

IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD BENCH

**Before: Shri Rajpal Yadav, Judicial Member  
And Shri Amarjit Singh, Accountant Member**

**ITA Nos. 1117, 2171 & 2172 /Ahd/2017  
Assessment Year 2011-12 to 2013-14**

The ACIT, Circle-2(1)(2), Ahmedabad (Appellant)	Vs	Mundra International Container Terminal Pvt. Ltd. New Mundra Port, Navinal Island, Post Box No. 8, Mundra, Kutch PAN: AADCA0917C (Respondent)
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**Revenue by: Shri Alok Singh, CIT-D.R.  
Assessee by: Shri S.N. Soparkar, A.R.**

Date of hearing : 18-06-2019  
Date of pronouncement : 28-06-2019

**आदेश/ORDER**

**PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-**

All the three appeals filed by the revenue are against the order of Id. CIT(A). Since identical issue of common facts are involved in all the three appeals filed by the revenue, therefore, we take ITA No. 1117/Ahd/2017 as lead case for the sake of convenience and its finding will be applicable to two remaining two appeals i.e. ITA No. 2171/Ahd/2017 & 2172/Ahd/2017.

2. The revenue has raised following substantive grounds of appeal:-

**ITA No. 1117/Ahd/2017**

*“1. The Ld. CIT(A) has erred in law and on facts in deleting the disallowance made on account of depreciation claimed on the infrastructure facility amounting to Rs.10,13,23,469/- without properly appreciating the facts of the case and the material brought on record.*

*2. The Ld. CIT(A) has erred in law and on facts in deleting the disallowance made on account of forex loss amounting to Rs.92,22,371/- without properly appreciating the facts of the case and the material brought on record.*

*3. The Ld. CIT(A) has erred in law and on facts in treating the speculation loss of Rs.2,33,24,764/- as business loss without properly appreciating the facts of the case and the material brought on record.*

*4. The Ld. CIT(A) has erred in law and on facts in deleting the disallowance made u/s.14A of the Act amounting to Rs.35,00,000/-without properly appreciating the facts of the case and the material brought on record.”*

3. The fact in brief is that return of income declaring income of Rs. Nil was filed on 16<sup>th</sup> Nov, 2016. Subsequently, the case was selected under scrutiny by issuing of notice u/s. 143(2) of the act on 8<sup>th</sup> August, 2013. The further facts of the case are discussed while adjudicating the different grounds of appeal filed by the assessee as under:-

**Ground No. 1 (Disallowance of deprecation of infrastructure facility)**

4. During the course of assessment, the assessing officer has noticed that assessee has claimed depreciation @ 25% amounting to Rs. 10,13,23,469/- on infrastructure usages facility. In this regard, the assessing officer has noticed that assessee has been using infrastructure developed by Mundra Port and Special Economic Zone (MPSEZ). Therefore, the assessee was asked to explain why not claim of depreciation of infrastructure facility should be disallowed. The assessee has explained that it has claimed depreciation of Rs. 10,13,23,469/- on infrastructure usages facility at written down of value of Rs. 405,23,93,877/- treating the same as intangible asset. It was also

explained that the exclusive right has been given to the assessee company to use the aforesaid infrastructure which was a sort of easement right. It was also explained that right from inception of the company i.e. 2004-05 and onwards, the depreciation claimed on the very same infrastructure usages facility has been allowed. The assessee has given the detailed submission along with judicial pronouncements reported by the assessing officer at page 2 to 12 of the assessment order. The assessee has also submitted that infrastructure usages facility as intangible asset was acquired in F.Y. 2003-04 relevant to assessment year 2004-05. Since then, it has been entered into block of plant and machinery as intangible asset and it has rightly claimed the depreciation of infrastructure usages facility. The assessing officer has not accepted the explanation of the assessee. He was of the view that right to usage infrastructure facility is not similar to intangible asset stated in section 32 of the act and hence the assessee was not eligible for claim of depreciation @ 25% on infrastructure facility. The assessing officer has also stated that expenditure incurred by the assessee for usages of infrastructure facility was undoubtedly capital in nature and the assessee has been deriving enduring benefit out of it. Consequently, the assessing officer has disallowed the claim of depreciation amounting to Rs. 10,13,23,469/- and added to the total income of the assessee.

5. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has allowed the appeal of the assessee. The relevant part of the decision of the Id. CIT(A) is reproduced as under:-

**“2.3. Decision:**

*I have carefully considered the facts of the case, assessment order and submission of the appellant. The AO has made the disallowance of*

claim of depreciation of Rs.1 0,13,23,469/- on the infrastructure usage facility taken by the appellant from Mundra Port and Special Economic Zone in the F.Y. 2003-04 relevant to A.Y. 2004-05. The appellant claimed the depreciation from the opening WDV of Rs.40,52,93,877/- as on 01/04/2011 and there was no addition in the assets in this block of assets during the year under consideration. The depreciation was claimed treating the same as intangible asset being infrastructure usage facility. The appellant has used the infrastructure developed by Mundra Port and SEZ under the right to use the same through the lease agreement executed between the appellant and the said party dtd. 5.6.2003 i.e. F.Y. 2003-04 relevant to A.Y. 2004-05. The AO held that the uses of the infrastructure facility and the expenditure incurred thereupon was undoubtedly capital in nature and the AO observed that right to use the infrastructure facility was not similar to intangible asset u/s.32 of the Act and hence not eligible to claim the depreciation @25% as the appellant has no business or commercial rights in the infrastructure facility, since the assessee has no right to transfer these facilities to others. The detailed discussion has been made by the AO in para-3 of the assessment order which has been reproduced in the preceding paras.

2.4. On the other side, the appellant has made the detailed written submission before the AO and the in the present appellate proceedings and the same have been reproduced in the preceding paras. The appellant has submitted that the infrastructure uses facility is sort of license given by Mundra Port SEZ to the appellant to operate its container operation in Mundra Port area and the exclusive right has been given to the appellant which is in the nature of Easement rights. This Easement right was nothing but license given to the appellant to enter on Mundra Port and SEZ lands with uses of infrastructure facility to carry out the business activities. The term license, easement and lease were well defined under Transfer of Property Act, the Hon'ble Supreme Court in the case of *Techno Shares and Stock Ltd. vs. CIT 327 ITR 323* has held that such rights were akin to license. It give the right to member to access the exchange and it was considered to be an intangible asset. In this way the appellant has been given the right to carry out its terminal operations. Thus it is nothing but a license which is in the nature of commercial right. It may be noted that licenses/franchise etc. are categorized as intangible assets under the block of assets. This view is supported with the various judgements relied upon by the appellant including the followings:-

- **Reliance Ports and Terminal Ltd. in IT Appeal No.1743, 1744 and 1745 (Mum) of 2007 dtd. 26.11.2007**
- **Kotek Forex Brokerage Ltd. Vs. ACIT (2009) 33 SOT 237 (Mum)**
- **DCIT 11 (OSD) Mumbai Vs. Weizmann Forex Ltd. (2012) 21 taxmann.com 99 (Mum)**
- **Birla Global Assets Finance Co. Ltd. in ITA No.6835 of 2010 (Hon'ble Bombay High Court)**
- **ONGC Videsh Business Ltd. Vs. DCIT 127 TTJ 497 (Delhi)**
- **S. Amika Vs. DCIT 15 Taxmann.com 28 (Kerala)**
- **Piem Hotels Ltd. Vs. DCIT 128 ITD 272 (Mum)**

2.5. Further submitted that this right has been acquired through the lease agreement dtd. 5.6.2003 and accordingly the A.Y. 2004-05 was the first year of this operation and in that year the depreciation of Rs.101,20,91,8887- has been claimed leaving the closing WDV at Rs.303,62,75,6637- as on 31/03/2004. Thus the appellant has been claiming the depreciation upon such infrastructure facilities from A.Y. 2004-05 and onwards upto A.Y. 2011-12. In all the above assessment years the scrutiny assessment u/s.143(3) of the Act has taken place and the depreciation claimed by the appellant in all these years have been allowed by the AO having regard to the facts and submissions given under the head.

2.6. It has been noticed that in the preceding years the appellant has claimed the depreciation on the closing WDV at the end of the relevant assessment years. The claim of depreciation made in the preceding years and the opening and closing WDV of the infrastructural facility uses is noted hereunder for ready reference.

A. Y.	Addition during the year	Opening Balance / Addition	Depreciation claimed	Closing WDV
2004-05	4048367551	0	1012091888	3036275663
2005-06	0	3036275663	759068916	2277206747
2006-07	0	2277206747	569301687	1707905061
2007-08	0	1707905061	426976265	1280928795
2008-09	0	1 280928795	320232199	960696597
2009-10	0	960696597	240174149	720522447
2010-11	0	720522447	180130612	540391836
2011-12	0	540391836	135097959	405293877
2012-13	0	405293877	101323469	303970408

Thus it has been noticed that the depreciation has been allowed to the appellant on the expenditure made in A.Y. 2004-05 and such claim of depreciation was granted by the AO from A.Y. 2004-05 onwards to A.Y. 2011-12. Even the scrutiny assessments of the aforesaid assessment years have been completed by the AO and such claim of depreciation made by the appellant has been granted without any adverse observations. The year under appeal was the first year wherein the AO has objected to the claim of depreciation made by the appellant on the opening WDV as on 1.4.2011 which is found to be not tenable. In case the AO is of ^ view that no depreciation is to be allowed on such infrastructural facility then the claim of depreciation has to be disregarded in the inception year i.e. A.Y. 2004-05 and then' only he can withdrew the depreciation of the subsequent years. This cannot be the case that the claim of depreciation from A.Y. 2004-05 to 2011-12 has been granted to the appellant and thereafter the claim of depreciation in A.Y. 2012-13 i.e. the year under appeal the depreciation is withdrawn.

2.7. Even during the year under consideration no assets in question has been acquired and therefore the block of assets of the plant and machinery in the nature of intangible assets introduced in A.Y. 2004-05 has been carried forwarded to the subsequent years without any addition/reductions in the assets value in the intervening periods with claiming the depreciation on the opening WDV in each of the years. It is a well settled proposition of law that once the assets entered into the block of assets it loses its individual character and no adjustment is permissible to take it out from the block unless it is sold. The ownership and the user of block of assets are the criteria to claim for depreciation and are required to be looked into only at the time when the assets form part of the block of assets and once the assets are part of the block of assets it loses its individual cost or WDV and depreciation has to be allowed on opening WDV of block of assets. This is supported by the various judgements as noted below.

(a) **Swati Synthetics Vs. ITO 38 SOT 208 (Mum)**

(b) **DCIT Vs. Boskalis Dredging India (P) Ltd. 23 Taxmann.com 4 (Mum)**

It has also been noticed that the concept of block of assets has been brought in the statute w.e.f 1.4.1988 and henceforth the depreciation is to be allowed on block of assets and not on individual items. The merger of various assets into the block of asset can be altered only when the eventuality contained in clause-c of Section 43(6) takes place i.e. when a particular asset is sold, discarded or destroyed in the previous year. In the instant case the impugned assets has been acquired in the previous year 2003-04 relevant to A.Y. 2004-05 and was forming part of block of asset of intangible assets and

*since then the appellant has been claiming depreciation on the impugned intangible assets namely Infrastructural uses facility and the same has been allowed by the A.O. since then.*

*2.8. It has also been contended that the AO has not empowered to disturb opening WDV of the block of asset which was purchased/expired in the preceding years and on which depreciation has already been allowed in the earlier years. This contention is found acceptable as has been held by the Hon'ble Courts noted as under:-*

*(a) The Hon'ble ITAT Pune Bench-A in the case of M/s. Western Precicaste Pvt. Ltd. vs. JCIT in ITA No.814/PN/2011 dtd. 9.11.2015*

*(b) The Hon'ble ITAT Mumbai in the case of M/s. HSBC Asset Management (India) Pvt. Ltd. Vs. DDIT in ITA No.2028/Mum/2009 dtd. 15.6.2011.*

*2.9. Respectfully following the aforesaid decisions, the depreciation claim made by the appellant in the year under consideration cannot be rejected on the opening WDV of the block of assets.*

*2.10. In view of the aforesaid discussion, the appellant is found eligible for the depreciation on the opening WDV of the infrastructure uses facility in the year under consideration and hence disallowance of depreciation made by the AO is found untenable and hence the same is **deleted**.*

*Thus the ground of appeal is **allowed**."*

6. During the course of appellate proceedings before us, the ld. departmental representative has supported the order of the assessing officer and contended that the assessing officer has rightly disallowed the claim of depreciation on infrastructure usage facility. On the other hand, ld. counsel has furnished paper book and referred a number of judicial pronouncements as under:-

1. Order of Hon'ble ITAT, Ahmedabad A.Y. 2009-10
- 2 Judgment of Hon'ble Gujarat High Court in case of S K Patel Family Trust
- 3 Order of Hon'ble ITAT, Mumbai in case of HSBC Asset Management (India) Pvt. Ltd.
- 4 Order of Hon'ble ITAT, Mumbai in case of Edel Commodities Ltd.
- 5 Judgment of Hon'ble Gujarat High Court in case of Cadila Pharmaceuticals Ltd.

The ld. counsel has also supported the order of ld. CIT(A). The ld. counsel has vehemently contended that the case of the assessee was rightly

adjudicated by the Id. CIT(A) after referring a number of judicial pronouncements, therefore, there is no merit in the appeal of the revenue.

7. We have heard both the sides and perused the material on record. The assessee has claimed depreciation of Rs. 10,13,23,469/- on infrastructure usages facility on written down value of Rs. 405,23,93,877/- treating the same as intangible asset. The assessee company was using infrastructure facility developed by Mundra Port and Special Economic Zone on account of exclusive right has been given to the assessee company to carry out its terminal operation work. It is further noticed that right from the inception of the assessee company for i.e. assessment year 2004-05 till assessment year 2011-12 the same claim of depreciation has been allowed to the assessee company since assessment year 2004-05. The assessee has entered into aforesaid asset into the block of plant and machinery as intangible asset. The assessee has acquired infrastructure usages facility right from Mundra Port Trust to operate its container operation in Mundra area in the F.Y. 2003-04 relevant to assessment year 2004-05. It is noticed that infrastructure usages facility is a sort of license given by Mundra Port to the assessee company to operate its container operation in Mundra Port area. The assessee has got the right to use and maintain services of certain infrastructural facilities as set out in the infrastructure usages agreement. The assessee has been showing this right on the asset side of the balance sheet and claimed the same as intangible asset on which the depreciation was claimed. With the assistance of Id. representatives, we have gone through the various judicial pronouncements referred by the Id. counsel. Co-ordinate Bench of the ITAT vide ITA No. 1253/Ahd/2016 in the case of assessee

itself pertaining to assessment year 2009-10 while adjudicating the order passed u/s. 263 by the Pr. CIT for disallowing the claim of depreciation on the similar issue has held that claim of the assessee for depreciation on infrastructural facility existed since 2004-05 should not be disturbed after referring a number of judicial pronouncements. In the case of ACIT vs. S.K. Patel Family Trust 33 taxman.com 678, the Honøble Gujarat High Court has held that wherein deprecation on certain asset had been allowed in earlier years could not be disallowed merely on the ground that such assets were not put to use during the year under consideration. In the case of HSBC Asset Management India Pvt. Ltd. vs. Deputy Direction of Income Tax vide ITA No. 2028/Mum/2019, the ITAT Mumbai has held that the assessing officer cannot dispute the opening WDV of block asset after having allowed the depreciation in the immediately preceding years and does not open to the assessing officer to take different stand. In the light of the judicial findings and the facts reported in the finding of Id. CIT(A), we do not find any infirmity in the decision of Id. CIT(A). Accordingly, this ground of appeal of the revenue is dismissed.

Ground No. 2 (Disallowance of foreign exchange losses)

8. During assessment, the assessing officer has noticed that assessee has claimed foreign exchange loss to the amount of Rs. 3,25,08,084/-. The detail of such foreign exchange loss is given as under:-

1.	Import Export Gain	39,051
2.	Forex Derivative (realized)	2,33,24,764

3.	Forex Derivative (Unrealized)	92,22,371
	Total	3,25,08,084

The assessee was asked to explain the claim of the foreign exchange loss. The assessee explained that it has entered into forward contract with standard chartered bank and HSBC Bank in order to hedge foreign currency exposure arising on account of receivable/payable for revenue account transaction. It was submitted that loss incurred by the assessee company was a loss on foreign currency forward contract. It is also explained that the assessee company raises invoices to its customers in foreign currency USD linked revenue after converting it into INR at the designated exchange rate. In order to hedge its exposure against foreign exchange fluctuation arising from foreign currency revenue, the assessee company had entered into foreign currency forward contracts with banks in terms of prevalent RBI guideline which mandates entering of foreign currency contract only with banks. It is also clarified that the assessee company has been consistently following method of accounting of charging the loss/gain arising on account of market to market price of foreign currency as on the last day of the year to P & L account in respect of revenue account transaction. The assessing officer has not accepted the explanation of the assessee and stated that the assessee is not a manufacturing unit nor is engaged in sale of merchandise. Therefore, treated the foreign exchange losses to the amount of Rs. 2,33,24,764/- as speculation loss in view of the section 43(5)(d) of the act and foreign exchange derivatives unrealized loss of Rs. 92,22,371/- was also

disallowed treating the same as notional loss and added to the total income of the assessee.

9. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has allowed the appeal of the assessee. The relevant part of the decision of Id. CIT(A) deleting the unrealized foreign exchange loss of Rs. 92,22,370/- is reproduced as under:-

**“3.3. Decision:**

*I have carefully considered the facts of the case, assessment order and submissions of the appellant. The AO has disallowed the unrealized forex loss of Rs.92,22,370/- being incurred on forward contracts in view of the Instruction No. 03/2010 dated 23/03/2010. The AO observed that the same was the notional loss as no sale or settlement of contract has taken place and the said continues to be owned by the company.*

*3.4. The appellant has given the detailed written submissions which have been reproduced in the preceding paras. Having considered the facts and submissions, it has been noticed that the appellant company was engaged in the business of operating container handling terminal and container freight station operations and for which it has made the hedging of the forward contracts to avoid the future losses. In this way, it has incurred the forex loss which is being consistently followed as a method of accounting on account of mark to market price of foreign currency as on last day of the year to the P & L Account in respect of revenue account transactions. The details of such transactions are noted as under:-*

<i>Particulars</i>	<i>Amount (Rs.)</i>
<i>MARK-TO-MARKET loss for outstanding forward contract with SCB</i>	<i>84,61,450/-</i>
<i>MARK-TO-MARKET loss for outstanding forward contracts with HSBC</i>	<i>15,02,689/-</i>
<i>Restatement of other monetary transactions</i>	<i>(741,769)</i>
<i>Net Unrealised loss</i>	<i>92,22,370/-</i>

*3.5. The appellant company has entered in forward contracts with Standard Chartered Bank and HSBC which has not been disputed by the AO. The appellant company has entered into hedging contracts in order to hedge foreign currency exposure arising on account of receivables / payables for revenue account transactions. The appellant company raises invoices to its customers in foreign currency i.e. in US \$ linked revenue after converting it in INR at the designated exchange rate. Thus during the course of carrying on of the said business in order to hedge its exposure against foreign exchange fluctuations arising from foreign currency revenue, the appellant company had entered into foreign currency forward contracts with banks in terms of prevalent RBI guidelines. Thus, the loss / gain on forward contract is not contingent on any future event which is not a case of derivatives. Thus the mark to market losses on forward contract is the*

crystallised liability and hence allowable. In support the appellant has relied upon various judgments which are applicable on the facts of the case and some of them are noted as under:-

- **Hon'ble Supreme Court in the case of Oil & Natural Gas Corporation Vs. CIT 322 ITR 180**
- **Hon'ble Supreme Court in the case of CIT Vs. Woodward Governor India Pvt. Ltd. 312 ITR 354**

3.6. The appellant has demonstrated that the test laid down by the Hon'ble Apex Court in the case of Woodward Governor India Pvt. Ltd. is duly satisfied in the following manner:-  
whether the system of accounting followed by the assessee is 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;

Admittedly, the Appellant is following mercantile system of accounting and that is in fact not denied by the Id. AO.

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:

Again admittedly, from the beginning the Appellant is following mercantile system of accounting and there is not changed in it.

whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it;

Yes. Chart showing the working of realized and unrealized gain/loss from F.Y. 2010-11 to 2014-15 relevant to A.Y. 2011-12 to 2015-16 is as under to show that the Appellant Company has also earned the gain on the said transaction in earlier years and which has been offered for tax in the respective years.

**F.Y 2010-11**

<b>GL Code</b>	<b>GL Description</b>	<b>Closing balance</b>
44010201	Fx (Gain) / Loss - Realised Others	-1,18,03,755.00
44020201	Fx (Gain) / Loss - Unrealised Others	-0.49

**F.Y. 2011-12**

<b>GL Code</b>	<b>GL Description</b>	<b>Closing balance</b>
44010201	Fx (Gain) / Loss - Realised Others	-2,33,24,764.12
44020201	Fx (Gain) / Loss - Unrealised Others	-92,22,370.44

**F. Y. 2012-13**

<b>GL Code</b>	<b>GL Description</b>	<b>Closing balance</b>
44010201	Fx (Gain) / Loss - Realised Others	2,03,83,390.18
44020201	Fx (Gain) / Loss - Unrealised Others	--84,71,489.66

**F. Y. 2013-14**

<b>GL Code</b>	<b>GL Description</b>	<b>Closing balance</b>
44010201	Fx (Gain) / Loss - Realised Others	-8,59,04,712.57
44020201	Fx (Gain) / Loss - Unrealised Others	-13,63,797.00

**F. Y. 2014-15**

<b>GL Code</b>	<b>GL Description</b>	<b>Closing balance</b>
44010201	Fx (Gain) / Loss - Realised Others	-4,80,92,971.43
44020201	Fx (Gain) / Loss - Unrealised Others	2,32,679.00

iv. whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains

Yes. As it is discussed in above point, the Appellant has declared foreign exchange gain and offered for taxation, the Appellant is consistent and definite in making entries in the books in respect of losses and gains as the case may be.

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:

Yes. The Appellant has following Accounting Standard AS - 11 issued by the Institute of Chartered Accountants of India.

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 system adopted by the Appellant is fair and reasonable and is not adopted with a view to reduce the incidence of taxation. In fact the Rule 115 of the Income Tax Rules provides that that all the assessee should convert their foreign exchange assets into Indian Rupees on the last day of the previous year. In CIT vs. R. B. Construction 202 ITR 222 (AP)(FB), it has been held that if rule is not considered, the decision becomes per incurram. In as much as the Appellant has followed the accounting treatment which is in conformity with Accounting Standard 11 issued by the ICAI. Various authorities have held that while determining allowability of an expenditure, accounting standard has a great persuasive value. Challapalli Sugars Ltd. Vs. CIT (1975) (98 I.T.R. 167). Further following authorities have held that foreign exchange fluctuation loss suffered on account of circulating capital or revenue account should be treated as revenue expenditure in the year in which the devaluation takes place when the method of accounting followed is mercantile.

- 116 ITR 1 (SC)
- 154 ITR 460 (Cal)
- 90 ITR 323 (Ker)
- 97ITD 125(Ahd) (TM)

151 para 8.28

Accordingly, this itself establishes that the Appellant has adopted the system of accounting which is fair and reasonable and supported by the Accounting Standard AS - 11, Rule 115 and various authorities and not adopted to avoid incidence of income tax. And in any case, as submitted by the Appellant, in the immediate preceding A.Y.2011-12, the Appellant has earned foreign exchange gain which has been offered for taxation, which itself shows that the system adopted by the Appellant is consistent, fair and reasonable.

3.7. In view of the aforesaid discussion, it is held that the forex loss on account of forward contracts incurred by the appellant was on revenue account and as per the consistent method of accounting being followed by the appellant from year to year basis, this loss is allowed as business loss. Further the instruction upon which the AO relied is also not applicable on the facts of the case. In result, the disallowance made by the AO is **deleted**.

The ground of appeal is **allowed**.”

The relevant part of the decision of Id. CIT(A) deleting the foreign exchange loss of Rs. 2,33,24,764/- which was treated by the assessee as speculation loss is as under:-

**“4.3. Decision:**

I have carefully considered the facts of the case, assessment order and submission of the appellant. The AO has made the disallowance of realised foreign exchange fluctuation loss of Rs.2,33,24,764/- holding the same as speculation loss in view of the section 43(5) (d) and the Instruction No. 03/201 Oof CBDT.

4.4. On the other side, the appellant has furnished the written submission which has been reproduced in the preceding paras of this order. The details of the realised loss on account of foreign exchange loss is noted as under:-

Particulars	Amount (Rs.)
Realized loss on account of forward contracts	2,31,02,500/-
Realized loss on other revenue A/c transactions	2,22,264/-
Total Realized loss	2,33,24,764/-

4.5. In view of the business of the appellant, it was in an underline exposure in the form of foreign currency receivables / payables, the appellant had to enter into forward contracts with banks to hedge against any losses arising due to fluctuation in foreign currency. Such realised losses on account of forward contracts were claimed as revenue expenditure.

4.6. Here it is worth to mention that the provisions of section 43(5) (d) would not be applicable on the facts of the case as the appellant did not indulge in any speculative transactions but it has made the hedging of the foreign exchange receivables from its clients towards the receipts of operating container handling terminal services. The **Honourable Bombay High Court in the case of Badridas Gauridu (P.) Ltd. [261 ITR 256]** and the **Calcutta High Court in the case of Soorajmull Nagarmull [129 ITR 169]** has held that such type of forward contracts with the banks in respect of foreign exchange cannot be covered under the provisions of section \ 43(5) (d) of the Act as speculative transactions. Since the appellant was not the dealer in foreign exchange but providing the operating container handling terminal services and there did not happen to be any purchase or sale of commodity settled otherwise then by actual delivery, thus the. same cannot be termed as speculative transactions. The foreign exchange were only incidental to the assessee's regular course of business and the loss was thus not a speculative loss but incidental to the assessee's business and allowable as such.

4.7. Similar views have also been endorsed by the **Honourable Gujarat High Court in the case of CIT Vs. Friends and Friends Shipping Pvt. Ltd. (2013) 35 taxmann.com 553.**

4.8. Further, the **Honourable ITAT, Bangalore, in the case of Quality Engineering and Software Technologies Pvt. Ltd. Vs. DCIT 52 taxmann.com 515** has also held the similar nature of losses as the business loss. The relevant extract of the observations are noted as under:-

"4.5.8 In the case on hand, it is not in dispute that the forward contracts have been entered into by the assessee in order to protect its interest against fluctuations in foreign currency, in respect of consideration for export proceeds, which is a revenue item. Therefore, in sum and substance, it has the trappings of stock-in-trade and the assessee has to restate or revalue the same as on the Balance Sheet date. The consequent effect of this accounting treatment was to recognize the exchange fluctuation gain or loss in the profit and loss account as on the valuation date. In view of the facts and circumstances of the case as discussed above, we are of the considered view that the appeal of the assessee on this issue, succeeds for the following reasons:—

(i) A binding obligation accrued against the assessee when it entered into foreign exchange forward contracts;

(ii) The forward contracts are in respect of consideration for export proceeds, which are revenue items;

(iii) The liability is determinable with reasonable certainty when an obligation is pending on the balance sheet date and such a liability cannot be said to be a contingent liability.

(iv)The accounting treatment is as per Accounting Standards and the ICAI Guidelines.

(v)The principles enunciated by the Hon'ble Apex Court in the case of Woodward Governor India (P.) Ltd. (supra) are applicable to the facts of the case on hand."

4.9. Further, the **Honourable ITAT, Bangalore** in the case cited above the applicability of the CBDT Instruction No. 3/2010 has also been analysed in detail and thereafter it has been held that there has been an existing contract with a binding obligation accrued against the assessee when it entered into for-ex forward contracts. The forward contracts are in respect of consideration for export proceeds, which are revenue items. There is an actual contract for sale of merchandise. In

*this factual matrix, it is clear in our view that the transaction in question will not qualify to be called as speculative transaction.*

*4.10. Subsequently, the Honourable Gujarat High Court in the case of CIT Vs. Panchmahal Steel Ltd. (2013) 33 taxmann.com 10 by following its earlier judgment in the case of Friends and Friends (supra) has allowed loss incurred on account of hedging on foreign exchange fluctuation as revenue / business loss.*

*4.11. In view of the aforesaid discussion, and respectfully following the decisions / judgments of honourable courts referred above, the claim of realised loss of foreign exchange fluctuation incurred by the appellant in the year under consideration is found to be eligible for deduction. Such profits / losses have also been claimed as revenue by the appellant and this method is consistently being followed in the preceding and subsequent years also. Thus, the disallowance made by the AO is found untenable and hence, the same is **deleted**.*

*The ground of appeal is **allowed**.”*

10. We have heard the rival contention and perused the material on record carefully. It is noticed that assessee has claimed loss under the category of realised and un-realized loss. The realized loss was claimed on actual payment made and un-realised loss was claimed for the contract outstanding at the year end. The assessee company has been constantly following method of accounting of charging the loss/gain arising on account of market to market price of foreign currency as on the last day of the year to the P & L account in respect of revenue account transactions and the same was permissible in the eyes of laws. The assessee has entered into forward contracts with Standard Chartered Bank and HSBC Bank. The assessee company has entered into hedge contract in order to hedge foreign currency exposure arising on account of receivable/payable for revenue account transaction. The assessee company had entered into foreign currency forward contracts with banks in terms of prevalent RBI guideline which mandates entering of foreign currency contracts only with banks. In view of the above and after considering the detailed finding and judicial pronouncement referred in the decision of Id. CIT(A) as elaborated above in this order, we consider that foreign exchange loss on account of forward contract incurred by the assessee from year to year basis was correctly

allowed by the Id. CIT(A). Therefore, we do not find any irregularity in the order of the Id. CIT(A), therefore, the appeal of the revenue on this issue is dismissed. Similarly, disallowance of realised foreign exchange loss of Rs. 23,32,49,764/- by the assessing officer by treating the same as speculation loss u/s. 43(5)(d) of the act is not justified. Since the assessee was not the dealer in foreign exchange but providing the operating container handling terminal services and there was no purchase or sale of commodity settled otherwise than actual delivery, therefore, the same cannot be termed as speculation transaction in the case of the assessee. After considering the detailed finding of Id. CIT(A) and submission of the assessee produced at page no. 52 to 68 of the Id. CIT(A), we do not find any substance in the finding of assessing officer treating the foreign exchange loss as speculative loss, therefore, this ground of appeal of the revenue is also dismissed.

#### Disallowance of 14A of the act

11. During the course of assessment proceedings, the assessing officer has noticed that assessee has shown investment of Rs. 70 crores in the shares of Container Rail Road Services Pvt. Ltd. and debited the interest expense amounting to Rs. 63,92,50,000/- in the P & L account. The assessing officer observed that assessee has not shown any expenses incurred u/s. 14A r.w. Rule 8D of the act. The assessee explained that it has not earned any exempt income therefore no expenses has been shown as incurred u/s. 14A r.w. Rule 8D for earning exempt income. The assessing officer has not accepted the explanation of the assessee and invoked the provision of section 14A and computed the disallowance to the amount of Rs. 35 lacs.

12. Aggrieved assessee has filed appeal before Id. CIT(A). The Id. CIT(A) has deleted the addition made by the assessing officer after following various judicial pronouncements that no disallowance u/s. 14A could be made when the assessee has not claimed any exempt income.

13. We have heard the rival contentions in this regard. We consider that the Honøble Gujarat High court in the case of Corrttech Energy Ltd. 372 ITR 97 (Gujarat) has held that where the assessee has not claimed any exempt income, no disallowance u/s. 14A can be made. In view of the above and the elaborate finding of the Id. CIT(A), we do not find any merit in this ground of appeal of the revenue, therefore, the same is dismissed.

14. In the result, the appeal of the revenue is dismissed.

15. In the combined result, all the three appeals filed by the revenue are dismissed.

Order pronounced in the open court on 28-06-2019

**Sd/-**  
**(RAJPAL YADAV)**  
**JUDICIAL MEMBER**

**Ahmedabad : Dated 28/06/2019**

**Sd/-**  
**(AMARJIT SINGH)**  
**ACCOUNTANT MEMBER**

**आदेश क० त० तालिम अ० षत / Copy of Order Forwarded to:-**

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलालय आधिकरण,  
अहमदाबाद