

आयकर अपील अाधिकरण, अहमदाबाद ँयायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
'SMC' BENCH, AHMEDABAD
BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
MS MADHUMITA ROY, JUDICIAL MEMBER
आयकर अपील सं./ITA No.269/AHD/2017
नधाण वष/Asstt. Year: 2004-2005

M/s South Shourne Corporation(India) 931, GIDC Estate, Makarpura, Baroda. PAN: AAGFS0493Q	V s.	ACIT, Circle-2(2), Baroda.
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(Applicant)		(Respondent)
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Assessee by :	Shri Parimal Parmar, A.R
Revenue by :	Shri Apoorva Bhardwaj, Sr.DR

सुनवाई का ताराख/Date of Hearing : 06/12/2018
घोषणा का ताराख /Date of Pronouncement: 01/01/2019

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)- 5, Ahmedabad[CIT(A) in short] vide appeal no.CAB/5-637/2014-15, dated 04/10/2016 arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to Assessment Year (AY) 2004-05.

2. The assessee has raised the concise grounds of appeal as detailed under:

The appellant craves liberty to place on record concise grounds of appeal as follows in line with Rule 8 of the Income-tax (Appellate Tribunal) Rules, 1963:

1. *The Ld. CIT(A) has erred, both in law and on the facts of the case, in confirming the addition of Rs.13,70,000/-made under section 68 of the Act.*
2. *The Ld. CIT(A) has erred, both in law and on the facts of the case, in confirming addition of Rs.33,594/- in respect of bad debts written-off.*
3. *The Ld. CIT(A) has erred, both in law and on the facts of the case, in partly confirming the ad hoc disallowance in respect of sales promotion expenses up to Rs.1,38,014/-being 20% of total expenses out of total disallowance of Rs.3,45,033/- being 50% of total expenses.*
4. *The Ld. CIT(A) has erred, both in law and on the facts of the case, in confirming ad hoc disallowance of Rs. 18,318/ being 20% of total vehicle & telephone expenses.*
5. *The Ld. CIT(A) has erred, both in law and on the facts of the case, in partly confirming the ad hoc disallowance in respect of travelling and conveyance expenses up to Rs.7,465/- being 10% of total expenses out of total disallowance of Rs. 14,930/- being 20% of total expenses.*
6. *The Ld. CIT(A) has erred, both in law and on the facts of the case, in confirming action of AO in treating trademark expenses of Rs.52,000/- as capital expenditure.*
7. *The Ld. CIT(A) has erred, both in law and on the facts of the case, in confirming disallowance of interest expenses of Rs.17,404/- under section 36(l)(iii) of the Act.*
8. *The Ld. CIT(A) has erred, both in law and on the facts of the case, partly confirming the ad hoc disallowance in respect of factory and welfare expenses up to Rs.23,241/-being 10% of total expenses out of total disallowance of Rs.46,483/-being 20% of total expenses.*
9. *Both the lower authorities have passed the orders without properly appreciating the fact and that they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed in the larger interest of justice.*
10. *The Ld. CIT(A) has erred in law and on facts of the case in confirming action of AO in levying interest u/s 234A/B/C of the Act.*
11. *The Ld. CIT(A) has erred in law and on facts of the case in confirming action of AO in initiating penalty proceedings u/s 271(l)(c) of the Act.*

Appellant craves leave to add, amend, alter, change, delete and edit the above ground of appeal before or at the time of the hearing of the appeal.

3. The first issue raised by the assessee is that Ld. CIT(A) erred in confirming the addition of Rs. 13,70,000/- u/s 68 of the Act.

4. Briefly stated facts are that the assessee is a partnership firm and engaged in the business of Pharmaceuticals. The assessee during the year has taken loans from the parties as detailed under:

Sr.No.	Name of Party	Amount
1.	P.R. Pankhania	2,95,000/-
2.	Sushilbhai Patel	10,75,000/-

4.1 The assessee claimed that both the parties are non-resident Indians and therefore they do not have any source of income in India.

4.2 The assessee in support of above loans filed the Xerox copies of the confirmation letters from both the lenders bearing dated 05/03/2004 and 17/02/2004.

4.3 However, the AO observed that the confirmation letters given by the lenders are hand-written by the single person. Accordingly, the AO did not believe the confirmations filed by the assessee. The AO also observed that the assessee failed to furnish the identity, genuineness, and creditworthiness of the lenders. Therefore the AO treated the amount of loan of Rs.13,70,000/- as unexplained cash credit u/s 68 of the Act and added to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to Ld.CIT (A). The assessee before Ld.CIT (A) submitted that it had filed confirmations, PAN of the lenders and copies of cheques issued by the lenders. In case of any doubt, the AO could have taken confirmation from the bank. The copies of the cheques issued by the lenders were available with the AO.

5.1 The assessee also submitted that both the lenders are non-resident Indian and this fact was very much brought to the notice of the AO during the assessment proceedings. Therefore these non-residents Indian maintained NRE account which was used for advancing loans to the assessee.

5.2 The books of accounts of the assessee were duly audited, and no adverse remark was pointed out by the Auditors regarding the Financial Statements. Therefore there cannot be any question of treating the loan as an unexplained cash credit under section 68 of the Act.

5.3 The Ld.CIT (A) called for the remand report from the AO who rejected the confirmations letters filed by the assessee vide letter dated 19/03/2013. Ld.CIT (A) after considering the submission of the assessee and remand report of the AO held that the assessee failed to justify the creditworthiness of the lenders and accordingly confirmed the order of the AO.

6. Being aggrieved by the order of the Ld.CIT (A) assessee is in appeal before us.

7. The Ld.AR before us filed a paper book running from pages 1 to 150 and submitted that the bank statement from Bank of Baroda was obtained in

connection with the loan from Shri P.R. Pankhania under section 133(6) of the Act which evidences the transaction with the assessee.

7.1 As regards the funds received from Shri Shashikant A Patel, a fresh loan of Rs.5,80,000/- was received from very same person in A.Y 2005-06 (i.e., immediate subsequent year) as is evident from confirmation placed on page 66 of the paper book and the same was accepted by the Department while framing assessment for A.Y 2005-06 u/s 143(3). Hence, even following the principles of consistency, department ought not to have doubted funds received in A.Y. 2004-05.

7.2 Ld.AR, as regards to NRE a/c submitted NRE a/c could be opened merely by ~~Non-resident~~ and only ~~of foreign income~~ can be parked in NRE a/c. Hence, Department ought not to have doubted funds received from NRE account.

7.3 Thus, sufficient documentary pieces of evidence about the funds received from the concerned both the people have been placed on record by the assessee.

7.4 Since certain additional pieces of evidence were furnished, Ld.CIT (A) called for a remand report from AO under which, AO furnished a remand report dated 19/03/2012 which is placed at pages 55 to 58 of the paper book. In such a remand report, the AO has not stated anything worth substance in rebuttal to evidence furnished by the assessee.

7.5 However, Ld.CIT (A) wrote a letter dated 15/05/2012 to AO stating that it is not good on the part of AO to send a report on the basis of his

personal opinion when there are means to verify the correctness of the claim of the assessee. Accordingly, Ld.CIT(A) requested AO to furnish a supplementary report. However, no such report has been furnished by AO.

7.6 As regards to Identity of the lender, the "Ld.AR submitted that same stands proved from confirmation, cheque and relevant extract of NRE account. With regard to the genuineness of transactions the "Ld.AR submitted that stands proved from the fact that funds have been received by cheque and also creditworthiness of lender, the same stands proved from bank statement wherein there were sufficient funds prior to the amount being lent to the assessee. Thus all the three ingredients as prescribed u/s 68 are proved by the assessee.

7.7 Ld.AR, stated that section 68 of the Act cast an initial burden on the assessee to prove identity, genuineness, and creditworthiness of lenders which has been discharged by placing on record documentary evidence. Having discharged the initial onus with a satisfactory explanation, onus shifts on the Revenue.

7.8 It transpires that objection of AO & CIT(A) was also that assessee had not proved a source of such persons to provide loans to the assessee.

7.9 The Ld.AR further submitted that section 68 of the Act, doesn't require an assessee to prove the source of the source of deposits. Hence no addition is called for u/s.68 of the Act. The Ld.AR also placed reliance upon the judgment as follows:

Murlidhar Lahorimal Vs. CIT 280 ITR 512 (Guj.)

CIT Vs. Pragati Co. Op. Bank Ltd. 278 ITR 170 (Guj.)

7.10 Having furnished the aforesaid details, the concerned credits, by no stretch of imagination, remain unexplained any further in the assessee's hands. In the light of the above, Ld.CIT (A) ought to have deleted the impugned addition.

8. On the other hand Ld.DR submitted that assessee failed to prove the creditworthiness of lenders. Therefore the cash credit remained unexplained under the provision of section 68 of the Act. The Ld.DR vehemently supported the order of the authorities below.

9. We have heard the rival contentions and perused the materials available on record. The assessee in the present case has taken the unsecured loan from 2 parties aggregating to Rs. 13,70,000/- as detailed under:

1. P.R.Pankhania
2. Sushibhai Patel

9.1 The provision of section 68 of the Act fastens the liability on the assessee to provide the identity of the lenders, establish the genuineness of the transactions and creditworthiness of the parties. These liabilities on the assessee were imposed to justify the cash credit entries under section 68 of the Act by the Honøble Calcutta High Court in the case of CIT Vs. Precision finance (p) Ltd reported in 208 ITR 465 wherein it was held as under:

“It was for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. On the facts of this case, the Tribunal did not take into account all these ingredients which had to be satisfied by the assessee.

Mere furnishing of the particulars was not enough. The enquiry of the ITO revealed that either the assessee was not traceable or there was no such file and, accordingly, the first ingredient as to the identity of the creditors had not been established. If the identity of the creditors had not been established, consequently, the question of establishment of the genuineness of the transactions or the creditworthiness of the creditors did not and could not arise. The Tribunal did not apply its mind to the facts of this particular case and proceeded on the footing that since the transactions were through the bank account, it was to be presumed that the transactions were genuine. It was not for the ITO to find out by making investigation from the bank accounts unless the assessee proved the identity of the creditors and their creditworthiness. Mere payment by account payee cheque was not sacrosanct nor could it make a non-genuine transaction genuine.”

9.2 In the case on hand, we find that the assessee has provided the following documents:

- i. Bank statement of NRE accounts of both the lenders.
- ii. Confirmation letters from both the lenders on the plain papers dated 17-2-2004 and 5-3-2004.
- iii. Copy of cheque issued to the assessee by both the lenders.
- iv. PAN of one lender namely Sushibhai Patel, the PAN of the other lender namely P.R. Pankhania was not furnished.
- v. Confirmation of the accounts maintained by the assessee in his books.

9.3 Regarding the identity of both the lenders, we note that the PAN of Shri Sushibhai Patel was furnished to the AO during the assessment proceedings. Therefore the identity of Sushibhai Patel cannot be doubted.

9.4 As regards the identity of Shri P.R. Pankhania, we note that there was the bank statement furnished by the assessee to the AO. The AO also obtained the copy of the bank statement from the bank of the lender which is available on record. A bank account is opened after due verification of the KYC documents of the customer. Therefore we can safely presume that the lender has furnished his identity to the banker at the time of opening the bank

account. Thus we are of the view the identity of the lender Shri P.R. Pankhania cannot be doubted in the given facts & circumstances.

9.5 In view of above we hold that the assessee has discharged his duty by furnishing the identity proof of the lenders.

9.6 The 2nd requirement of the assessee is to prove the genuineness of the transactions. There is no doubt that the transaction of the loan was carried out through the banking channel. Therefore there cannot be any doubt about the genuineness of the transactions. In this regard, we find support and guidance from the judgment of Honøble High court of Bombay in the case of CIT Vs. Green Infra Ltd reported in 78 taxmann.com 340 wherein it was held as under:

'The identity of the subscribers was confirmed by virtue of the Assessing Officer issuing a notices under section 133(6) to them. Further, it holds that the revenue itself makes no grievance of the identity of the subscribers. So far as the genuineness of the transaction of share subscriber is concerned, it concludes as the entire transaction is recorded in the books of account and reflected in the financial statements of the assessee since the subscription was done through the banking channels as evidenced by bank statements which were examined by the Tribunal. With regard to the capacity of the subscribers the impugned order records a finding that 98 per cent of the shares is held by IDFC Private Equity Fund-II which is a Fund Manager of IDFC Ltd. Moreover, the contributions in IDFC Private Equity Fund-II are all by public sector undertakings.

The Tribunal has examined the case of the revenue on the parameters of section 68 and found on facts that it is not so hit. Therefore, section 68 cannot be invoked. The revenue has not been able to show in any manner the factual finding recorded by Tribunal is perverse in any manner.

9.7 In view of the above we hold that the assessee has duly discharged his duty by establishing the genuineness of the transactions.

9.8 Now the 3rd requirement of the assessee is to prove the creditworthiness of the lenders, as there was sufficient balance in both the accounts of the

lenders before transferring the loan amount to the assessee. Therefore the creditworthiness of the lenders cannot be questioned. As such the assessee is liable to justify the source of money in his bank accounts. The assessee is not expected to justify the source of funds in the hands of the lenders. In this connection, we place our reliance on the judgment of Honøble Gujarat High Court in the case of DCIT Vs. Rohini builders reported in 256 ITR 360 wherein it was held as under:

“It has also proved the capacity of the creditors by showing that the amounts were received by the assessee by account payee cheques drawn from bank accounts of the creditors and the assessee is not expected to prove the genuineness of the cash deposited in the bank accounts of those creditors because under law the assessee can be asked to prove the source of the credits in its books of account but not the source of the source as held by the Bombay High Court in the case of [Orient Trading Co. Ltd. v. CIT \[1963\] 49 ITR 723](#). The genuineness of the transaction is proved by the fact that the payment to the assessee as well as repayment of the loan by the assessee to the depositors is made by account payee cheques and the interest is also paid by the assessee to the creditors by account payee cheques.”

9.9 In view of the above we hold that the assessee has discharged his duties imposed under section 68 of the Act by establishing the identity of the lenders, the genuineness of the transactions and creditworthiness of the lenders.

9.10 We also note that the assessee has taken a loan of Rs. 5,80000/- in the assessment year 2005- 06 from Shri Shushibhai Patel which was not doubted by the Revenue in the assessment proceedings framed under section 143(3) of the Act. Thus it is clear that the Revenue doubted the loan taken by the assessee in the year under consideration whereas the Revenue did not doubt the loan taken by the assessee from the same party in the subsequent year. Thus it is clear that the Revenue has taken the contradictory stand in two different assessment years.

9.11 We also note that the lenders are non-resident Indians and the loan was given to the assessee out of the NRE accounts. This fact has not been doubted by the authorities below. It is an established fact that the income in an NRE account can be deposited only from the foreign countries. The fund cannot be deposited in NRE accounts from India.

9.12 There was no allegation of the Revenue that the assessee has provided funds from his unaccounted fund to the lenders to get its unaccounted fund in the accounting form. In the absence of any adverse remarks by the Revenue on this issue, we are of the view that the lenders have provided funds to the assessee out of their sources generated by them.

9.13 In view of the above we are of the view that the loan taken by the assessee in the instant case as discussed above cannot be treated as unexplained cash credit under section 68 of the Act. Accordingly, we set aside the order of Ld. CIT(A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

10. The second ground raised by the assessee is that Ld.CIT (A) erred in confirming the addition of Rs. 33,594 in respect of bad debts written-off.

11. The assessee during the year has written-off bad debts amounting to Rs. 33,594/- only. However, on the question by the AO about the supporting evidence the assessee failed to file the necessary details as desired by the AO. Therefore, the AO disallowed the claim of the assessee and added the bad debts written-off amount to Rs.33,594/- as the total income of the assessee.

12. Aggrieved assessee preferred an appeal to the Ld.CIT (A). The assessee before the Ld.CIT (A) submitted that it has wrongly claimed the deduction of Rs. 33,594/- under the head ~~bad debts~~. As such the amount represents advance given to the parties which were written-off in the year under consideration on the ground that there was nothing recoverable from such parties. The assessee furnished the details of advances as reproduced below:

Sr.No.	Name of Party	Nature of Advance	Amount in Rs.
1.	American Quality Assessor India Pvt Ltd	Professional Fees paid to obtain ISO 9001 certification work	8500
2.	Kanubhai B Mali	Paid for building Renovation	8626
3	Kanaram T Mistry	Paid for Furniture Repairing	14280
4.	Kancharabhai S Mali	Paid for Furniture Repairing	2188
		Total	33594

12.1 The assessee further submitted that the advances were given in the course of business. Therefore the same are liable for deduction u/s 37(1) of the Act.

12.2 The remand report was called upon by the Ld. CIT (A) from the AO who submitted that the assessee had not filed any documentary evidence suggesting that these advances were given in the course of business. Accordingly, the AO craved to sustain the addition.

12.3 The Ld.CIT (A) after considering the remand report confirmed the order of AO by observing that the assessee filed no supporting evidence justifying that the advances were given in the course of business.

13. Being aggrieved by the order of Ld.CIT (A) assessee is in appeal before us.

14. The Ld.AR submitted that such advances were given in the course of business of the assessee and hence if the amount so written-off is not allowed as bad-debts, then the same must be allowed as business loss u/s 28 or u/s 37 of the Act.

15. On the other hand Ld.DR vehemently supported the order of the authorities below:

16. We have heard the rival contentions and perused the materials available on record. The assessee, in this case, has claimed bad debts amounting to Rs. 33,594/-. But no detail submitted by the assessee before the AO to substantiate its claim of bad debts. Therefore the AO had no alternative but to disallow the claim of the assessee of bad debts.

16.1 However the assessee before the Ld. CIT(A) has changed his stand and submitted that it has wrongly claimed as bad debts in the books of accounts. As such these were representing the trade advances given to the parties in the course of the business. Therefore the same is allowable for deduction under section 37(1) and section 28 of the Act.

16.2 There is no ambiguity that any advance given by the assessee in the course of the business can be written off in the books of accounts and the assessee is entitled to the deduction either under section 37(1) or section 28 of the Act. In this regard, we find support and guidance from the judgment of Honøble tribunal of Kolkata in case of DCIT Vs. J.thomas & co reported in 87 taxmann.com 250 wherein it was held as under:

The assessee had written off the advances given in the normal course of business to aforesaid three parties after taking necessary steps for recovery of the same and also preferring civil suits and criminal suits, wherever possible, as the case may be. The assessee had also enclosed the necessary evidences in this regard before the Assessing Officer. Hence, it would be factually incorrect to state that no legal steps were taken by the assessee for recovery of the dues. The relevant evidences with regard to steps taken by the assessee for recovery of these advances and consequential write off thereon are enclosed. The issue under dispute is squarely covered by the Co-ordinate Bench decision of this Tribunal in favour of the assessee in assessee's own case for the assessment year 2009-10 in Dy. CIT v. J. Thomas & Co. (P.) Ltd. [I.T. Appeal No. 275/Kol/2014, dated 28-2-2017]

16.3 However, on the perusal of Ld. CIT(A) order we find that the claim of the assessee was denied due to non-furnishing of supporting evidence by the assessee. Though, the assessee claimed in the submission before the Ld. CIT(A) that the copies of the ledgers of the parties were filed vide letter dated 13 January 2012.

16.4 From the preceding discussion, we find a contradiction in the submission of the assessee before the Ld. CIT(A) vis a vis the finding of the Ld. CIT(A). We also find that the Ld. Counsel for the assessee had not furnished the copies of the ledgers of the parties in the paper book filed before us to whom the assessee provided the trade advances.

16.5 Thus we hold that the facts of the dispute are not clear as discussed above from the order of authorities below. But we note that the onus lies on

the assessee to justify its claim by the documentary pieces of evidence that these advances were in the course of the business. However, the assessee failed to do so. Accordingly, we are inclined to hold that there is no infirmity in the order of authorities below. Hence the ground of appeal of the assessee is dismissed.

17. The third ground raised by the assessee is that Ld.CIT (A) partly confirmed the ad-hoc disallowances for Rs. 1,38,014/- incurred for sales promotion expenses.

18. The assessee during the year has claimed sales promotion expenses amounting to Rs. 6,90,065/- only. The assessee submitted that these expenses were necessary to increase the sales in the competitive environment.

18.1 However, the AO found that these expenditures were incurred on the purchase of gift articles in cash. He also found that the expenses are exorbitant comparing to the business of the assessee. Accordingly, he made the disallowance of such expenses to the tune of Rs.3,45,033/- being 50% of the sales promotion expenses. The amount was disallowed and added to the total income of the assessee.

19. The aggrieved assessee preferred an appeal to the Ld.CIT (A). The assessee before the Ld.CIT (A) submitted that the AO had made the disallowance on an ad-hoc basis and without pointing out any specific defect/discrepancies in the details submitted by it.

19.1 There was increased in the sales of the assessee in comparison to the earlier years which certainly justify the sales promotion expenses.

19.2 The books of accounts of the assessee were duly audited u/s 44 AB of the Act, and there was no adverse remark made against the sales promotion expenses.

19.3 However, the Ld.CIT (A) observed that the expenses were incurred in cash. Therefore it was not possible to verify the expenses incurred by the assessee. However, he was of the view the disallowance at the rate of 50% is quite excessive. Accordingly, Ld.CIT (A) restricted the expenses to Rs.1,38,014/- being 20% of the total expenses.

20. Being aggrieved by the order of Ld.CIT (A) assessee is in appeal before us.

21. The Ld.AR submitted that the AO and Ld.CIT (A) failed to appreciate that the assessee is in the business of manufacturing pharmaceutical formulations and hence, it was to incur huge expenditure in relation to marketing and sale promotion to survive in the environment of cut-throat competition. Such expenses have been incurred wholly and exclusively for the business. Ld.AR further submitted that AO and Ld.CIT (A) cannot sit in the chair of the businessman and decide the reasonableness of any business expense. The details of such expense appear in the audited books of account running from pages 21 to 40 of a paper book. Under such circumstances, Ld.CIT (A) ought to have deleted the impugned addition in toto.

22. On the other hand the Ld.DR vehemently supported the order of authorities below.

23. We have heard the rival contentions and perused the materials available on record. The assessee in the instant case has claimed sales promotion expenses amounting to Rs. 6,90,065/-only. However, the AO was of the view that the expenses claimed by the assessee under the head sales promotion expenses are exorbitant considering the nature of the business of the assessee. However the Ld. CIT (A) restricted the disallowance to the tune of 20% of such expenses by observing that the expenses were not verifiable as these were incurred in cash.

23.1 The scheme of the income tax Act mandates that the expenses incurred wholly and exclusively for the purpose of the business are eligible for deduction under section 37(1) of the Act, provided these should not be in the nature of capital expenditure. There was no allegation of the AO that the expenditures were not incurred for the purpose of the business. Therefore in our considered view, the expenses which in the opinion of the AO are exorbitant cannot be the basis for the disallowance.

23.2 The AO cannot enter into the shoe of the assessee to decide the quantum of the expenses to be incurred in connection with the sales promotion activities. The assessee decides the expenses to be incurred for the purpose of the business. There is no role of the AO in the decision-making process of the assessee.

23.3 We also note that there is no prohibition for incurring the expenses in cash under the income tax Act subject to the exception such as specified under section 40A(3) of the Act. But in the case on hand, there is no dispute concerning the provisions of section 40A(3) of the Act. The finding of the Ld. CIT(A) does not point out the specific instances of the expenses which are not

verifiable. In our considered view it was the duty of the Ld. CIT(A) to refer the expenses which were not supported with the documentary evidence. The Ld. CIT(A) has made a general remark that the expenses were incurred in cash and therefore it was impossible to verify whether these were incurred wholly for the purpose of the business.

23.4 We also note that the basis adopted for the disallowance, i.e. 20% of the expenses are not based on any scientific basis. As such we are of the view that the disallowance has been restricted to 20% on guesswork.

24.5 There is no allegation from the side of the Revenue stating that the assessee has not filed the necessary vouchers and other documentary evidence in support of such expenses.

24.6 We also note that the Ld. CIT(A) has not doubted on the reasonableness of such expenses keeping in view the volume of the business of the assessee.

24.7 The nature of the business of the assessee is the manufacturing of pharmaceuticals. Thus there will be a regular business dealing of the assessee with its creditors and debtors. But there will not be any regular dealing with the parties from whom the assessee is purchasing gift items. Accordingly, when the assessee approaches any party for the purchases of the gift items, it needs to make the payment instantly. It is because there can be a possibility that the assessee and the party are unknown to each other. Thus the party will not supply the gift items to the assessee without receiving the payment at the time of delivery of the gift items. Thus the assessee has no option except to make the payment in cash against the purchases of the gift items. So we are of

the view that there prevail certain situations and circumstances where assessee cannot make the payment through banking channel. Therefore we are of the view that the gift expenses incurred by the assessee cannot be disallowed merely on the ground that these were incurred in cash and without establishing the fact that these were not incurred wholly for the purpose of the business.

24.8 We also find that the Honøble Calcutta High Court in the case of Cheviot Co Ltd versus CIT reported in 11 taxmann.com 276 has held that the disallowance of the expenses cannot be made on the basis of the guesswork and without pointing out the specific defects in the expenses claimed by the assessee. The relevant extract of the order is reproduced below:

“The assessee produced details of vouchers and other documents in support of the claim in respect of those expenses. It appeared that the Assessing Officer did not at all consider those documents nor did he find those documents to be manufactured or otherwise not relevant and on the basis of a mere guesswork, reduced the deduction claimed. Similarly, the Commissioner (Appeals), after finding that the approach of the Assessing Officer was erroneous, allowed the entire claim of the assessee without verifying those documents and the Tribunal took a midway by modifying both the orders without, however, any reference to any of the materials produced by the assessee

All the three authorities assessed the amount without reference to the evidence produced by the assessee but on the basis of guesswork and, as such, assessment was perverse. It is settled law that if a finding of fact is perverse and is based on no evidence, it can be set aside in the appeal even though the appeal is permissible only on the substantial question of law. The perversity of the finding itself becomes a substantial question of law.

24.9 In view of the above we conclude that the expenses incurred by the assessee under the head sales promotion cannot not be disallowed on an estimated basis. Hence we reverse the order of authorities below. Thus we set aside the order of Ld. CIT(A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

25. The fourth ground raised by the assessee is that Ld.CIT (A) erred in confirming ad-hoc disallowance of Rs. 18,318/- for vehicle and telephone expenses.

26. The assessee during the year has claimed following expenses:

Sr.No.	Particular	Amount
1.	Car Insurance	1295/-
2.	Vehicle Repair Expenses	2743/-
3.	Car Repair Expenses	35454/-
4.	Depreciation of Vehicle	79301/-
5.	Telephone & Fax	107747
		237540/-

26.1 The assessee in the statement of income has made disallowance at its own for Rs. 29,190/- on account of personal element of the assessee in these expenses.

26.2 However, the AO observed that personal element in these expenses cannot be denied and therefore made disallowance of Rs.47,508/- being 20% of Rs.2,37,540/-. Thus, the difference amount of Rs.18,318/- (47,508 ó 29,190) was disallowed and added to the total income of the assessee.

27. The aggrieved assessee preferred an appeal to Ld.CIT (A). The assessee before Ld.CIT (A) submitted that there could not be any personal element in the car insurance and depreciation allowance. Therefore this cannot be considered for the disallowance at the rate of 20%.

27.1 It has already made disallowance in the computation of income and therefore no further disallowance on ad-hoc basis can be made. However, the Ld.CIT (A) did not agree with the submission of the assessee on the ground that the assessee failed to furnish evidence in the form of the logbook for the vehicle and call details of the telephone expenses. Therefore he confirmed the disallowance made by the AO.

28. Being aggrieved by the order of the Ld.CIT (A) the assessee is in appeal before us.

29. The Ld.AR before us submitted that these expenses comprise of car insurance, vehicle repairs, depreciation on vehicles and telephone expenses which has been incurred wholly and exclusively for the business. Such expenses appear in audited books of the account running from page 21 to 40 of the paper book. Under such circumstances the Ld.CIT (A) ought to have deleted impugned additions.

30. The Id. DR vehemently supported the order of authorities below.

31. We have heard the rival contentions and perused the materials available on record. The assessee in the instant case has claimed vehicle and telephone expenses amounting to Rs. 2,37,540/-only. As per the AO, the personal use of the vehicle & telephone cannot be denied. Therefore the AO worked out the personal expenses at Rs. 47,508/- being 20 % of Rs. 2,37,540.00 and disallowed the sum of Rs. 18,318.00 (Rs. 47,508 ó Rs. 29,190 amount already disallowed).

31.2 The Ld. CIT (A) confirm the same by observing that the assessee failed to file the logbook for the use of the car and call details for the use of the telephones.

31.3 In this regard, we note that the assessee itself has made the disallowance of Rs. 29,190/- treating the same as used for personal purposes. The basis adopted by the assessee for the purpose of the disallowance was not disputed by the authorities below. In our considered view the authorities below before making any further disallowance of the expenses described above on account of personal use of the assessee should have rejected the disallowance made by the assessee at its own with cogent reasons. As such we note that no defect was pointed out by the authorities below in the disallowance made by the assessee.

32. In view of the above, we conclude that the expenses incurred by the assessee as discussed above cannot be disallowed on an estimated basis. Hence we reverse the order of authorities below. Thus we set aside the order of Ld. CIT(A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

33. The fifth ground raised by the assessee is that "Ld.CIT (A) erred in partly confirming the ad-hoc disallowance of Rs.7,465/- for traveling and conveyance expenses.

34. The assessee during the year has claimed traveling expenses of Rs.15,616/- and conveyance expense of Rs.59,032/- only. The assessee claimed to have incurred such expenses wholly and exclusively for the purpose of business.

34.1 However, the AO was of the view that element of expense cannot be ignored. Therefore he made the disallowance of Rs.14,930/- being 20% of Rs.74,648/- only. Thus, the amount of Rs.14,390/- was added to the total income of the assessee.

35. The aggrieved assessee filed an appeal to Ld.CIT (A). The assessee before Ld.CIT (A) submitted that it had furnished all the relevant supporting evidence to the AO during the assessment proceedings. The AO without pointing out any defect in the details filed by it has made ad-hoc disallowance.

35.1 The books of accounts of the assessee were duly audited, and no defect whatsoever was pointed out by the Auditor.

35.2 The Ld.CIT (A) after considering the submission of the assessee restricted the addition to 10% by observing that the element of personal used cannot be denied.

36. Being aggrieved by the order of Ld.CIT (A) the assessee is in appeal before us.

37. The Ld.AR, before us, submitted that such expenses had been incurred wholly and exclusively for the business, and also such expenses appear in audited books o accounts running from pages 21 to 40 of the paper book. Under such circumstances the Ld.CIT (A) ought to have deleted the impugned addition in toto. Alternatively, some token disallowance may be confirmed.

38. On the other hand Ld. DR vehemently supported the order of the authorities below.

39. We have heard the rival contentions and perused the materials available on record. The assessee in the instant case has claimed Travelling & conveyance expenses amounting to Rs. 74,648/-only. As per the AO, the element of the personal expenses cannot be ruled out. Therefore the AO worked out the personal expenses at Rs. 14,930/- being 20% of Rs. 74,648/- and disallowed the sum of Rs. 14,930/-and added back to the total income of the assessee.

39.1 However the Ld. CIT (A) restricted the disallowance to the tune of 10% of such expenses by observing that the disallowance @ 20 % is excessive and unreasonable.

39.2 From the preceding discussion we note that the AO made the disallowance on ad hoc basis by observing that the assessee failed to prove whether these expenses were incurred in connection with the business of the assessee.

39.3 In this regard, we note that the assessee has claimed almost similar expenses in the immediately preceding and succeeding assessment year. There can be negligible difference in the quantum of the expenses comparing to the turnover of the business of the assessee in all the years.

39.4 However, we note that the onus lie on the assessee to prove that the expenses were incurred wholly and exclusively for the purpose of the business. But the assessee in the case before us failed to do so. Therefore we

justify the disallowances made by the authority below. Hence the ground of appeal of the assessee is dismissed.

40. The sixth ground raised by the assessee is that the Ld.CIT (A) erred in treating the trademark expenses of Rs. 52,000/- as capital expenditure.

41. The assessee during the year had incurred an expense of Rs.52,000/- for the registration of trademark of its product. The assessee claimed such expenditure as revenue in nature. However, the AO was of the view that the trademark expense is representing the intangible asset, therefore, the same should be treated as capital in nature. Accordingly, the AO treated the trademark expenses as capital in nature and added to the total income of the assessee.

42. Aggrieved assessee preferred an appeal to Ld.CIT (A). The assessee before the Ld.CIT (A) submitted that the trademark expenses does not create any capital asset and it does not result in any enduring benefit. Therefore, the same should be treated as revenue expenses.

42.1 However, the Ld.CIT (A) disregarded the contentions of the assessee by observing that the trademark expenditure is creating an intangible asset and therefore the same is treated as capital in nature.

43. Being aggrieved by the order of Ld. CIT (A) assessee is in appeal before us.

44. The Ld.AR, before us, submitted that it is mandatory to get the products registered under trademark laws. Such expenses have neither

resulted into any capital asset, not any enduring benefit to the assessee to hold that such expenses are capital in nature. Such expense has been incurred wholly and exclusively for the business. Under such circumstances, Ld.CIT (A) ought to have deleted impugned addition.

45. On the other hand the Ld.DR vehemently supported the order of the authorities below.

46. We have heard the rival contentions and perused the materials available on record. The assessee has incurred expenses for the registration of the trademark of its product amounting to Rs. 52,000/- Only. The assessee claimed such expenses as in the nature of revenue and accordingly debited the same in the profit and loss account. However, the AO was of the view such expenses represents the intangible assets within the meaning of section 32 of the Act. Therefore the AO disallowed the same after allowing the depreciation on such expenses treating the same as intangible assets. The Ld. CIT-A subsequently confirmed the view of the AO.

46.1 It is an undisputed fact that the trademark represents the intangible assets of the company and duly covered within the definition of assets as provided under section 32 of the Act. Therefore we are of the view that the expenditure incurred on the registration of the trademark cannot be treated as revenue in nature. In this connection, we place our reliance on the order of Honøble Mumbai ITAT in case of L&T Demag plastic machinery (P) Ltd. Vs. ITO reported in 123 ITD 391 wherein it was held as under:

“Clauses of the agreement between the assessee and L&T clearly showed that the assessee-company was getting a right to use trademark of L&T for the purpose of preparing a combined trademark of L&T and DET. The assessee was also entitled to the use of such combined trademark in India. In pursuance of that agreement,

the assessee had applied to the Registrar of trademark for registration of the new trademark which had already been obtained. Thus, the assessee had obtained rights to two trademarks, one of L&T and another of DET and thereafter, combined those two trademarks to make a new trademark which was registered with the Registrar of the trademarks. Such new trademark was for the exclusive use of the assessee-company as its own. It was to be noted that the agreement did not provide for any particular time-frame but was indefinite in nature. Of course, L&T had been given a right to terminate in the case of breach of the provisions of the agreement. One of the clauses of the said agreement, regarding entitlement of L&T to terminate the agreement if the trademark authorities imposed any conditions, had become infructuous since the new trademark had already been registered. Therefore, the payments made by the assessee-company to L&T were only with a view to evolve and register a combined trademark with DET and, therefore, cost incurred could also be considered to be cost for acquiring such new trademark. The assessee having obtained registration of a new trademark using a combination of trademark of two companies and such new trademarks being the sole asset of the company, all expenses incurred in relation to acquiring such assets could only be considered as capital in nature. Therefore, the order of the Commissioner (Appeals) was to be confirmed”

46.2 In view of the above we hold that the expenditure incurred in connection with the registration of trademark represents the intangible assets. Accordingly, such expenses need to be capitalized. Therefore we do not find any infirmity in the order of authorities below. Hence the ground of appeal of the assessee is dismissed.

47. The seventh ground raised by the assessee is that Ld.CIT (A) erred in confirming disallowance of interest expenses of Rs.17,404/- u/s.36(1)(iii) of the Act.

48. The assessee during the year has given advance to the following parties:

Sr. No.	Name of party	Amount
1.	Shalini D Patel	1,00,000/-
2.	V.M. Ganatara	16024/-

48.1 The assessee in respect to such loans has not charged any interest. However, the assessee claimed that the advances were given during the normal business transaction, out of internal accruals and it was for a very short period. Therefore no interest was charged on such advances.

48.2 However, the AO observed that the assessee has been showing losses since the assessment year 1997-98 onwards and there was no own fund available with it.

48.3 However, the AO also observed that the assessee had claimed interest expenses in the profit and loss account amounting to Rs. 21,42,710 which justify that the borrowed fund has been used as advance to the aforesaid parties.

48.4 The assessee has not proved that the impugned advance was given in the course of business. In view of the above, the AO held that the borrowed fund had been advanced to interest-free loan & advance. Thus the AO worked out amount proportionate interest amount of Rs.17404/- and added to the total income of the assessee.

49. Aggrieved assessee preferred an appeal to Ld.CIT (A). The assessee before the Ld. CIT (A) submitted that the advances were given in the course of business. Therefore the same cannot be disallowed. However, the Ld. CIT(A) disregarded the contentions of the assessee by observing that the assessee has not given any evidence suggesting that the advances were given in the course of the business. Accordingly the Ld. CIT (A) upheld the order of the AO.

50. Being aggrieved by the order of Ld.CIT (A) assessee is in appeal before us.

51. The Ld.AR before us submitted that advances were given in the normal course of busies and that too out of internal accruals. Thus, no interest bearing funds have been diverted by the assessee, and hence disallowance u/s 36(i)(iii) is unwarranted.

52. On the other hand the Ld. DR vehemently supported the order of the authorities below.

53. We have heard the rival contentions and perused the materials available on record. From the preceding discussion, we note that the own fund of the assessee as on 31 March 2004 stands in negative as evident from the balance sheet of the assessee placed on page no. 46 of the paper book.

53.1 The assessee has not produced any documentary of evidence suggesting that these advances made to the parties are representing the business transactions. Therefore in the absence of any documentary evidence, we concur with the finding of the lower authorities and justify the disallowance.

53.2 We also note that there was not sufficient own fund available with the assessee to make such interest-free advance. Thus it is clear that interest-bearing fund has been diverted by the assessee for interest-free advances. Therefore in our considered view the interest claimed as a deduction to the extent of the funds diverted for interest-free advances will be disallowed under the provisions of section 36(1)(iii) of the Act. In view of the above we

do not find any infirmity in the order of Ld. CIT(A). Hence the ground of appeal of the assessee is dismissed.

54. The eight ground raised by the assessee is that Ld.CIT (A) erred in partly confirming the ad-hoc disallowance of Rs. 23,241/- for factory and welfare expenses.

55. During the year assessee has claimed expenses of Rs. 76,771.00 and 1,55,645/- for factory and welfare expenses. The assessee claimed that these expenses were incurred for providing lunch, biscuits, snacks, etc. As per the assessee, these expenses were incurred exclusively for the purpose of the business.

55.1 However, the AO was of the view that the personal element out of these expenses cannot be ruled out. Therefore he made the disallowance of Rs. 46,483/- being 20% of Rs. 2,32,426/- and added to the total income of the assessee.

56. The aggrieved assessee preferred an appeal to Ld.CIT (A). The assessee before Ld. CIT (A) submitted that the disallowance had been made on an ad-hoc basis and without pointing out any specific instance to justify that the assessee has incurred such expenses for its personal use.

56.1 However, Ld.CIT (A) disagreed with the contentions of the assessee by observing that element of the personal expenditure cannot be ruled out. However, Ld.CIT (A) was of the view that disallowance at the rate of 20% is excessive and accordingly he restricted the disallowance to the tune of @ 10% only.

57. Being aggrieved by the order of the Ld.CIT (A) the assessee is in appeal before us.

58. The Ld.AR before us submitted that the impugned expenses had been incurred wholly and exclusively for the business.

59. On the other hand Ld. DR vehemently supported the order of the authorities below.

60. We have heard the rival contentions and perused the materials available on record. The assessee in the instant case has claimed factory expenses amounting to Rs. 76,771/- and staff welfare expenses amounting to Rs. 1,55,645/-only. As per the AO, the element of personal use in these expenses cannot be ruled out. Therefore the AO worked out the expenses of personal nature at Rs. 46,483/- being 20 % of Rs. 2,32,416/- (total of Rs. 76,771/- + Rs. 1.55,416/-) and disallowed the sum of Rs. 46,483/-and added back to the total income of the assessee.

60.1 However the Ld. CIT (A) restricted the disallowance to the tune of 10% of such expenses by observing that there was no specific defect in such expenses pointed out by the AO representing personal expense.

60.2 The AO in his assessment order has noticed that these expenditures were incurred on lunch, biscuits, snacks, tea, etc. The nature of the expenses suggest that the assessee incurred these for the staff welfare and to keep the conducive working environment in the company. Thus in such a case, we are of the view that even if the staff or the partners obtain some personal

advantage, then also it will be in nature of maintaining good relations with officers and in nature of staff welfare expenses. These expenses were incurred to keep the staff happy and active so that there should be better performance of the staff. However, the assessee must maintain supporting evidence to justify that these expenses do not fall in the category of personal expenses.

In this regard, we also note that the assessee has claimed almost similar expenses in the immediately preceding and succeeding assessment year. There can be negligible difference in the quantum of the expenses comparing to the turnover of the business of the assessee in all the years.

60.3 We also note that there was no specific instance referred by the authorities below suggesting that the impugned expenses were in the nature of personal expenditure. Therefore we are not inclined to uphold the finding of the authorities below. Accordingly, we reverse the same. Hence the ground of appeal of the assessee is allowed.

61. Ground nos. 9 to 11 of assessee's appeal are general in nature and do not require any adjudication.

62. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the Court on 01/01/2019 at Ahmedabad.

**-Sd-
(MS MADHUMITA ROY)
JUDICIAL MEMBER**

**-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated 01/01/2019
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(True Copy)

आदेश क० त० प्रतः / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. त्रिभागीय प्रजाध, आयकर अपीलार्थी अधीकरण / DR, ITAT,
6. गार्डफाइल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलार्थी अधीकरण, अहमदाबाद / ITAT, Ahmedabad