IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI

BEFORE SHRI G.S. PANNU (VP) AND SHRI RAM LAL NEGI (JM)

ITA No. 3905/MUM/2014
Assessment Year: 2010-11

The DCIT-24(3), Room No. 701, C-11, 7th Floor, B.K.C. Bandra (E)), Mumbai 400051	**Vs.**	M/s Kewal Kiran Enterprises, B-101/107, Synthofine Estate, Opp. Virwani Ind. Estate, Goregaon (East), Mumbai - 400063 PAN: AAAFK2525L
(Appellant)		**(Respondent)**

Revenue by : Shri Satish Chandra Rapre (DR)

Assessee by : Shri Ronak G. Doshi &
Ayushi Modani (AR)

Date of Hearing: 18/12/2018
Date of Pronouncement: 15/03/2019

O R D E R

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 24/03/2014 passed by the Ld. Commissioner of Income Tax (Appeals) 34, Mumbai, for the assessment year 2010-11, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 143(3) of the Income Tax Act, 1961 (for short 'the Act').

2. Brief facts of the case are that the assessee filed its return of income for the assessment year under consideration declaring total income of Rs. 14,15,66,959/-. The return was processed u/s 143(1) of the Act. Since, the case was selected for scrutiny, the AO issued notice u/s 143 (2) and 142 (1) of the Act. In response to the said notices the authorized representative appeared before the AO and furnished the necessary details called for. The AO after hearing the assessee made disallowance of Rs. 6,09,244/- claimed by the

assessee towards electricity expenses, disallowance of Rs. 30,69,430/-, on account of excess interest paid u/s 40A(2)(b), disallowance of Rs. 32,00,257/- u/s 14A, disallowance of Rs. 96,10,850/- F&O loss claimed by the assessee, disallowance of Rs. 70,000/- sundry balance written off Rs. 1,33,936/- depreciation on Daman building claimed by the assessee and disallowance of Rs. 2,31,073/- interest claimed. Accordingly, the AO determined the total income of the assessee at Rs. 15,84,91,750/- as against the returned income of 14,15,66,959/-. The assessee challenged the assessment order before the CIT (A). The Ld. CIT (A) after hearing the assessee partly allowed the appeal of the assessee. The revenue is in appeal before the Tribunal against the said order passed by the Ld. CIT (A).

3. The revenue has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

> *1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in deleting the interest expenses of Rs. 30,69,430/- made by the Assessing Officer ignoring the fact that the assessee had advanced loans and received interest at lower rates whereas higher interest had been paid to the related parties of the assessee.*
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> *2. Whether on the facts and in the circumstances of the case and in law, the Ld. C.I.T. (A) erred in deleting the addition of Rs. 32,00,257/- made by the A.O. as per the provisions u/s 14A r.w.s. Rule 8D on the exempt income, ignoring the fact that the working provided by the assessee was not in conformity with section 14A r.w.r 8D and the assessee itself had worked out the disallowance of interest and thus agreed to the borrowed funds being utilized for the purpose of investment wherefrom exempt income or income not forming part of total income was earned.*
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> *3. Whether on the facts and in the circumstances of the case and in law, the Ld. C.I.T. (A) erred in deleting the addition of Rs. 96,17,828/- made by the Assessing Officer on account of future and option loss ignoring the fact that the Assessing Officer has*

stated in his assessment order that there was substantial modification in the client code to the extent of 998 times and that same were made intentionally and to suppress the profits.

The Ld. C.I.T. (A) further erred not relying on the decision of the Hon'ble Supreme Court in the case of Sumati Dayal 214 ITR 801 wherein it has been held that test of human probabilities should be applied to verity whether the transfer is real or has been made to give it a colour of reality.

4. Whether on the facts and in the circumstances of the case and in law, the Ld. C.I.T. (A) erred in deleting the addition of Rs. 70,000/- made on account of sundry balance written off ignoring the fact that amount written off had not been offered as income in the earlier years and that irrecoverable loans is not deductible as bad debts u/s 36 (1)(vii) or business loss u/s 37.

5. Whether on the facts and in the circumstances of the case and in law, the Ld. C.I.T. (A) erred in deleting the addition of Rs. 2,31,073/- made by the Assessing Officer on account of interest expense u/s 36(1)(iii) r.w.s. 37(1) of the Act, ignoring the fact that the assessee was diverting funds borrowed on interest from other parties for making payment towards margin money, which is speculative and the interest expenditure related to speculation activity and the expenditure claimed has to be allowed as deduction under the head speculation income and not under the computation of normal income."

4. The first ground of appeal pertains to the interest expenses of Rs. 30,69,430/- claimed by the assessee. It was noticed during the assessment proceedings that the assessee had claimed income from interest on loans and advances. It was further noticed that assessee received interest on loan @ 9 to 15% and in majority of the cases the rate of interest was charged @ 12%. It was further noticed that assessee had paid interest to the related parties than the interest charged by it. Accordingly, the AO asked the assessee to justify its action. In response thereof the assessee contended that it had paid interest @

12% to the family members which was a prevailing market rate, however, the AO holding that the assessee paid excessive interest by 3% and allowable rate of interest should be 9%, disallowed the payment of interest amounting to Rs. 30,69,430/- and added the said amount to the total income of the assessee.

5. Before us, the Ld. Departmental Representative (DR) submitted that the assessee has paid brokerage in connection with lending @ 2%. Hence, the effective rate of interest received is around 10% where as the assessee paid interest to its related parties @12%. Therefore, the AO has rightly made disallowance of 3% of the total amount of interest paid to its related parties and added back the said amount to the income of the assessee. Since, it has been established that the assessee had paid higher rate of interest to its related parties than the interest rate charged by the assessee from the borrowers, the Ld. CIT(A) should have confirmed the disallowance made by the AO u/s 40A(2)(b) of the Act.

6. On the other hand, the Ld. counsel for the assessee relying on the findings of the Ld CIT(A) submitted that the Ld. CIT(A) has rightly deleted the disallowance holding that the interest paid by the assessee @ 12% to its related parties is reasonable and does not fall under the category of excessive or unreasonable. The assessee has not suffered any loss during the year relevant to the assessment year under consideration. Since, the provisions of section 40A(2)(b) are not applicable in the assessee's case, the Ld. CIT(A) has rightly deleted the addition.

7. We have gone through the entire material on record in the light of the rival submissions. The Ld. CIT (A) has deleted the addition made by the AO on account of disallowance u/s 40A(2)(b) of the Act holding that the interest paid by the assessee to its related parties @ 12% is reasonable and not excessive. The operative portion of the order reads as under:-

"4.4 I have carefully considered the submissions made by the appellant and impugned assessment order on this issue. During the course of appellate proceedings the A.R. has produced the detailed chart of interest income received as against the interest paid along with chart of movements of cash and bank balances. The appellant has its own capital on which no interest is charged. This amount of capital comes to Rs. 6,95,00,000/- after reducing Rs. 45,00,000/- for investments in tax free income investments out of the capital accounts of the appellant. The total average loan granted during the year is Rs. 16,18,65,353/- on which interest earned for the year Rs. 1,96,87,505/- at an average rate of 12.6%. As against this appellant has taken average loan for the year Rs. 15,19,30,838/- and paid interest of Rs. 1,64,46,932/- at an average rate of 10.83%. The net interest income after reducing interest payment comes to Rs. 32,40,573/- which is 32.62%. The provisions of sec. 40A(2)(b) says as follows "wherein the "a" incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-section, and the A.O. is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business of profession of the assessee or the benefit derived by or accruing to it there from, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as deduction". Here in the case of the appellant the end result of the interest income is positive to the tune of Rs. 32.40 lacks. The provision u/s 40A(2)(b) is very clear about fair market value of the expenditure. Interest paid @ 12% per annum is a regular fair market rate which is acceptable at all the market levels. The test of the section is the expenses should be excessive or unreasonable, interest paid at 12% is most reasonable rate and it does not fall in the category of excessive or unreasonable. The A.O's contention that the motive of the appellant should be to maximize the profit is not called for. Appellant has earned income of Rs. 32.40 lacks at the end of the year. There is no claim of loss by the appellant. The provisions of the section does not hit by the appellant, when there is end result of profit. The provision of

section is applicable when appellant has claimed loss from the source of the income. A.O's observation that "it cannot pay interest at higher rates to its related parties because this is business activity of the assessee and its motive is to maximize its profit and not to incur losses by paying interest at higher rates and giving loans at lower rate cannot be acceptable as appellant has all the right to safe guard the interest of the business by following the prudent business policy. The expenses incurred by the appellant is towards the business activity, and its justifiable. The brokerage paid and other expenses are towards business activity and to safeguard the capital of the business. All the expenses are allowable u/s 378 of the I.T. Act, 1961. Hence, the addition of Rs. 30,69,430/- is deleted. This ground of appeal is allowed."

8. We find that the Ld. CIT(A) has deleted the addition holding that the interest paid by the assessee to its related parties does not come within the category of excessive or unreasonable. The Ld. CIT(A) has pointed out that the assessee had earned interest income of 32.40 lakhs. Since, the AO has not pointed out any evidence of instance to establish that the interest paid by the assessee is excessive in the light of the prevailing market rate, the Ld. CIT(A) has rightly set aside the findings of the AO. Hence, in our considered view, the findings of the Ld. CIT(A) does not warrant any interference. We, therefore, uphold the decision of the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

9. Vide Ground No. 2 the revenue has challenged the action of the Ld. CIT(A) in deleting the addition of Rs. 32,00,257/- made by the AO u/s 14A read with rule 8D of the Income Tax Rules(rules). The Ld DR submitted before us that the assessee received exempt income of Rs. 19,81,722/- during the previous year and the assessee made *suo moto* disallowance of Rs. 1,82.240/-. Since, the assessee had not worked out the disallowance as per the provisions of section 14A read with rule 8D, AO made disallowance of Rs. 32,00,257/- as per the provisions of law. In the said backdrop the Ld DR submitted that since, the workout furnished by the assessee was not in accordance with the provisions of

section 14A read with rule 8D, the Ld. CIT(A) should have confirmed the addition made by the AO.

10. Per contra, the Ld. counsel for the assessee relying on the findings of the Ld. CIT(A) submitted that since the AO had made disallowance in a mechanical manner without complying with the mandatory provisions prescribed under section14A of the Act, the Ld. CIT(A) has rightly restricted the addition to the *suo moto* disallowance by the assessee. The Ld. counsel further pointed out that the assessee had own funds more than the investments generating tax-free income therefore the AO has wrongly made disallowance under rule 8D(2)(ii) of the rules. The assessee had partner capital amounting to Rs. 10,69,24,341/- whereas the total investment was Rs. 1,50,81,843/-. The Ld. counsel relied on the decision of the Hon'ble Bombay High Court in the case of *HDFC bank Ltd versus DCIT* (383 ITR 529) Bom., *CIT versus HDFC bank* (366 ITR 505) Bom, *CIT vs. Reliance utilities and power Ltd.* (313 ITR 340) Bom and other cases to substantiate his contention. The learned counsel further pointed out that since the AO had applied rule 8D(2)(iii) without recording his dissatisfaction regarding the assessee's claim, the Ld. CIT(A) has rightly restricted the disallowance under section 14A read with rule 8D to the *suo moto* disallowance made by the assessee.

11. We have carefully gone through the orders passed by the authorities below and the cases relied upon by the parties. The Ld. CIT(A) has restricted the disallowance under section 14 A read with rule 8D to the suo moto disallowance made by the assessee. The relevant part of the findings of the Ld. CIT(A) reads as under:-

> *"5.3 I have considered the submissions of the appellant and impugned assessment order on this issue. I find the arguments and documentary evidences along with supporting submitted before the A.O. has substantial force to establish genuineness of the appellant in its working and suo moto disallowance u/s 14A. The facts of the case is very much clear as the calculation of the Assessing Officer is totally depended on the profit & loss a/c and*

Balance-Sheet submitted. I had specifically observed that A.O. has not established any nexus between the load bearing fund and investments in tax-free investments. The facts of the case that appellant has sufficient fund at the beginning of the year and amount of investments made. The appellant is in the business of investments and finance. All the activities of the firm is applied to pursue the main object of the firm. During the year firm has earned interest income of Rs. 1,96,87,505/- as against the interest exp. Of Rs. 1,64,46,932/-. The own capital of partners on the first day of the year was Rs. 3,48,01,712/- as against the total investments for the year is Rs. 1,50,81,843/-. The contentions of the appellant was not verified by the A.O. The appellant has submitted bank statements, along with copies of the investments to establish nexus, and justification of its claim. As per the recent pronouncements of various ITAT and Honorable Courts one thing is very much clear that before invoking disallowance u/s 14A r.w.r. 8D the A.O. needs to record its dissatisfaction of the accounts of the assessee. The condition precedent for the AO to invoke rule 8D is that he first must examine the accounts of assessee and then record by giving cogent reasons why is not satisfied with the correctness of the assessee's claim. In the absence of an examination of accounts and the recording of satisfaction, rule 8D cannot be invoked. On facts, the assessee had itself diallowed Rs. 1,82,240/-. The AO has not examined the accounts or given a finding how the assessee's computation was wrong. Consequently, the invocation of rule 8D was improper and disallowance was not permissible. The recent pronouncements of ITAT Pune in the case of Kalyani Steels Ltd. v/s ACIT it was categorically observed by the court that S. 14A & Rule 8D: if AO does not deal with assessee's arguments, it means that he has not reached objective satisfaction that assessee's method is incorrect & cannot invoke rule 8D.

In AY 2008-09 the assessee earned dividends of Rs. 5.45 crore and offered a disallowance u/s 14A of Rs. 5 lakhs. It gave a detailed explanation on why the amount of disallowance was adequate. However, the AO refused to accept the explanation

and made a disallowance under Rule 8D of Rs. 1.05 crore. This was upheld by the CIT (A). On appeal by the assessee to the Tribunal HELD allowing the appeal:

(i) The invoking of Rule 8D to compute the diallwoance u/s 14A is neither automatic and nor is triggered merely because assessee has earned an exempt income. The invoking of rule 8D of the Rules is permissible only when the AO records the satisfaction in regard to the incorrectness of the claim of the assessee, having regard to the accounts of the assessee. This recording of satisfaction is a condition precedent in accordance with the law laid down in Godrej & Boyce Manufacturing Co 328 ITR 81 (Bom) & Maxopp Investment Ltd. 247 CTR 162 (Del),
(ii) On facts, the AO has given no reasons why the assessee's calculation was not proper except to say that "the said disallowance was not acceptable. The detailed submissions of the assessee have been brushed aside by making a bland statement that the disallowance is "not acceptable". Therefore, the AO has not recorded any objective satisfaction in regard to the correctness of the claim of the assessee, which is mandatorily required in terms of s. 14A(2) and so his action of invoking Rule 8D is untenable. The AO is directed to retain the disallowance u/s 14A to the extent of Rs. 5 lakhs as returned by the assessee.
In view of the above decision, the third ground of appeal of the appellant is allowed, and disallowance u/s 14A is restricted to the amount of disallowance offered by the appellant of Rs. 1,82,240/-. Hence, additional disallowance of Rs. 32,00,257/- is deleted."

12. The Ld. CIT(A) has restricted the addition in question on the ground that the AO has not recorded his dissatisfaction before applying the provisions contained in section 14A of the Act which contemplates that AO shall determine the amount of expenditure incurred in relation to the income which does not form part of the total income in accordance with rule 8D if the AO after having regard to the accounts of the assessee is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income. We notice that

the AO has made disallowance under section 14A read with rule 8D without recording his dissatisfaction which is mandatory as per the provisions of subsection (2) of section 14A. We, therefore, do not find any reason to interfere with the findings of the Ld. CIT(A). Accordingly we uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

13. Vide ground No. 3 the revenue has challenged the action of the Ld. CIT(A) in deleting the addition of Rs. 96, 17, 828/– made by the AO on account of future and option loss. The Ld. DR submitted before us that the Ld. CIT(A) has deleted the addition ignoring the fact that assessing officer has noticed that the assessee had modified the client code 998 times with the intention to conceal the profits. The Ld. DR further contended that the Ld. CIT(A) has ignored the ratio of law laid down by the Hon'ble Supreme Court in the case of *Sumathi Dayal 214 ITR 801* wherein it has been held that the test of human probabilities should be applied to verify the genuineness of the transaction.

14. On the other hand the Ld. counsel for the assessee relying on the order passed by the Ld. CIT(A) submitted that change of client code is handled by the brokers and not by the assessee. Therefore, there is no involvement of assessee in changing of client code. It is quite evident that assessee does not have any access to such activities. Hence the AO has wrongly drawn inference against the assessee based on assumption and presumptions. The LD. counsel further pointed out that during the appellate proceedings the Ld. CIT(A) examined the statement of Mr. J.D. Metha recorded under section 131 of the Act and also examined the documentary evidence on record. The Ld. counsel relying on the decision of the Hon'ble Bombay High Court in the case of *Coronation Agro Industries Ltd. vs. DCIT* (Writ No 2627 of 2016) submitted that mere suspicion cannot be the basis for making addition/disallowance. Similarly, the Ld. counsel relying on the findings of the ITAT in the case of *ITO vs. Indervadan ITA No 4861/M/2014* and *DCIT vs. Sunita Khemka* ITA No 714/Kol/2011 submitted that where the payment is made through proper channel, the

transaction in shares cannot be treated as bogus. The Ld. counsel further contended that since the findings of the Ld. CIT(A) are based on the evidence on record and as per the settled principles of law. Hence, there is no merit in the contention of the revenue.

15. We have gone through the relevant record apart from the orders passed by the authorities below in the light of the rival submissions of the parties. The Ld. CIT(A) has deleted the addition made by the AO for the reason that the AO has made the addition on the basis of surmises and conjunctures without pointing out any cogent evidence on record. The relevant portion of the findings of the Ld. CIT(A) reads as under:-

> *6.5 I have considered the submissions made by the appellant and the impugned assessment order on this issue. The AR of the appellant has produced documentary evidences before me, in the form of All F&O bills, Copy of the ledger a/c of the appellant, Copy of the Global Report. I had also examined the statement of Mr. Jaydeep Mehta recorded u/s 131 of the Act, by the A.O. on 27-12-2012. The data called by the A.O. u/s 133(6) of the Act from NSE is the factual part of the recording of transactions in the master computer of the exchange. As per the system of the exchange and as per the direction of SEBI the monitoring authority, all the transactions takes place, are fully recorded in the master computer of the exchange, and the same is available on requisition. All the data recorded at exchange is also -available with the stockbrokers. The statement of the stockbroker Mr. Jaydeep Mehta is very vital and important in deciding the ground of the appellant/It Is very important to observe, what is the actual fact in the matter. The change of client code is at the centre of the whole episode. Now the finding' is very clear that there is a change of client code, in the transactions of F&O segment. The appellant has incurred F&O loss of Rs.96,17,8287-. Before deciding the appellants ground it necessary to put this observations and finding to a litmus test. The stockbroker .does not deny the fact of change of client code, but the grounds and. reasons submitted for the same needs to*

be looked in. Statement of the stockbroker recorded on 27-12-2012, gives us the clear picture of what has transpired in the whole episode. The answer of the stockbroker for question no:-7 to 14 clears all the basic, fundamental need to decide the ground. The argument of the'' appellant that he has no access to the system of the exchange and operating system or bolt of the stockbroker is factually correct, and there is no doubt about the same. AO in his observation also has not confronted the submission of the appellant. The observation of AO on other aspect of the disallowance also found to be not hitting the target. The observation, of AO of appellant being cash reach party, is not factually correct, as the key man insurance maturity amount received by the appellant is not 15.20 crores by only 6.84 'crores. The application of the said amount in bank FDR and other investment was also proved by the appellant by submitting the bank statement. AO's observation of transactions squared up on the same day and not carried over till the last day of the month, is also not helping the revenue-. The revenue does not have right to give direction to the appellant how to carry on its business and its affairs. The statue is; meant to allow or disallow certain income/expenditure based on the provisions contained in it. The revenue is not entrusted with the right to give its opinion on the conducting the personal affairs of the appellant. The squaring of the transaction on daily basis is prerogative of the appellant. The view of the AO cannot be forced on the appellant. Even the observation of AO of having liquidity does not support the arguments. The appellant has proved that the key man insurance maturity, immediately applied for the business activity of investment and finance. The statement of stockbroker in question no:-8 also clarifies the 'need of the margin money requirement. I have found from the submissions and arguments that not all the observations of the AO has any .corroborative/concrete evidence to substantiate the disallowance of the. F&O loss. AO has relied only on one fact, and that is data received from NSE stating change • of client code in the transactions. This data of NSE is the fact, but the need of the revenue is to fundamentally establish the

corroborative evidence to support the disallowance. .AO has not brought any evidence to support the disallowance. The statement of stockbroker recorded by the AO u/s 131 has also not helped revenue establish any modus operandi as alleged by the AO. The intention of the appellant also not established by the AO. Except one fact of change of client code/there is nothing with the AO to support the disallowance. The argument of AR of not having any access to the exchange and bolt or computer of the stockbroker is factually correct and verifiable. The statement of stockbroker of correcting an error and not modification of client code is also factually .correct. It is also not proved by the AO that modification of client code-were modified to pass on the looses of some other persons to the appellant. At the outset, I have considered all the arguments, details and explanations brought before me, along with documentary evidences produced, I am of the opinion that AO has not established any evidence against the appellant to disallow the F&O loss. Hence disallowance of F&O loss of Rs.96,17,828/- is deleted.

16. We notice that the Ld. CIT(A) has examined the documents including All F &O bills, copy of Ledger account, copy of global report etc.. The Ld. CIT(A) has further examine the statement of Mr. Jaydeep Metha recorded under section 131 of the Act and arrived at the conclusion that the data called by the AO under section 133 (6) of the Act from NSE is the factual part of the recording of transactions in the master computer of the exchange. As per the system of the exchange the transactions are recorded in the master computer of the exchange and the same can be retrieved. Under these circumstances, the action of the AO in making disallowance on the basis of assumption and presumption is not justified. So for as the change of the client code is concerned it has come in evidence that the assessee had no access to the system of the exchange. Hence, in our considered view, since the AO has made addition in question on the basis of suspicion and conjunctures, the Ld. CIT(A)

has rightly deleted the addition. We, therefore uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the Revenue.

17. Vide ground No 4, the revenue has challenged the action of the Ld CIT(A) deleting the addition of Rs. 70,000/-made by the AO on account of sundry balance written off. The Ld. DR submitted that the Ld. CIT(A) has deleted the addition ignoring the fact that the amount written off had not been offered as income in the earlier years therefore the irrecoverable loan is not deductible as bad debts u/s 36(1)(vii) or as business loss u/s 37 of the Act. During the assessment proceedings the assessee failed to demonstrate that the loan given by the assessee represent the income of the earlier years. These amounts are on capital account and no revenue account. Therefore the same are not allowable as expenditure in the year under consideration.

18. On the other hand, the Ld. counsel for the assessee relying on the order passed by the Ld. CIT(A), submitted that since the advances were made to the staff who have left the firm therefore the same has become irrecoverable, therefore the Ld. CIT(A) has rightly deleted the addition made by the AO.

19. We have gone through the orders passed by the authorities below in the light of the rival submissions of the parties. The Ld.CIT (A) has deleted the addition holding that if the said amount is not recoverable, it is part of the business loss allowable u/s 36(1) (vii) of the Act. The relevant para of the order of the Ld. CIT(A) reads as under:

> *7.3 I have carefully considered the submissions made by the appellant and the impugned assessment order on this issue. I had also verified the contention of the appellant/ along with the documentary evidences to substantiate the claim of the amount of Rs.70,000/- return off. I found the contention of the appellant is correct, as the business activity of the appellant is of investment and finance. This amount is part of the business activity of finance. If the said amount is not recoverable, it is part of the business loss allowable u/s 36(1)(vii). Hence disallowance of Rs.70,000/- is deleted*

20. We notice that the Ld. CIT(A) has deleted the addition holding that the contention of the assessee is correct as the business activity of the assessee is of investment and finance. In our considered view the Ld. CIT(A) has not pointed out any evidence which establishes that the amount in question was advanced by the assessee in an ordinary course of business to claim bad debts. On the other hand the assessee has claimed the same as business loss. Hence, we observe that the AO has not examined as to whether the amount claimed by the assessee comes within the ambit of business loss? Hence, in our considered view, the matter requires verification by the AO. We accordingly set aside the findings of the Ld. CIT (A) and restore this issue back to the AO to verify the claim of the assessee and decide the issue afresh after affording a reasonable opportunity of being heard to the assessee. Hence, we allow this ground of appeal for statistical purposes.

21. Vide ground No. 5 of the appeal, the revenue has challenged the Action of the Ld. CIT(A) in deleting the addition of Rs. 2,31,073/-made by the AO on account of interest expenses u/s 36(1)(iii) of the Act. The Ld. DR submitted before us that the Ld. CIT(A) has deleted the addition ignoring the fact that the assessee has diverted the interest bearing funds for making payments towards margin money. Since the activity of the assessee is speculative in nature, the related expenditure has to be allowed as deduction under the head speculative income.

22. On the other hand the Ld. counsel for the assessee relying on the findings of the Ld. CIT(A) submitted that the Ld. CIT(A) has rightly held that the income from the business of commodity is covered as speculative income. Since the assessee is in the business of commodity trading which, the expenses incurred is allowable u/s 36(1)(iii) of the Act. The Ld. counsel further pointed out that in the assessment year 2009-10 the then CIT(A) dealt with the identical issue and decided the same in favour of the assessee. However, the ITAT dismissed the department's appeal due to low tax effect.

23. We have gone through the relevant material on record in the light of the rival submission. A pointed out by the Ld. counsel the Ld. CIT(A) had decided the identical issue in favour of the assessee in the assessment year 2009-10. We find that in the present case the Ld. CIT(A) has taken the similar view. The relevant para of the CITA's order reads as under:-

> *9.3. I have carefully considered the submissions-made by the appellant and the impugned assessment order on this issue. During the course of appellate proceedings, the Authorized Representative of the appellant has produced the partnership deed documents and also the earlier year statement of total income and assessment order u/s 143(3) where in the income from the business of commodity is covered as speculation income. As per sec. 43(5) of the Income tax Act, 1961 "speculation transaction means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares is periodically or ultimately settled otherwise than by the actual delivery." In the case of the appellant it is observed that firm was very much in the business of commodity trading, which is covered as per clause in the partnership deed. The observation of the A.O. is general and not specific to distinguish the business of F&O as non permissible business, or change of object clause of the firm, It is also not correct to say that the fund has been transferred to conduct speculation activity which is not a business activity. The utilization of fund is the prerogative of the appellant, the observation of the A.O. is to find out the genuineness of the expenses vis a vis whether it is allowable as per the provisions of the statue. The A.O. has no right to comment on the utilization of the fund, because the appellant is wise enough to maximize its profit and utilization of the fund. Earning a profit or incurring a loss is an after effect of employment of funds. Not all the business ends in profit. The genuine business' expenses cannot be disallowed on the pretext of being utilized for speculation business. The commodity trading business is a speculative business as per sec. 43(5) and any genuine expenses incurred by the appellant to conduct the business is allowable u/s. 36(i)(iii) r.w.s. 37(1). Hence the disallowance of interest expenses of Rs. 2,31,073/- deleted.*

24. We notice that the view taken by Ld. CIT(A)in the present case is consistent with the view taken by the CIT(A) in assessee's own case for the assessment year 2009-10. Though the ITAT has dismissed the appeal pertaining to the earlier year on ground of low tax effect, yet we find merit in the consistent findings of the first appellate authorities that since the assessee is in the business of commodity trading and the commodity trading is a speculative business under section 43(5) of the Act, the genuine expenses incurred by the assessee is allowable u/s 36(1)(iii) of the Act. Hence, we uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

In the result, appeal filed by the revenue for assessment year 2010-2011 is partly allowed for statistical purposes.

Order pronounced in the open court on 15th March, 2019.

Sd/-	*Sd/-*
(G.S. PANNU)	(RAM LAL NEGI)
VICE PRESIDENT	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 15/03/2019

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**