of Revenue's Appeal in ITA No.987/Kol/2017, for Assessment Year 2012-13.

10. The brief facts qua the issue are that Ld. AO / Transfer Pricing officer (TPO) made addition on account of guarantee commission income to the tune Rs.1,60,24,050/- u/s 92CA(3) read with section 92C(4) of the Act, for corporate guarantee given by the assessee in favour of Capital One, National Association Bank on behalf of associated enterprise Birlasoft Inc.(USA). During the assessment proceedings a report in Form 3CEB was filed by the assessee along with its return of income for A.Y.2012-13. On reference from the Assessing Officer u/s. 92CA(1), the case was taken up for determination of Arm's Length Price in respect of International Transactions entered by the assessee with its Associated Enterprises.On examination of the Transfer Pricing Study Report and Audited Accounts along with Form No.3CEB, it was noted that assessee company has given Corporate Guarantee to its AE, Birla Soft Inc., USA in FY 2010-11 (AY 2011-12). The total value of corporate guarantee given by the assessee to its AEs was USD 10.5 million. For the A.Y. 2012-13, the assessee has offered an amount of Rs.20,54,850/- as corporate guarantee fee charged on such loan to the AE. The corporate guarantee fee was determined @0.38% on the value of corporate guarantee. On examination of the TP records for the AY 2011-12, it was noted that the issue of corporate guarantee provided by the assessee was examined by the TPO at the time of TP proceeding for the AY 2011-12 and the arm's length guarantee fee was determined @3% p.a. on the amount of credit availed by the subsidiary. It had been mentioned by the assessee, that there has been no newcorporate guarantee (CG) provided in FY 2011-12.In the course of hearing dated 07/01/2016, the assessee was informed that in view of the benchmarking of thecorporate guarantee(CG) fee in AY 2011-12, by the TPO and considering the fact that no corporate guarantee was given in the FY 2011-12, it was proposed to consider 3% as arm`s length price (ALP) of corporate guarantee (CG) fee for the AY 2012-13 following order u/s.92CA (3) for the AY 2011-12. The assessee was asked to submit explanation and also to provide computation ofcorporate guarantee`(CG) fee for the AY 2012-13.

11. In response, the assessee submitted that the corporate guarantee cannot be treated as an international transaction, as no services have been rendered to the AE on account of provision of CG. The determination of CG do not have a proper basis as the pricing of loan varies from party to party and cannot be compared to interest charged from bank to others. The pricing of interest cannot be treated as a straight Jacket formula which can be curtailed down to only two variants i.e. initial cost of the bank and risk taken by the bank as the same do not take into consideration other commercial issues such as viability of the project, equity provided by the promoters, future option receipt by the bank etc. The assessee contended that the guarantee commission charged by the IDBI Bank @0.40% for an identical amount of loan taken can be proper comparison regarding charge on guarantee commission to the AE.The current financial position of the AE has to be taken into consideration which has an effect in risk and liability of the assessee in the corporate guarantee transaction.

12. The ld Transfer Pricing officer noted that there are various decisions of the different ITAT benches which confirms the treatment of transaction in respect of providing corporate guarantee to the AEs as international transactions where ALP has to be determined.In the case of Everest Kanto Cylinder vs. DCIT ITA No.542/M/2012 dated 23.11.2012 and ITA No.7073/Mumbai/2012 dated 25/09/2014, it was held that the transactional benefits to the assessee on account of easy availability of funds not at arm's length would attract TP provisions as the procurement of such comfort/guarantee entails significant costs in the open market. The AEs also rides on the goodwill and market credibility of the assessee in such a scenario. Generation of this goodwill over a period of time has definitely cost the assessee, which are now being made available to the AEs for free. The cost of the assessee has been affirmed in many Judgments, which has not been considered by the ITAT Ahmedabad in while delivering Judgment in the case of Micro Ink Ltd. vs ACIT dated 27/11/2015 (ITA No.2873 of 2010). These citations has also been considered by the Mumbai ITAT while deciding identical principle in the case of Aditya Birla Minacs Worldwide Ltd vs DCIT (ITA No.7033/Mumbai/2012) wherein it has held as below:

i. Transaction of providing loan to subsidiary whether a direct loan or providing credit for initial expenditure, which is stated to be reimbursable, calls for transfer pricing adjustment.

ii. Transaction of providing corporate guarantee involves services rendered to the AE and therefore, provisions of transfer pricing can be invoked in respect of such transactions.

Further, Hon`ble ITAT Hyd. in the case of M/s. Prolific Corporation Ltd vs DCIT Circle-3(l), Hyd. (AY 2009-10) 55 taxmann.com 226 (Hyd) has held that the transaction of providing corporate guarantee involves services rendered to AE and therefore provisions of transfer pricing can be invoked in respect of such transactions. Similar view was taken by Hon`ble ITAT Mumbai in the case of Tata Auto comp (ITA No.7354/Mumbai/2011). Therefore, ld TPO held that it is valid, in so far holding the transaction as International transaction and thereafter working out the inherent cost element to such transaction and ALP as a consequence. The ld TPO noted that as far as quantum of CG fee is concerned, it is to be stated that the CG was given in AY 2011-12 and the same was benchmarked by the TPO at the time of TP proceeding for that year after due consideration of the facts and circumstances involved in the transaction and objections put forward by the assessee. Since the CG is continuing in the year also without any change in terms and conditions and also quantum (as communicated and accepted by the assessee) there is no scope for revisiting the decisions taken by the TPO in the AY 2011-12. In view of the above facts, assessee's prayer for reduction of GG fee from 3% was rejected. Thereafter the arm's length rate of CG fee had been determined at 3% p.a. Accordingly, the quantum of arm's length adjustment on account of Corporate Guarantee fee computed as under:

Value of CG	Period of CG	Arm's length rate of CG fee	CG fee In INR USD	CG fee IN INR
USD 105,00,000	12 months	3%	315,000	Rs.160,24,050/-
Less: Already offered by the assessee in Form 3CEB				Rs.20,54,850/-
Arm's Length Adjustment				Rs.1,39,69,200/-

Therefore, the ALP adjustment on account of Corporate Guarantee fee was made to the tune of Rs.1,39,69,200/-

13. Aggrieved by the order of the ld AO/TPO, the assessee carried the matter in appeal before the ld CIT(A), with success. The ld CIT(A) noted that in assessee`s case the guarantee is a shareholder activity hence no TP adjustment on account of corporate guarantee should be required and hence deleted the ALP adjustment on account of Corporate Guarantee Fee Rs.1,60,24,050/-.

14. Aggrieved by the order of ld CIT(A), the Revenue is in appeal before us. The Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. On the other hand, ld counsel for the assessee has defended the order passed by the ld CIT(A).

15. We have given a careful consideration of the rival submissions and perused the material available on record, we note that the assessee-company provided corporate guarantee on behalf of its associated enterprise - Birlasoft Inc. New Jersey, United States to Capital One, National Association Bank, and the total value of such guarantee was USD 10.5million(Rs.47.50 crores). The said guarantee was given on 11.03.2011, and the loan was made available to Birlasoft Inc by Capital One bank on 17.03.2011. It is also an undisputed fact that the assessee did not realize any guarantee commission from Birlasoft Inc; however, on amendment made in Finance Act 2012, the assessee-company had revised its Income-tax Return to include a deemed Guarantee Commission @0.38%, this being the average cost of all bank guarantees taken by the Assessee from the Indian Banks. It has also been categorically brought on record that the said corporate guarantee was never invoked and was ultimately returned on 31.12.2012.The AO/TPO determined the arm's length rate of Corporate Guarantee fee @3% p.a. without providing this year's data for benchmarking the ALP and/or assigning any reason. The TPO/AO just relied on the preceding year's Order where in the Corporate Guarantee fee was assessed @3% and consequently this year also the Corporate Guarantee fee was assessed @3% as follows:

Value of CG	Period of CG	Arm's length rate of CG fee	GG fee In INR USD	CG fee IN INR
USD 105,00,000	12 months	3%	315,000	Rs.160,24,050/-
Less: Already offered by the assessee in Form 3CEB				Rs.20,54,850/-
Arm's Length Adjustment				Rs.1,39,69,200/-

We note that the application of rate of 3 percent for guarantee commission, as computed by the ld TPO in above cited table, cannot be upheld in every case as it is largely dependent upon the terms and conditions, on which loan has been given, risk undertaken, relationship between the bank and the client, economic and business interest are some of the major factors which has to be taken into consideration. In this case, the assessee has itself charged 0.38% guarantee commission from its AE, therefore, it is not a case of not charging of any kind of commission from its AE. The only point which has to be seen in this case is whether the same is at ALP or not. We have already come to a conclusion in the foregoing paras that the rate of 3% by taking external comparable by the TPO, cannot be sustained in facts of the present case.

We note that on examination of the Transfer Pricing Study Report and Audited Accounts along with Form No.3CEB, it is noted that assessee company has given Corporate Guarantee to its AE, Birla Soft Inc., USA in FY 2010-11 (AY 2011-12). The total value of corporate guarantee given by the assessee to its AEs was USD 10.5 million. For the A.Y. 2012-13, the assessee has offered an amount of Rs.20,54,850/- as corporate guarantee fee charged on such loan to the AE. The corporate guarantee fee was determined @0.38% on the value of corporate guarantee.We made it clear that guarantee fee arrangement is an international transaction but the guarantee fee percentage as determined by the TPO @ 3% is not correct on various counts, as explained above. We note that various decisions of Coordinate Benches of Mumbai Tribunal, wherein, the bank guarantee commission has been charged from 0.5% to 1%. List of such decisions, are as under:

Sr.No.	Name of case law
1	Glenmark Pharmaceuticals Limited (ITA No. 5031/Mum/2012)
2	Godrej Household Products Limited (ITA No. 7369/Mum/2010)
3	Everest Kanto Cylinder Limited (ITA No. 7073/Mum/2012)
4	Everest Kanto Cylinder Limited (ITA No. 542/Mum/2012)
5	Nimbus Communications Limited (ITA No. 3664/Mum/2010)
6	Reliance Industries Ltd. (ITA No. 4475/Mum/2007)

We note that assessee-company had included a Guarantee Commission @0.38%, being the average cost of all bank guarantees taken by the Assessee from the Indian Banks, should not be considered at arm`s length, that is, guarantee commission charged by bank is not a arm` length price. Normally bank decides the guarantee commission based on the credit rating of the company, credit spread and past and future financial performance of the company therefore, the same should not be treated as arm`s length because every company does not have same credit rating and credit spread.

We note that ld CIT(A) deleted the ALP adjustment of guarantee fee based on the judgment of Coordinate Bench Kolkata in the case of M/s Tega Industries Limited Vs. DCIT, ITA No. 1912/Kol/2012. We note that judgment in the case of M/s Tega Industries Limited(supra) is *per incuriam,*as the same has been passed without considering the judgment of the coordinate bench in the case of M/s Electrosteel Casting Ltd, IT (SS) No.47 to 53 /Kol/2014, for A.Y. 2003-04 to 2011-12, order dated 25.11.2016 and without considering the judgment of the Special Bench, on the theory of 'Base erosion profit shifting` in the case of M/s Instrumentarium Corporation, ITA No. 1548 and 1549/K/2009, for A.Y. 2003-04 and 2004-05 order dated 15.07.2016, therefore, we do not take into account the judgment of Coordinate Bench Kolkata in the case of M/s Tega Industries Limited (supra), so far the guarantee issue is concerned.

In wake of these fact and without going into the other arguments of the assessee and also looking to the fact that the Tribunal in various cases has accepted guarantee commission chargeable between 0.5% to 1%, we hold that guarantee commission of 1% should be chargeable. Here in this case, assessee itself has agreed to charge guarantee commission @ 0.38%% of the outstanding guaranteed amount, accordingly, we also hold that a guarantee commission should be benchmark by taking the rate of 1% of the outstanding

guaranteed amount in line with the consistent views taken by the coordinate Benches, from its AE and adjustments should be made accordingly. Thus, this ground raised by the Revenue is treated as partly allowed.

16. Ground No.2 raised by the Revenue in ITA No.986/Kol/2017 relates to loss of embezzlement of goods of Rs.32,61,237/-.

17. The brief facts qua the issue are that during the assessment proceedings, the ld AO noted that assessee has claimed loss on embezzlement of good of Rs.32,61,237. The ld AO asked the assessee to explain the nature of loss. In response, the assessee submitted that there was a pilferage of material at Rubber factory in Kolkata amounting to Rs.32,61,237/- due to collusion between Vedor's and transporters' employees and store keeper employed by the assessee at its Rubber factory. The assessee initiated criminal proceedings against the concerned persons. The amount of pilferage of Rs.32,61,237 comprised of following:-

Basic Material Cost (excluding WBVAT)		Rs. 28,50,231
Excise duty		Rs.4,11,006
	Total	Rs.32,61,237

The VAT of Rs.4,07,655/- paid on above pilfered material has neither been charged to revenue account nor claimed in computing income. The VAT amount of Rs.4,07,655/- was availed as input tax credit with due intimation to the joint Commissioner sales Tax. The amount of Rs.32,61,237/- has been charged to revenue account and has been claimed in computing the total income for the year. The assessee received Rs.3,84,918/- on 24.04.12, as final settlement of claim from National Insurance Co, Ltd,under the Fidelity Guarantee Insurance Scheme against the above pilferage loss. The said claim amount received from the National Insurance Co, Ltd was credited to Profit & Loss account in financial year 2012-13 and included in computation of total income for assessment year 2013-14.

The assessee submitted that a business especially which is to yield taxable profits has to be carried on through employees. The employment of the concerned

employee was in the normal course of that business and the employment was a normal incident of the conduct of that business. The entrustment of the duty to that employee was in the normal course of the conduct of that business. If employment of people is incidental to the carrying on of business, it must logically follow that losses which are incidental to such employment are also incidental to the carrying on of the business. The loss caused by the embezzlement by the employee was incidental to the employment and entrustment of duty and thus incidental to the business.

However, the ld AO rejected the claim of the assessee for the following reasons:

(i) The legal proceedings are not completed; hence the loss is contingent till settlement of case and final realization from the award.

(ii) A claim for deduction of loss due to embezzlement cannot be admitted because theft of good which is by an employee by fraud on the proprietor can in no sense be said to be "an expenditure laid out or expended wholly and exclusively for the purpose of the business.

Therefore, the amount of Rs.32,61,237/- was disallowed by ld AO.

18. Aggrieved by the order of ld Assessing officer, the assessee carried the matter in appeal before the ld CIT(A) with success. The ld CIT(A) noted that the CBDT vide Circular No. No. 35-D (XLVII-20) [F. No. 10/48/65-IT (A-I)] dated 24-11-1965, wherein it has been provided that losses arising due to embezzlement of employees or due to negligence of employees should be allowed if the loss took place in the normal course of business and the amount involved was necessarily kept for the purpose of the business in the place from which it was lost. The ld CIT(A) noted that loss took place in the normal course of business therefore, it should be allowed and hence deleted the addition.

19. Aggrieved by the order of Ld CIT(A), the Revenue is in appeal before us.The Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated

for the sake of brevity. On the other hand, ld Counsel for the assessee defended the order passed by the ld CIT(A).

20. We have given a careful consideration to the rival submissions and perused the material available on record, we note that a business especially which is to yield taxable profits has to be carried on through employees, and that the employment of the concerned employee was in the normal course of that business and the employment was a normal incident of the conduct of that business. The entrustment of the duty to that employees was in the normal course of the conduct of that business, and that if employment of people is incidental to the carrying on of business, it must logically follow that losses which are incidental to such employment are also incidental to the carrying on of the business. It was therefore claimed by the assessee-company that the loss caused by the embezzlement by the employee was incidental to the employment and entrustment of duty and thus incidental to the business.

We note that this is a claim of pilferage of Rs.32,61,237/- by the assessee-company on account of collusion between certain elements both from outside and within the factory premises, and that criminal proceedings against the accused had also been initiated by the assessee-company. It was claimed that the amount of pilferage of Rs.32,61,237/- comprised of Basic Material Cost (excluding WBVAT) of Rs.28,50,231/-, and excise duty of Rs.4,11,006/-, totaling to Rs.32,61,237/-. The VAT amounting to Rs.4,07,655/- paid on the pilfered material has neither been charged to revenue account nor claimed in computing the income of the assessee, and that the VAT amount of Rs.4,07,655/- was availed as input tax credit with due intimation to the Appropriate Authority, namely the Joint Commissioner sales Tax. The amount of Rs.32,61,237/- had been charged to revenue account and had been claimed in computing the total income for the year.The assessee-company had received Rs.3,84,918/- on 24.04.12 as final settlement of its claim from National Insurance Co. Ltd. under the Fidelity

Guarantee Insurance Scheme against the impugned pilferage loss, as also that the said claim amount received from the National Insurance Co. Ltd was credited to the Profit& Loss account in financial year 2012-13 and included in computation of the total income of the assessee for assessment year 2013-14. The relevant proof was also submitted by assessee during the scrutiny hearing, as has been recorded by the Ld. AO.

21. It may be noted that the CBDT vide Circular No. No. 35-D (XLVII-20) [F. No. 10/48/65-IT (A-I)] dated, 24-11-1965, allows such type of losses. The relevant para reads as follows:

" 1. A reference is invited to the instructions on the above subject contained in the Board's Circular No. 25 of 1939 and Circular No. 13 of 1944 [Clarification 2], In these circulars it was clarified that losses arising due to embezzlement of employees or due to negligence of employees should be allowed if the loss took place in the normal course of business and the amount involved was necessarily kept for the purpose of the business in the place from which it was lost"

We note that the Hon`ble Supreme Court has considered the matter and laid down the law in this regard in two decisions in BadridasDaga vs CIT [1958] 34 ITR 10 and Associated Banking Corporation of India Ltd, v. CIT [1965] 56 ITR 7, wherein it was held that the loss resulting from embezzlement by an employee or agent of a business is admissible as a deduction under section 10(1) of the 1922 Act [corresponding to section 28 of the 1961 Act], if it arises out of the carrying on of the business and is incidental to it, and loss must be deemed to have arisen only when the employer comes to know about it and realizes that the amounts embezzled cannot be recovered.

Since the loss caused by the embezzlement by the employee and the employment of the employee is incidental to the carrying on of business, then the losses which are incidental to such employment are also incidental to the carrying on of the business. The loss caused by embezzlement by the employee was incidental to the employment and entrustment of duty and should be allowed in computing the business income of the year under consideration, that being so we decline to

interfere in the order passed by ld CIT(A), his order on this issue is hereby upheld and grounds of appeal raised by the revenue is dismissed.

22. In the result, appeal filed by the Revenue(in ITA No.986/Kol/2017 and ITA No.987/Kol/2017) are partly allowed.

Order is pronounced in the open court on 12.09.2018.

Sd/-	**Sd/-**
(S. S. GODARA)	**(A. L. SAINI)**
न्यायिकसदस्य / JUDICIAL MEMBER	**लेखासदस्य / ACCOUNTANT MEMBER**

कोलकाता /Kolkata;
दिनांक/ Date: 12/09/2018
(RS, Sr.PS)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/The Assessee- D.C.I.T, Circle-6(1), Kolkata
2. प्रत्यर्थी/ The Respondent- M/s. National Engineering Industries Ltd.
3. आयकरआयुक्त(अपील) / The CIT(A)-22
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, **कोलकाता**/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.

सत्यापितप्रति

True Copy

By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.