IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "C" BENCH

(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER & SHRI WASEEM AHMED, ACCOUNTANT MEMBER)

ITA. Nos: 807 & 808/AHD/2016 (Assessment Years: 2010-11 & 2011-12)

DCIT, Circle-3(1)(1), Ahmedabad	**V/S**	**M/s. Pushpak Bullions Pvt. Ltd. SF/3 abhishek Complex Above Grish Cold Drinks C.G. Road, Ahmedabad-380006**
(Appellant)		**(Respondent)**

PAN: AABCP9537H

Appellant by	**: Shri O.P. Sharma, CIT/DR & Lalit P. Jain, Sr. D.R.**
Respondent by	**: Shri A.C. Shah, A.R.**

(आदेश)/ORDER

Date of hearing : 22 -04-2019
Date of Pronouncement : 25-04-2019

PER MAHAVIR PRASAD, JUDICIAL MEMBER

1. These two appeals filed by the Revenue are directed against the order of the Ld. CIT(A)-9, Ahmedabad dated 18.01.2016 pertaining to A.Ys. 2010-11 & 201-12. The revenue has taken following grounds of appeal:

1. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.17,95,725/- made on account of notional marked to market (M2M) loss.

2. The Ld. CIT(A) has erred in law and on facts by not following the CBDT instruction No.3/2010 dated 23/3/2010 on the above issue.

3. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.2,17,74,153/- made on account of disallowance u/s.10AA of the Act on interest income.

4. The Ld. CIT(A) has erred in law and on facts by not following the decision of the Hon'ble Supreme Court in the case of Tuticorin Alkali Chimicals &. Fertilizers Ltd. v/s CIT (227 ITR 172) in which interest on FDs was held to be income from other sources.

5. On the facts and circumstances of the case, the Ld. Commissioner of Income Tax(A) ought to have upheld the order of the Assessing Officer.

6. It is, therefore, prayed that the order of the Ld. Commissioner of Income Tax(A) may be set-aside and that of the Assessing Officer be restored.

2. Facts of the case are that the assessee has earned profit on hedging on own account of Rs.81,17,879/-. Under this heading the assessee had claimed mark to market loss in the preceding Assessment Year which was disallowed in the assessment proceedings of that year.

3. The assessee was asked to submit the details regarding the same for the current year and vide its submission dt. 09.12.2011, it has stated as under:

"Explanation on allowability of Mark to market Loss:

We would like to state that there is a notional M2M loss of Rs. 33.72 lacs as on 31.03.2010 and the opening Balance is of Rs. 15.76 lacs as on 31.03.2009. The M2M loss during the year under consideration is Rs. 1 7.95 lacs.

The breakup of mark to market loss is as under-

Sr. No.	*Particulars*	*Amount (Rs.)*
1.	*Mark to Market loss as at start of Year*	*1576360/-*
2.	*Additions made during the Current Year*	*1795725/-*
	Total	*3372085/-*

In respect of Assessment Order for AY 2009-10, we are in bonafide belief backed with the following Supreme Court d&risdnn cited by us that M2M loss can be adjusted against the profits as eventually the actual profits or loss on such transactions will automatically adjust the M2M loss of the previous years. On insistence of Your Honour's predecessor, we had voluntarily agreed for the said addition of Rs. 15.76 lacs cmcTco- operated with the Department and paid taxes as applicable on the said voluntary and agreed dddffxon of Rs. 15.76 lacs for AY 2009-10. After adjusting the taxes payable on the aforesaid addition of Rs. 15.76 lacs, we are to receive a refund of Rs.45.40.787/- for AY 2009-10. This addition was agreed upon to buy peace of mind and to avoid prolonged litigation though there are many case law as which do suggest that M2M loss can be offset and allowed to be adjusted against the profits.

The Hon'ble Supreme Court in the case of CIT Vs. Woodward governor India (P.)Ltd. [2009] 312 ITR 254 has held that even a notional loss can be claimeffTry way of a business loss and as a deductible item ir Tcomputmg the income of the assessee for the year, as it is a computation on national basis, it is made dependent on the manner of conduct of the assessee in respect of the earlier assessment period and particularly as to the assessee has been following this uniformly over a period of years and the test being when there was a notional gain as to whether it had been offered for tax etc. The Supreme court took the view that suctudaim can be entertained subject to fulfillment of the following six conditions:

(i) Whether the system of accounting followed by the assessee is the mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received;

(ii) Whether the same system is. followed by the assessee from the very beginning and if there was change in the system, whether the change was bona fide;

(iii) Whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it;

(iv) Whether the assessee has been consistent and definite in making entries in the account booksin respect of losses and gains;

(v) Whether the method adopted by the assessee for making entries in books both in respect of losses and gains is as per nationally accepted accounting standards;

(vi) Whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation.

The aforesaid Supreme Court case was followed in the most recent judgment by the Karnataka High Court in the case of Commissioner of Income Tax, Central Circle Vs. Vipro Finance Ltd, IT APPEAL No. 106 of 2007, JANUARY 7, 2013, wherein the gist of he matter is as under-

JUDGMENT:- Appeal by the revenue under Section 260A of the Income Tax Act, 1961 [for short, the Act], had been admitted to examine the following substantial question of law:

Whether the Appellate Authorities were correct in holding that a sum of Rs. 80,04, OOO/- claimed as a foreign exchange loss on account of restatement of CDC loan should be treated as a revenue loss despite the same not having actually arisen and was only notional?.

2. Assessee is a financial company and the assessment year in question is 2000-01. Assessee had claimed certain deductions by way of loss in its business income, due to fluctuations in therate of exchange on the outstanding dues payable in foreign exchange, which the assessee had raised for the purpose of buying its stock-in-trade. While the assessing officer rejected the same, on the premise that it is national loss and therefore not allowable, the appellate

Commissioner and the tribunal opined otherwise. It is in this background, the revenue is in appeal.

3. Sri KV Aravind, learned standing counsel for the appellants-revenue and Sri RB Krishan, learned counsel for respondent-assessee submit before us that the question is now concluded by the judgment of the Supreme Court in the case of CIT Vs. Woodward Governor India (P.) Ltd. [2009] 312 ITR 254.

4. The view taken by the Supreme Court in this judgment is to the effect that while even a notional loss can be claimed by way of a business loss and as a deductible item in computing the income of the assessee for the year, as it is a computation on notional basis, it is made dependent on the manner of conduct of the assessee in respect of the earlier assessment period and particularly as to the assessee has been following this uniformly over a period of years and the test being when there was a notional gain as to whether it had been offered for tax etc. The Supreme Court took the view that such claim can be entertained subject to fulfillment of the following six conditions:

(i) whether the system of accounting followed by the assessee is the mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received;

(ii) Whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide;

(iii) Whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it;

(iv) Whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains;

(v) Whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards;

(vi) Whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation.

5. In the wake of this judgment of the Supreme Court, it is now submitted that while the view of the tribunal that the assessee can claim such deduction has to be affirmed, the matter does not end with that, but such claim will have to be examined in the light of the fulfillment of the conditions as indicated by the Supreme court, for which purpose, the matter may have to go before the assessing officer, who has to apply this test to the claim made by the assessee and then either admit the claim or reject it depending upon the assessee being in a position to satisfy the fulfillment of the conditions.

6. In view of the joint submission made by both counsel, the question is apparently answered in favour of the revenue, in the sense, that though the view of the tribunal is to be affirmed on the principal that being further made subject to the fulfillment of the conditions, the matter has to go back to the assessing officer for examination. In this view of the matter, the appeal is allowed in these terms. The claim of the assessee to be reexamined by the assessing officer and in respect of the assessment year applying the test fulfillment of the six conditions mentioned above. The assessing officer to issue notice to the assessee, fixing a date of hearing the assessee or its counsel and then pass orders.

We are fulfilling all the six conditions that are laid down by the Hon'ble Supreme Court and the system has been continuously been followed by us from year to year basis.

We would further like to state that in the subsequent years i.e. FY 2012-13, we have closed our commodity division as such the actual notional profit loss have been booked in said financial year we start reversing the entries for M2M in the year under consideration then we will have to revise our income and show the Net M2M gains In the said year i.e. FY 2012-13 as Notional Gain which would then be non taxable. The residue effect of Notional Loss or Notional Profit is the same as the Income is going to be taxed in one year or the other and as such

there will be no loss of revenue. In the year under consideration, there is a M2M loss of Rs. 17.95 lacs (i. e. .33.72 lacs Minus Rs. 15.76 lacs) and in view of the above explanations, justifications and material on records and based on the judgment of the Hon'ble Supreme Court, we rquest Your Honour to allow the said M2M Loss. "

4.2 From the details filed, it is seen that the said profit also includes mark to market loss of Rs. 33,72,085/- pertaining to future contracts as on 31.03.2010. The profits on account of mark to market have been ignored on the basis of prudence principle.

4.3 The ICAI Guidance Note on Accounting for Equity Index and Equity Stock futures and Options describes "futures" as like a forward contract. As futures do not have any cost of their own at the time of execution of the contract, no asset or liability is created on purchase or sale of the futures and the futures contract is not recognized as such at inception in the books of account, unlike when security is purchased in cash market, where an asset is recorded in the books irrespective of the payment made for it. No such accounting takes place for futures.

4.4 In case of options, if any premium is paid that remains in the nature of advance. The marked to market adjustments also are in the nature of advances.

4.5 On final settlement of futures contract, parties pay the difference between the final settlement price as on the expiry date and the contract price, which is recognized as income or loss by debating or crediting the P&L A/c. The margin accounts are appropriately adjusted and closed.

4.6 As the derivative contracts are not accounted for in the books of account at the ' inception-thereof at the time of purchase they do not and cannot form a part of stock in trade. Any contract to acquire a derivative at a future date is a forward contract to acquire a commodity. This contract as such is not a stock of trade and hence it cannot be valued at the time of preparation of balance sheet as stock in trade.

4.7 Even for the argument sake, if it is assumed that the future contract for the derivative is itself a stock in trade and can be valued at cost or market price which ever is lower, in cases where mark to market results in a loss, the cost of acquisition being NIL, the valuation of such a contract will be a negative figure. By its very nature the value of stock in trade cannot be negative. Hence this argument is not correct. The marked to market loss at best can be an unascertained liability or a provision for loss which may or may not incur at the time of settlement of the contract at a future date. -

4.8 The future contracts are in the nature of ready Forward Contracts. In such types of contracts, the profit or loss cannot accrue until and unless the contracts are settled.

4.9 Hence based on the above discussion, this amount is a notional loss and cannot be allowed to be set off against the taxable income. However, similar disallowance made in the preceding year, having been settled this year, is given credit to as the assessee consistently has given the same treatment to the issue. Thus, Rs. 15,76,300/-,disallowed in the preceding year is given credit to and remaining sum of Rs. 17,95,725/- is added to the total income of the assessee.

4. Against the addition of Rs. 17,95,725/-, assessee preferred first statutory appeal before the ld. CIT(A) who partly allowed the appeal of the assessee.

5. We have gone through the relevant record and impugned order. The ld. A.O. had made an addition of Rs. 17,95,725/- by disallowing Mark to Market (M2M) loss for the reason that such losses were notional losses and equating the M2M transaction with that of derivative contracts. According to the A.O derivative contracts were not accounted for in the books of accounts at the inception and they do not and cannot form the part of stock in trade. It was in the nature of ready forward contracts. The A.O was of the opinion that in such

type of contracts the profit or loss cannot accrue until and unless the contracts are settled. The ld. A.O. for an amount of Rs. 15,76,3007- disallowed in the preceding year, had given the credit for the same in the year under consideration and the remaining amount of Rs. 17,95,725/- was added to the total income of the assessee. The assessee had entered into certain transactions at Multi Commodity Exchange and other Exchanges and as the contracts were not settled on the last day of financial year, they were valued at market rate i.e. Mark to Market rate. The appellant had accounted not only for notional loss but also for the notional gains as on 31.03.2010.

6. In support of its contention, ld. A.R. cited a judgment of CIT vs. Woodward Governor India Pvt. Ltd. 312 ITR 254 (SC) wherein Hon'ble Supreme Court had laid down six conditions/principles required for allowing any losses on M2M transactions. And ld. A.O. had nowhere pointed out that appellant has not fulfilled these conditions. In our considered opinion, ld. CIT(A) has passed reasoned order and same does not require any kind of interference at out end.

7. Now we come to next ground relating to deleting the addition of Rs. 2,17,74,153/- made on account of disallowance u/s. 10AA of the Act.

8. Assessee is in the business of Trading of Diamonds which was imported into the SEZ Unit at Surat for the purpose of Export. Assessee imported diamonds on LC. The payment made to supplier of diamond was made for purchase of diamond through LC and assessee/appellant earned Rs. 2.17 crores as interest from the bank. Ld. A.O. rejected the claim of the assessee by saying this income has not earned through its regular business activities. Thus, same cannot be allowed.

9. In appeal before the ld. CIT(A) who allowed the claim of the assessee.

10. We have gone through the impugned order and heard both the parties. In our considered opinion, ld. CIT(A) has rightly allowed the claim of the appellant that FDs were the business assets of the assessee and as per section 10AA(7) profits of the business of the undertaking would include profits from exports as well as income derived from the business of undertaking. In our considered opinion, ld. CIT(A) has passed reasoned order and same does not require any kind of interference at out end.

11. In the result, the appeal filed by the Revenue is dismissed.

12. Now we come to ITA No. 808/Ahd/2016. The revenue has taken following grounds of appeal:

> *1. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.13,48,300/- made on account of notional marked to market (M2M) loss.*
> *2. The Ld. CIT(A) has erred in law and on facts by not following the CBDT instruction No.3/2010 dated 23/3/2010 on the above issue.*
> *3. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.6,46,65,220/- made on account of disallowance u/s.10AA of the Act on interest income.*
> *4. The Ld. CIT(A) has erred in law and on facts by not following the decision of the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. v/s CIT (227 ITR 172) in which interest on FDs was held to be income from other sources.*
> *5. The Ld. CIT(A) has erred in law and on facts in deleting the disallowance of web-site maintenance charges of Rs,75,000/- made u/s 40(a)(ia) of the Act.*
> *6. On the facts and circumstances of the case, the Ld. Commissioner of Income Tax(A) ought to have upheld the order of the Assessing Officer.*
> *7. It is, therefore, prayed that the order of the Ld. Commissioner of Income Tax(A) may be set-aside and that of the Assessing Officer be restored.*

13. Ground nos. 1 to 4 are common as in the connected appeal in ITA No. 807/Ahd/2016 and same are dismissed.

14. Now remaining ground is that ld. CIT(A) has erred in law and on facts in deleting the disallowance of web-site maintenance charges of Rs. 75,000/- made u/s. 40(a)(ia) of the Act.

15. The ld. A.O. has made an addition of Rs. 75,000/- u/s. 40(a)(ia) on failure of appellant to deduct tax at source on payment of website maintenance charges. The appellant contention is that ld. CIT(A) has rightly granted relief to the assessee as there is no provision under chapter XVIIB which mandates the appellant to make TDS while making payment of maintenance charges. We agree with the finding of the ld CIT(A) and ld. A.O. ought to have clearly mentioned that under which provision ld, A.O. is making addition. We are of the considered opinion, the ld. CIT(A) has passed reasoned order and it does not require any kind of interference at our end.

16. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in Open Court on	25- 04- 2019

Sd/- Sd/-

(WASEEM AHMED) **(MAHAVIR PRASAD)**
ACCOUNTANT MEMBER **True Copy** **JUDICIAL MEMBER**

Ahmedabad: Dated 25/04/2019

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.