

THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 3385/Mum/2016 (Assessment Year 2011-12)

ACIT 16(1) Room No. 439 Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Zoom Entertainment Network Limited 1 st Floor, Trade Garden Kamala Mills Compound Senapati Bapat Marg Lower Parel Mumbai-400 013.
(Appellant)		(Respondent)

I.T.A. No. 3454/Mum/2016 (Assessment Year 2011-12)

M/s. Zoom Entertainment Network Limited 1 st Floor, Trade Garden Kamala Mills Compound Senapati Bapat Marg Lower Parel Mumbai-400 013.	Vs.	ACIT 11(1) Room No. 439 Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

PAN : AAACZ2897B

Assessee by	Shri V. Muhan
Department by	Shri Sanjay Singh
Date of Hearing	13.5.2019
Date of Pronouncement	2.8.2019

ORDER

Per Shamim Yahya (AM) :-

These are appeal by the Revenue and assessee arising out of order of learned CIT(A) for A.Y. 2011-12.

2. Grounds of appeal raised by the Revenue read as under :-

- 1) On the facts and circumstances of the case and in law, whether the Ld. CIT(A) to delete the disallowance u/s. 40(a)(ia) rws 194J of & Acquisition Expenses' and failing to appreciate in the light of CBDT circular No.04/2016, the findings made in the assessment order that the

expenditure was not covered under any contract for 'carrying out any work', as required in sub-section (1) of section 194C and therefore such payments are not liable for TDS u/s. 194C but however liable for TDS u/s. 194J.

- 2) On the facts and circumstances of the case and in law, whether the Ld. CIT(A) was justified in directing to delete-the disallowance u/s. 40(a)(ia) rws 194J of 'Programme Production & Acquisition Expenses' placing reliance on the judgment in the case of CIT Vs S.K.Tekriwal [2014] 46 taxmann.com 444 (Calcutta) without appreciating that in the judgment dated 20th July, 2015, the Hon'ble Kerala High Court, CJT-1, Kochi Vs PVS Memorial Hospital Ltd. [2015] 60 taxmann.com 69 (Kerala), had held as under -

"In so far as the judgment of the Calcutta High Court in S.K. Tekriwal (supra) which was relied on by the Tribunal is concerned, with great respect, for the aforesaid reasons, we are unable to agree with the views that if tax is deducted even under a wrong provision of law, Section 40(a)(ia) cannot be invoked."

- 3) On the facts and circumstances of the case and in- law, whether the Ld. CIT(A) was justified in directing to delete the disallowance u/s. 40(a)(ia) rws 194J of 'Carriage Fees/Channel Placement fees' and failing to appreciate that the payments made for use/right to use of 'process' are 'royalty' as per Explanation 6 to section 9(l)(vi) hence such payments are covered u/s. 194J of the Income-tax Act, 1961.
- 4) On the facts and circumstances of the case and in law, whether the Ld. CIT(A) was justified in directing to delete the disallowance u/s. 40(a)(ia) rws 194J of 'Carriage Fees/'Channel placement fees' placing reliance on the judgment in the case of CIT Vs S.K.Tekriwal [2014] 46 taxmann.com 444 (Calcutta) without appreciating that in the latest judgment dated. 20th July, 2015, the Hon'ble Kerala High Court, CJT-1, Kochi"Vs PVS Memorial Hospital Ltd. [2015] 60 taxmann.com 69 (Kerala), had held as under -

"In so far as the judgment of the Calcutta High Court in S.K. Tekriwal (supra) which was relied on by the Tribunal is concerned, with great respect, for the aforesaid reasons, we are unable to agree with the views that if tax is deducted even under a wrong provision of law, Section 40(a)(ia) cannot be invoked."

- 5) On the facts and circumstances of the case and in law, whether the learned CIT(A) was justified in directing to delete the disallowance u/s. 40(a)(ia) rws 194J of 'Carriage Fees/Chanel Placement Fees', whereas the jurisdictional ITAT, Mumbai 'L' Bench, in its order dated 28.03.2014 in the case of ADIT-(IT)-2(2), Mumbai Vs Wacom 18 Media Pvt.Ltd. answered in the affirmative, the following questions of law raised by the Department -

- a) Whether definition of term 'process' in Explanation 6 to section 9(l)(vi), by way of retrospective amendment is clarificatory in nature and did not amend definition of 'royalty' per se - Held, yes; and
- b) Whether payments made for use/right to use of 'process' are 'royalty' in terms of the Income-tax Act, 1961- Held Yes.
- 6) On the facts and in circumstances of the case and in law, whether the Ld. CIT(A) was justified in deleting the disallowance of website charges without failing to appreciate that the expenses claimed were towards designing, layout etc, which inter se results in bringing in an asset of enduring and capital in nature"?
- 7) The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing officer be restored.
3. Grounds of appeal raised by the assessee read as under :-
- Each of the following grounds is independent of and without prejudice to one another.
- 1) On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in confirming the disallowance of Rs.7,55,160/- made under Section 14A(2) r/w Rule 8D by the Assessing Officer.
- 2) On the facts and in the circumstances of the case and in law, the Assessee submits that since the Ld. Assessing Officer had not considered the correctness of the claim of disallowance made by the Assessee under Sec.14A(1) and objectively arrived at a satisfaction that the said claim of the Assessee was incorrect before invoking Rule 8D, the Ld. CIT(A) erred in confirming the disallowance of Rs.7,55,160/- made under Sec.14A(2) by the Assessing Officer.
- 3) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the disallowance of Rs.2,26,02,802/- made by the Ld. Assessing Officer.
- 4) On the facts and in the circumstances of the case and in law, the Assessee submits that the amount of Rs.2,26,02,802/- is allowable as loss incidental to business.
4. Assessee has also filed an additional ground which reads as under :-
- “On the facts and circumstances of the case in the alternative amount of Rs. 2,26,02,802/- may be allowed as capital loss to be carried forward and set off in the subsequent year.”

Revenue's appeal :-

5. Apropos issue of disallowance u/s. 40(a)(ia) of the I.T. Act. Assessee in this case operates Television channel by the name 'Zoom' and 'moves now' and is engaged in bollywood based specialty and lifestyle television segment. The Assessing Officer in this case made disallowance u/s. 40(a)(ia) of the I.T. Act of Rs. 87,78,259/- being programme, production and acquiring expenses and Rs. 27,95,83,044/- being channel placement fees and carriage fees. The assessee had deducted tax at source u/s. 194C of the Act at the rate of 2%. However, the Assessing Officer was of the opinion that these payments were subject to deduction of tax at source u/s. 194J of the Act and hence disallowance made u/s. 40(a)(ia) of Act.

6. Upon assessee's appeal learned CIT(A) referred to the decision of Hon'ble Calcutta High Court decision in the case of DCIT Vs. S.K. Tekriwal (361 ITR 472) for the proposition that no disallowance u/s. 40(a)(ia) of Act is warranted where tax has been deducted at source under different section. Furthermore, learned CIT(A) further referred to Hon'ble Delhi High Court decision in the case of Prasar Bharti (Broadcasting Corporation of India) (292 ITR 580), wherein it had been held that payment made towards programmes produced for broadcasting falls within expression 'work' as defined in section 194C of the Act. Furthermore, learned CIT(A) observed that in assessee's own case the ITAT, Mumbai Bench has also held that tax has been correctly deducted at source on payments made to cable operators u/s. 194C of the Act. Learned CIT(A) held that on merits also the assessee has correctly deducted tax at source on payments made both for programme, production and carriage fees u/s. 194C of the Act. Hence, learned CIT(A) deleted the addition of Rs. 87,78,259/- and Rs. 27,95,83,044/- made by the Assessing Officer u/s. 40(a)(ia) of Act.

7. Against the above order the Revenue is in appeal before us.

8. We have heard both the counsel and perused the records. The main contention of the Revenue is that learned CIT(A) has erred in as much as he

has relied upon Hon'ble Calcutta High Court decision in the case of S.K. Tekriwal (supra) and Revenue has referred to the decision of Hon'ble Kerala High Court in the case of P.V.S. Memorial Hospital Ltd. (380 ITR 284), wherein Hon'ble Kerala High Court has not agreed with Hon'ble Calcutta High Court and had taken a contrary view.

9. Upon careful consideration, we find that there are two decisions on this subject. One from Hon'ble Calcutta High Court in favour of the assessee and another from Hon'ble Kerala High Court in favour of the Revenue. No decision of Hon'ble Jurisdictional High Court in this subject has been brought to our notice. In these circumstances we place reliance upon Hon'ble Supreme Court decision in the case of M/s. Vegetables Products Ltd. (88 ITR 192). In this decision Hon'ble Supreme Court has expounded that if two views are possible, one in favour of the assessee has to be adopted in this view of the matter when the assessee had deducted tax at source under the provisions of section 194C. Assessee cannot be visited with provisions of section 40(a)(ia) of Act disallowance on the ground that deduction was required to be made u/s. 194J of the Act. Hence, respectfully following Hon'ble Calcutta High Court decision, we uphold the order of learned CIT(A).

10. Furthermore we note that learned CIT(A) has further referred to the ITAT decision in assessee's own case, wherein it had been held that tax was to be deducted u/s. 194C on payments made to cable operators. Furthermore, Hon'ble Delhi High Court in the case of Prasar Bharti (Broadcasting of India) (supra) has held that broadcasting and telecasting including production of programme falls within expression 'work' as defined in section 194C. In assessee's own case ITAT for A.Y. 2010-11 has followed this decision and decided the issue in favour of the assessee. On identical issue, Hon'ble Bombay High Court in the case of UTV Entertainment Ltd. in ITA No. 525 of 2015 and other vide order dated 10/11 October 2015 have held that on these items tax was deductible u/s. 194C and not u/s. 194J. Hence, the issue on

merit also is covered in favour of the assessee. Accordingly, ground No. 1 to 5 raised by the Revenue stand dismissed.

Apropos ground relating to website charges.

11. The Assessing Officer has disallowed the expenditure on website maintenance, storage and related charges of Rs. 28,81,702/- as capital expenditure.

12. Upon assessee's appeal learned CIT(A) has decided the issue in favour of the assessee by referring to following decisions which according to him are directly on the issue in favour of the assessee :-

- CIT Vs. Indian Visit com Pvt. Ltd. (Delhi High Court)
- DCIT Vs. Mahindra Reality and Infra Developers Ltd. (ITAT, Mum)

13. Furthermore, learned CIT(A) held that expenditure incurred towards maintenance, storage and internet charges related to website have not resulted in the assessee acquiring any fixed asset and benefit of enduring nature and hence expenditure was not capital in nature.

14. Against this order, the Revenue has filed this appeal before us.

15. Learned Counsel of the assessee submitted that the issue is covered in favour of the assessee by following decisions :

16. We have heard both the counsel and perused the records.

17. Upon carefully consideration, we note that the aforesaid decisions referred by learned CIT(A) are fully in favour of the assessee. We find ourselves in agreement with learned CIT(A) that charges of website hosting and maintenance cannot be said to be capital expenditure.

Assessee's appeal :-

Apropos disallowance u/s. 14A.

18. Brief facts of the case are as under :-

During the previous year the assessee-company earned income by way of dividend of Rs.37,77,7007- on units of mutual fund that was exempt from tax. The appellant while filing its return of income, had suo moto disallowed indirect expenditure of Rs. 1,97,9027-. This amount was arrived at by allocating the indirect interest expenditure of Rs. 19,88,7657- in the ratio of average investment to average fixed asset and considering 0.5% of the average opening and closing investments as required by Rule 8D of the Income-tax Rule, 1962. In considering the average investments, only those investments, income from which was exempt from tax was considered by the assessee. However, the A.O. while applying Rule 8D considered also investments on which income earned was taxable and arrived at an aggregate amount of Rs 9,53,2077- as disallowable under section 14A(2) of the Income Tax Act, 1961. After reducing Rs.1,97,9027- disallowed by the assessee in its return of income, the A.O. added a further sum of Rs.7,55,3057- in the assessment order.

19. Upon assessee's appeal learned CIT(A) directed the Assessing Officer to recalculate disallowance of expenditure under rule 8D considering the investment capable of exempt income and not entire investment.

20. Against this order assessee is in appeal before us.

We have heard both the counsel and perused the records. Learned Counsel of the assessee contended that though the assessee has made suo-moto disallowance, assessee's investment for earning exempt income is out of its own funds and hence no disallowance on account of interest needs to be done. Learned counsel further referred to the decision of Special Bench of the ITAT in the case of Vireet Investments and Hon'ble Apex court decision in the case of Maxopp Investment Ltd vs CIT, in Civil Appeal 104-109 of 2015 dated 12.02.2018 respectively for canvassing position that in computing disallowance only those investments should be considered which have earned

exempt income and disallowance should be limited to exempt income earned, respectively.

21. Upon careful consideration, we are inclined to remit this issue to the file of the Assessing Officer to compute section 14A disallowance afresh based on the following :-

- (i) If the assessee has non-interest bearing own funds more than investment in instrument for earning exempt income, no disallowance for interest should be done on touchstone of decision of Hon'ble Jurisdictional High Court in the case of HDFC Bank Ltd. (366 ITR 505).
- (ii) In considering the average value of investments for disallowance u/s. 14A only those investment should be considered on which exempt income has been earned.
- (iii) Disallowance u/s. 14A cannot exceed exempt income earned.

22. We direct accordingly. Needless to add the assessee should be granted adequate opportunity of being heard.

Apropos disallowance of Rs. 2,26,02,802/- on account of sale consideration in Zen International Inc.

23. The Assessing Officer in the assessment order noted that the assessee was asked to produce the details of transfer of share for claiming long term capital loss as computed u/s. 48 of the Act. Assessee explained as under :-

“As part of the its existing business of running and operating Television channels, the company was looking for an opportunity to acquire an existing channel called TV Asia that was running in the United State (US). The channel catered to the Indian Diaspora in the US and was owned by a New Jersey based company called Asia Star Broadcasting Inc. This therefore offered a good opportunity for the company to expand its existing line of business overseas. The company therefore entered into a stock purchase agreement on 1st May 2008 with the owners of the said channel. The company thereafter set-up a wholly owned subsidiary in the US called ZEN International INC. in the state of Delaware and remitted a sum of US \$ 1 million, equal to Rs.4,52,00,549/-, on 10th September, 2008. ZEN International Inc. allotted 10,000 equity shares of the face value of 0.01 to the company on 10th September 2008. On 15th September 2008 the company assigned the stock purchase agreement to ZEN International Inc. pursuant to which ZEN India remained liable for the performance of the obligation

under stock purchase agreement as well as the escrow agreement entered into on 8th July 2008 between ZEN India, the owners of the channel and the escrow agent. In view of the global crisis and the worsening market conditions in the US, the management decided not to go-ahead with the purchase of the channel but instead to terminate the transaction.

Consequently a Termination Agreement dated 8th January, 2009 was entered into between the parties pursuant to which the entire transaction was mutually terminated. Copy of the termination agreement dated 8th January 2009 is attached as per annexure-I. Under the terms of the original understanding for purchase of the television channel, the party who terminates the agreement was liable to pay US \$ 500,000 to the other side. As a consequence, out of the US \$1 million remitted by the Company to ZEN International USA, US\$ 500,000 was paid to the owners of the US based channel "TV Asia" by the escrow agent Resultantly the value of the 10,000 equity shares held by the Company in ZEN International Inc. was impaired and a provision of Rs. 2,26,02,802/- was made by the Company in its accounts for the year ended 31st March 2009 towards the provision for diminution in the value of Investment in equity shares. This amount of provision towards diminution in the value of investment in equity shares of Rs. 2,26,02,802/- was not claimed as deduction by the company in the return of Income for AY 2009-10. Attention in this connection is invited to the computation of Income filed by us in assessment year 2009-10 in annexure -II.

The Company has, in the year ended 31st March 2011, after obtaining the permission of RBI the company written off the amount of Rs.2,26,02,802 in its accounts. A copy of the permission granted by RBI is attached as per annexure -III. The amount of Rs. 2,26,02,802 is accordingly claimed either as a long term capital loss or as a business loss while filing the return for AY 11-12 as per calculation below:-

Particulars		Amount
Application of Money for Share	US\$	1,000,000
Application Money Refunded by ZEN International Inc.	US\$	499,000
Fund maintained in escrow Account by ZBNL International Inc.	US\$	1,000
No of Shares Allotted		10,000
Carrying Cost of Shares (As per Audited Mar'09 BS of ZENL) (A)	Rs.	22,648,009
No. of Equity Share (Share @, .01 \$ each) (B)		10,000
Cost per Share (A/B)	Rs.	2,264.8
No. of Share disinvested		10,000
Amount Received in Bank on account of Redemption of Shares	Rs.	22,500
Reduced Carrying Cost of Redeemed Shares	Rs.	22,648,009
Net Gain/(loss)	Rs.	(22,625,509)
Indexation		
2008-09 Purchase Oct. 2008		582
2010-11 Sale 23-02-11		711
Indexation Cost of Purchases		27,667,929

Amount Received in Bank on account of Redemption of shares	Rs.	22,500
Long Term. Capital Loss	Rs.	27,645,42 8

In the alternative, the company submits that the above sum of Rs.2,26,02,802/- is business loss that it has suffered consequent to its overseas venture not turning out to be a viable business proposition.”

24. Considering the above the Assessing Officer held that there is no movement of transfer of asset, hence no capital loss arose. Hence, he held that the assessee has wrongly claimed long term capital loss. Hence, amount of Rs. 2,76,45,429/- was disallowed.

25. Upon assessee’s appeal learned CIT(A) recapulated the facts as under :-

“As stated by the Assessee, it has entered into a stock purchase agreement on 1stMay 2008 with the owners of the said channel. The company, thereafter set-up a wholly owned subsidiary in the US called ZEN International INC. in the state of Delaware and remitted a sum of US \$ 1 million, equal to Rs.4,52,00,5497-, on 10th September, 2008. ZEN International Inc. allotted 10,000 equity shares of the face value of 0.01 to the company on 10th September 2008. On 15thSeptember 2008 the company assigned the stock purchase agreement to ZEN International Inc. pursuant to which ZEN India remained liable for the performance of the obligation under stock purchase agreement as well as the escrow agreement entered into on 8th July 2008 between ZEN India, the owners of the channel and the escrow agent. Subsequently, on account of some reason, Appellant had decided not to go ahead for purchase of channel and had terminated the transaction and had written off the investment in ZEN International Inc. following termination agreement dated 08.01.2009”.

26. Thereafter learned CIT(A) observed that such written off investment is a loss of capital which cannot be allowed as revenue expenditure. Learned CIT(A) held that obtaining permission of RBI does not make any difference to the assessment. He noted that here was a case of investment made for acquiring channel of TV Asia in USA, but because of some reasons the assessee had not gone ahead and hence it lost investments. Thus learned CIT(A) held that cannot be regarded as loss of revenue but capital loss.

27. Furthermore, learned CIT(A) noted that such investment has been shown as asset in the balance-sheet, hence writing it off cannot be said to be revenue expenditure. Learned CIT(A) further held that alternative claim that

investment was made in shares of company that was engaged in its existing line of business, hence such loss is allowable is not tenable because such investment in shares is a capital investment and if such business is not started in America due to any reason and such investment made in subsidiary is written off, that cannot be presumed to be business expenditure. Hence learned CIT(A) dismissed the alternative claim also.

28. Against this order assessee has filed the appeal.

29. Learned Counsel of the assessee reiterated details of investment in this regard. He recapulated that the assessee has sent US\$ 1 million to wholly on subsidiary in USA by name ZEN. That ZEN has advanced US\$ 500,000 for acquisition of Asia Star Broadcasting Inc., USA. However the matter could not be completed and US\$ 500,000 given to M/s. Asia Star Broadcasting Inc. (ASB) was forfeited by ASB. The assessee has made provision in the books of account for the year ended 31st March, 2009 for loss of 500,000 dollars in the value of investment in ZEN. The same was not claimed as deduction in the return of income for A.Y. 2009-10. He reiterated that thereafter upon liquidation of ZEN in USA, the assessee received a sum of Rs. 22,500/- upon dissolution. That write off of the balance was duly done after RBI permission. Learned counsel further submitted that assessee had invested in wholly on subsidiary in USA for acquiring shares in capital of ASB which was into the same business of operating television channel. That since the business of the assessee was also the same, it was envisaged that there would be business advantage. That since said proposal could not be implemented there was loss. That in similar circumstances, the ITAT, Mumbai in CIT Vs. Colgate Pamolive India Ltd. in ITA No. 548/Mum/2009 vide order dated 25.10.2011 held that loss incurred on sale of shares in strategic subsidiary was incidental to business and allowable as deduction in computing taxable income.

30. Learned Counsel of the assessee further submitted that in additional ground, balance of investment account in ZEN of Rs. 2,26,48,009/- has

reduced by Rs. Rs. 22,500/- received from ZEN amounting to Rs. 2,26,25,509/- is allowable as short term capital loss in his computation of income for A.Y. 2011-12. In this regard learned counsel placed reliance upon the case of CIT Vs. Jaykrishana Harivallabhdas (231 ITR 108). He further submitted that decision of Hon'ble Apex Court in the case of CIT Vs. R.M. Amin (106 ITR 368) is not applicable. He further submitted that decision relied upon by learned Departmental Representative of ITAT Special Bench, Mumbai in the case of Bennett and Coleman & Co. Ltd. (133 ITD 1) is not applicable.

31. We have heard both the counsel and perused the records. We find that the assessee in this case was intending to acquire TV channel running in USA. There was business synergy between the assessee's business in the said channel operating in USA. The intention of the assessee was to expand its existing line of business overseas. The assessee entered into a stock purchase agreement with the said US company on 1st May, 2008.

32. For going ahead with the project, the assessee set up a wholly owned subsidiary in the US called ZEN and remitted a sum of US\$ 1 million equal to Rs. 4,52,00,549/- on 10.9.2008. Now, financial year before us is 2010-11. For the entire intervening period there was no question by the revenue regarding treatment of the nature of advance. No case was made out that the amount sent to the subsidiary was not for the purpose of business or not for business expediency. Resultantly, no disallowance on account of interest or for that matter payment to AE not at arm's length was made out. In this regard we note that on similar issue of KSS Ltd., Hon'ble Bombay High Court in ITA No. 476 of 2006 vide order dated 26.11.2018 was considering the issue of advance by the Indian assessee to its overseas AE for acquisition of Hollywood moves. The Revenue's case that money was lying with the AE for quite some time and charge for diversion of interest was rejected by Hon'ble High Court. High Court had noted that the money was routed through the AE by the assessee for the purpose of acquisition of distributorship. There the sum was advanced for specific purpose of acquisition of distributorship of films. Hence, it was held

that advance was for the purpose of business and transfer did not result into diversion of income of the assessee to its AE.

33. We have referred to the above decision only to highlight that in a situation akin to the present assessee money was advanced or money was spent through overseas intermediary for a business purpose. It was held that the same was for the purpose of business of the assessee. This analogy is fully applicable on the facts of the case. The purpose for which US\$ 1 million was sent by the assessee to its overseas subsidiary was for the purpose of acquisition of TV unit/business in the USA, which was operating in the same line of assessee's business and assessee's intention was to expand its activity in overseas market. Hence, subsidiary was only a method by which the assessee was going to spend US\$ 1 million for the purpose of its business. In this view of the matter when the amount sent was for the purpose of business, the loss thereof undoubtedly is a business loss. During current year out of the above sum invested of US\$ 1 million, the assessee has received only Rs. 22,500/-. Hence, resultant loss is business loss and deserves to be allowed. In this regard we may also gainfully refer to the decision of this Tribunal in the case of Colgate Pamolive India Ltd. in ITA No. 5485/Mum/2009 vide order dated 25.10.2011. In the said case the issue was of loss on sale of shares of subsidiary which was strategic investment of the assessee. The Tribunal had allowed such loss as revenue by elaborately referring to catena of case laws which are germane on the issue before us also. We may gainfully refer to the adjudication of the Tribunal in this case as under :-

7. We find that Camelot was set up to manufacture toothbrushes exclusively for the assessee company and that it had no other customer than the assessee. It was said to have been set up as a small scale industrial undertaking with a view to certain preferential treatment in the excise laws, but whatever it manufactured was bought by the assessee company alone. Camelot did incur the losses but the assessee company extended financial help to Camelot from time to time. This financial help was clearly in assessee's own business interests because, if the assessee company was not to do so, Camelot could not have continued to exist, and all these losses incurred by Camelot were essentially relatable to doing business with assessee alone, i.e. Camelot's only customer. The loans and advances so given by the assessee were therefore wholly incidental to its business and

could not be treated in isolation of its legitimate business interests. When the grant of loan itself is justified on the ground of commercial expediency, it is only corollary thereto that even write off of such a loan is incidental to business. It is, therefore, not really correct to say that write off of the loans granted by the assessee to Camelot would have been an inadmissible business deduction and the entire transaction was devised to avoid legitimate tax liability. We see substance in the plea of the company that anyone buying a company would like to buy a company with minimum liabilities, it was considered appropriate to first pay off the dues by the company, even by raising the funds through fresh issue, and then sell the company. This explanation is in consonance with the ground business realities and we find no infirmity in the same. The advances given by the assessee were finally converted into equity, as the assessee company subscribed to the Camelot shares to enable Camelot to pay off its dues to the assessee company. On these facts, in our humble understanding, the assessee had invested in the Camelot, and extended financial help to Camelot, purely for commercial expediency. The head under which investments in subsidiaries is shown is governed by the disclosure requirements under Schedule VI to the [Companies Act](#), and, therefore, the fact that an asset is shown as 'investment' per se does not, and cannot, negate the fact that such investments are made on the grounds of commercial expediency. Similarly, the head under which dividend income is assessed to tax does not also affect determination of question whether the shares are purchased on account of commercial expediency or not. It is only elementary that dividend income, whether the shares are held as investments or as any other asset, is always taxable under the head 'income from other sources'. Therefore, nothing really turns on Assessing Officer's emphasis on the fact that the Camelot shares were shown as investments in the balance sheet and that dividend income from these shares is taxable as income from other sources. We have also noted that as long as shares are acquired on the grounds of business expediency, any loss on sale thereof is also required to be treated as an admissible business deduction. Hon'ble Supreme Court's judgment in the case of *Patnaik & Co (supra)* deals with a situation in which the assessee had subscribed to certain Government security but incurred a loss on sale of that security. The stand of the assessee was that the assessee had made the said investment with a view to promote its business interests and as subscription to the Government Loan was conducive to its business, the loss arose in the course of the business, and that, therefore, the assessee was entitled to a deduction of the loss claimed by it. A coordinate bench of this Tribunal upheld the claim made by the assessee. The Tribunal found that having regard to the sequence of events and the close proximity of the investment with the receipt of the Government orders, the conclusion was inescapable that the investment was made in order to further the sales of the assessee and boost its business. In the circumstances, the Tribunal held that the investment was made by way of commercial expediency for the purpose of carrying on the assessee's business and that, therefore, the loss suffered by the assessee on the sale of the investment must be regarded as a revenue loss. Upholding the stand of the Tribunal, Hon'ble Supreme Court held that the Tribunal was right in its view. It is thus clear that as long as investment is justified on the grounds of commercial expediency, the loss on sale of such investment is to be

considered a business loss. The nature of business expediency could vary from case to case but what is important is that there must be an underlying motive to serve business interests of the assessee in making such investment. Let us now turn to the facts of the case before us. The company in which shares are subscribed is engaged only in the business of manufacturing the toothbrushes for the assessee company. Any investment in such a company is justified for pure commercial considerations, and, therefore, loss on sale of such shares is admissible as business losses. In the case of DCIT Vs Gujarat Small Industries Corporation (84 TTJ 22), a coordinate bench of this Tribunal was dealing with a situation in which "from the facts on record, it is obvious that the Girnar Scooter Ltd. was floated for the same purpose as a subsidiary and later on sold off when the loss started mounting" and on these facts the coordinate bench held that loss on sale of shares in subsidiary was business loss in nature. We are in considered agreement with the line of reasoning thus adopted by the coordinate bench. In view of these discussions, as also bearing in mind entirety of the case, we uphold the stand of the CIT(A) and decline to interfere in the matter.

34. We find that the above case law fully supports the case of the assessee that investment done in subsidiary which is actually a business investment, loss thereof was under the realm of business loss. As already noted above Hon'ble Jurisdictional High Court decision in the case of KSS (supra) also supports the proposition of advance to the subsidiary or AE only for fulfillment or purpose of assessee's business are to be treated as business advances for business purposes of the assessee. Consequently, loss on such business loss/investment is business loss and deserves to be allowed as such. Accordingly, we set aside the order of learned CIT(A) on this issue and decide the issue in favour of the assessee.

35. Since we have already held that the impugned amount was a business loss, additional ground raised by the assessee for the same being capital loss cannot be accepted and hence additional ground stands dismissed.

36. In the result, appeal by the assessee on this issue stands allowed.

37. In the result, Revenue's appeal stands dismissed and assessee's appeal stands partly allowed.

Order has been pronounced in the Court on 2.8.2019.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 2/8/2019

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai