

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "B" MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4133/MUM/2015  
Assessment Year: 2010-11**

NowrosjeeWadia and Sons Limited Admin Office : C-1, Wadia International Budhkar (W.I.C.), PandurangBudhkar Marg, Worli, Mumbai-400025. <b>PAN No. AAACN1836A</b> <b>Appellant</b>	Vs.	The Income Tax Officer 2(2)(3), Mumbai.      <b>Respondent</b>
--	-----	---

**ITA No. 4705/MUM/2015  
Assessment Year: 2010-11**

The Income Tax Officer 2(2)(3), Mumbai.      <b>Appellant</b>	Vs.	NowrosjeeWadia and Sons Limited Admin Office : C-1, Wadia International Budhkar (W.I.C.), PandurangBudhkar Marg, Worli, Mumbai-400025. <b>PAN No. AAACN1836A</b> <b>Respondent</b>
--	-----	---

**ITA No. 5284/MUM/2015  
Assessment Year: 2011-12**

Deputy Commissioner of Income Tax Circle 2(2)(2), R. No. 549, AayakarBhavan, M.K. Road, Mumbai-400020. <b>PAN No. AAACN1836A</b> <b>Appellant</b>	Vs.	M/s NowrosjeeWadia & Sons Ltd., Neville House, J.N. Heredia Marg, Bellard Estate, Mumbai-400001.      <b>Respondent</b>
--	-----	--

Assessee by : Mr. Ronak Doshi, AR  
Revenue by : Ms. Jothi Lakshmi Nayak, DR

Date of Hearing : 12/06/2019  
Date of pronouncement: 09/09/2019

ORDER

PER N.K. PRADHAN, AM

The captioned appeals are directed against the order of the Commissioner of Income Tax (Appeals)-5 (in short 'CIT(A)'), Mumbai and arise out of the assessment order passed u/s 143(3) of the Income Tax Act 1961, (the 'Act'). As common issues are involved, we are proceeding to dispose them off by a consolidate order for the sake of convenience.

**ITA No. 4133/MUM/2015**  
**Assessment Year: 2010-11**

2. The grounds of appeal filed by the assessee read as under:

Ground No. I

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Income-tax Officer-2(2)(3), Mumbai ("the AO") in denying the deducting of expenditure incurred in respect of Talab Project amounting to Rs.78,40,391/- while computing the net income chargeable to tax under the settlement agreement.
2. He failed to appreciate and ought to have held that the said expenses (relatable to Talab Project) were initially incurred by Bombay Dyeing and Manufacturing Company Ltd. and later recouped by the Appellant to BDMCL.

Ground No. II

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred confirming the levy of interest u/s 234B of the Act.
2. The appellant prays that the interest u/s 234B of the Act be deleted.
3. Briefly stated, the facts are that the assessee-company, in pursuance to Memorandum of Understanding (MoU) dated 31.05.2006 entered into a Joint Development Agreement (JDA) dated 20.10.2006 for project development with Talab, pursuant to which it claimed payment of advances amounting to Rs.4,32,00,000/-. The locational clearance for the said JDA was to be obtained by Talab by 20.10.2007. However, the same was only obtained on 16.07.2008 for 127 acres of land. There was dispute between the assessee and Talab, since Talab wanted to modify the JDA unilaterally, which was unacceptable to the assessee. Talab then sought to terminate the said JDA by way of notice dated 17.09.2008. The assessee filed a civil suit on 26.11.2008 in the District Court at Pune for restraining Talab from dealing with the disputed property. The matter was pending for hearing before the Court, and in order to resolve the outstanding issue, the assessee entered into a Settlement Agreement on 25.02.2010 with Talab to mutually terminate and cancel the MoU, i.e. JDA and all incidental documents. Arising out of the Settlement Agreement, the assessee and Talab executed a Deed of Cancellation of the Development Documents. As per the deed of settlement the assessee received a settlement consideration of Rs.8,50,00,000/- for giving of its claims, rights, vested under the MoU and JDA as against advance of

Rs.4,32,00,000/-. The assessee offered income of Rs.1,16,29,169/- calculated as under :

<b>Settlement Consideration received</b>		8,50,00,000
<b>Less : Advances paid by the assessee adjusted</b>		
a. Payment made vide cheque No. 687557 dated May 31, 2006	2,04,00,000	
b. Payment made vide Cheque No. 744777 dated October 19, 2006	2,28,00,000	(432,00,000)
<b>Payments towards expenses incurred by the Bombay Dyeing &amp; Manufacturing Co. Ltd. ("BDMCL") a group company in terms of the agreement, on Talab Project as per Debit note raised by BDMCL on the assessee</b>		
a. Directly to Talab as stated in above	2,23,30,440	
b. Other payment as stated	78,40,391	(301,70,831)
Net Income on Talab Project on offered to tax by the assessee		<b>1,16,29,169</b>

In the assessment order dated 05.03.2013, the AO disallowed Rs.3,01,70,831/- on the reason that (i) expenses claimed to have been incurred by Bombay Dyeing DMCL are the expenses incurred in FYs 2006-07, 2007-08 and 2008-09 relevant to the AYs 2007-08, 2008-09 and 2009-10, (ii) the assessee had not booked any expenses in its books of accounts for Talab project right from the commencement of the MoU period nor as and when the expenses were incurred nor till the date of

Deed of Settlement. The only time the entry was passed was at the fag end of the year i.e. only on 31.03.2010 on the basis of the debit note issued by BDMCL. Thus the debit note raised by BDMCL and expenditure booked are nothing but an afterthought done only with a view to show unreliable unproved expenditure, (iii) all these purported expenses are only prior period expenses which are not allowable in the year under consideration, (iv) the assessee failed to explain why the expenses claimed to have been incurred by BDMCL on assessee's behalf in AYs 2007-08, 2008-09 and 2009-10 were not booked in its books of accounts in the relevant assessment years.

4. In appeal, the Ld. CIT(A) held as under :

"4.5.4 In the context, it is noted that the settlement between the assessee company and Talab Farms P Ltd was reached at Rs.8,50,00,000/- on the basis of the claim as given hereunder:

- Rs.6,46,00,000/- (Actually gross amount Rs.6,55,00,000/-) towards advance payment made by the assessee company and BDMCL to Talab Farms Pvt. Ltd. and;
- Rs.2,04,00,000/- towards work carried out by the assessee company.

As regards to the amount of Rs 2,04,00,000/-, it has been explained that no formal bills were raised in that regard; and the claim was made to compensate for the mental or intellectual efforts of the promoters/directors and/or employees for monitoring the development activities, devotion of time and mental agony due to delay. The assessee has also reiterated these facts vide its affidavit filed during the appellate proceedings on 20.02.2015 [in the context of the addition of Rs.2,04,00,000/- made u/s 69C - as dealt hereunder in Para 4.6 [grounds Nos (22) to (24)]. Thus, it is noted that on the one hand assessee

taken a plea that it had lodged its claim of Rs.2,04,00,000/- before Talab Farms P Ltd to compensate for its efforts and that no actual expenses were incurred; but on the other hand, it has also taken a plea that the expenses to the extent of Rs.0.78 crores were incurred by BDMCL on Talat project. The stand so taken is quite contradictory. In the facts and the circumstances, it is to be concluded that no expenditure was made to the extent of Rs.2.04 crores and the claim was made to reach to the settlement and would represent the overall gain in the transactions. In the context, it has been clarified that the assessee and BDMCL had given advances of Rs.4.32 crores and 2.23 crores [through cheques] respectively to the TFPL and as such the total amount of advances aggregated to Rs.6.55 crores and not Rs.6.46 crores as mentioned in the agreement and as such the balance claim would amount to Rs.1.95 crores [Rs.8.50 - Rs.6.55] and not Rs.2.04 crores. Therefore, in my considered view, the assessee had made a profit of Rs.1.95 crores whereas it has offered only Rs.1,16,29,169/-. Therefore, the addition of Rs.78,40,391/- ought to have been made by the AO as against the amount of Rs.3,01,70,831/-. Accordingly, the addition to the extent of Rs.78,40,391/- is confirmed as against the disallowance of Rs.3,01,70,831/-."

5. Before us, the Ld. counsel for the assessee submits that expenses should be allowed when the expenses have crystallized/become quantifiable when these expenses are incurred for the purpose of business. In this regard, reliance is placed by him on the decision in *CIT v. Phalton Sugar Works Ltd.* (162 ITR 622) (Bom HC), *Uni Paper Pack Pvt. Ltd. v. ITO* (13 TTJ 589) (T Ahd), *SRF Ltd. v. DCIT* (2009) (34 SOT 1) (T Del), *Saurashtra Cement Chemical Industries Ltd. v. CIT* (213 ITR 523) (Guj HC) and *CIT v. Jagajit Industries Ltd.* (194 Taxman 158) (Del HC). Without prejudice to the above proposition, the Ld. counsel submits that accounting is not decisive for determining the allowability of expenditure. In this regard, reliance is placed by him on the decision in *CIT v. Sutlej*

*Cotton Mills Supply Agency Ltd. (100 ITR 706) (SC), Kedarnath Jute Mfg. Co. Ltd. CIT (82 ITR 363) (SC).*

On the other hand the Ld. DR relies on the order of the AO.

6. We have heard the rival submissions and perused the relevant materials on record. The issue relates to other payment of Rs. 78,40,391/- . We are of the considered view that the relevant documents/evidence on it would resolve the above issue. Therefore, we set aside the order of the Ld. CIT(A) on the addition of Rs. 78, 40,391/- and restore the matter to the file of the AO to pass an order after giving reasonable opportunity of being heard to the assessee. We direct the assessee to file the relevant documents/evidence before the AO.

7. In the result, the appeal is allowed for statistical purposes.

**ITA No. 4705/MUM/2015**  
**Assessment Year: 2010-11**

8. The grounds of appeal filed by the Revenue read as under:

1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the disallowance ignoring the fact that the AO had rightly disallowed the expenses claimed which did not have any nexus with the income earned nor were expenses incurred wholly and exclusively for the purpose of business u/s 37(1) of the Act.
2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in restricting the addition of Rs.3,01,70,830/- to Rs.78,40,391/- ignoring the fact that the decision taken by the assessee to reduce its profit when the payments actually pertained to F. Yrs. 2006-07 to 2009-10.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition ignoring the fact the assessee had already claimed expenses on payment to its promoters/directors and/or employees for monitoring the development activities.

9. The background facts have been discussed at length in ITA No. 4133/M/2015 hereinabove.

Before us, the Ld. counsel for the assessee submits that even a single isolated transaction amounts to adventure in the nature of trade. Neither repetition nor continuity of similar transaction is required to constitute a transaction to be adventure in the nature of trade. Without prejudice to the above proposition, it is stated that temporary lull in the business does not amount to closing of business and expenditure is allowable during the period of lull. Further, without prejudice to the above two propositions, it is stated that sum chargeable to tax under the head "income from business and profession" is not on the separate income of every distinct business but on the aggregate of profits of all the businesses carried on by the assessee. Further, without prejudice to the above three propositions, it is stated that in view of the concept of 'block of assets' under IT Act, depreciation is allowable in respect of assets used for business in earlier assessment years and not used in the year under consideration as well as assets ready for use i.e. passive use. Further without prejudice to the above four propositions, it is stated that apart from clauses in the MoU or in the absence of supporting documents, conduct of parties is essential to determine a nature of transaction and corresponding income.

In support of the above five propositions, the Ld. counsel relies on the case laws.

Further the Ld. counsel submits that where the Department has consistently allowed in the previous years, the assessee's claim of offering income from financing activities as business income, the Department cannot change its stance and treat income from financing activity as 'income from other sources'. Also it is argued that if interest income is earned as part of systematic or organized course of activity or conduct with a set purpose, the interest yield is business income and not income from other sources. Further, it is argued that to find out if a particular activity of a company constitutes business or not, it is irrelevant to consider whether the activity is intra vires or ultra vires the MoU. Relying on the case laws, the Ld. counsel submits that the above propositions are for financing activities. Finally it is stated that in so far as it relates to Talab project, clearly undertaking a project to develop township and share revenue would be a business income and an adventure in the nature of trade.

On the other hand, the Ld. DR relies on the order of the AO.

10. We have heard the rival submissions and perused the relevant materials on record. As mentioned earlier at para 4 hereinabove, the Ld. CIT(A) has rightly deleted the addition/disallowance of Rs.2,23,30,440/- made by the AO.

Therefore, we uphold the order of the Ld. CIT(A) and dismiss the appeal filed by the Revenue.

**ITA No. 5284/MUM/2015**  
**Assessment Year: 2011-12**  
*(Revenue's Appeal)*

11. The 1<sup>st</sup> ground of appeal is general in nature. The 2<sup>nd</sup> ground of appeal reads as under-

On the facts and in the circumstances of the case and in law, the CIT(A) has erred in allowing the disallowance ignoring the fact that the AO had rightly disallowed the expenses claimed which did not have any nexus with the income earned nor were expenses incurred wholly and exclusively for the purpose of business u/s 37(1) of the Act.

12. In the assessment order dated 30.03.2014, the AO observed that as per the tax audit report, the assessee-company is engaged in the business of trading and export. On perusal of the profit and loss account, the AO noticed that the assessee-company had not carried out any business activities during the year, as could be seen that the incomes are shown under the head "other income". But it claimed various expenses.

Further, the AO noticed that the assessee had received dividend on investments made in the units of mutual fund and shares and also received interest on Inter Corporate Deposits (ICDs). In response to a query raised by the AO to explain why the expenses debited to the profit and loss account should not be disallowed in absence of business activity, the assessee filed a reply stating that due to temporary setback in the textile export market, the company has diversified into the activity of giving and taking inter corporate deposits. It further stated before the AO that merely because there is an absence or a temporary lull in the export

activity, it should not be construed as absence of business. However, the AO was not convinced with the above explanation of the assessee and held that trading and other expenses and depreciation are not considered to be incurred for earning business income and therefore, made a disallowance of Rs.1,02,99,473/-.

13. In appeal, the Ld. CIT(A) noted that during the year under consideration, due to excessive competition in export sector, the assessee temporarily discontinued its business. He noted that similar issues were there in AY 2010-11. Thus following the order of the CIT(A) for AY 2010-11, he allowed the claim of the assessee regarding business expenses and depreciation.

14. Before us, the Ld. DR relies on the order of the AO, whereas the Ld. counsel for the assessee relies on the order of the CIT(A).

15. We have heard the rival submissions and perused the relevant materials on record. We have mentioned at para 9 hereinabove the submission of the assessee for AY 2010-11. Having dealt with the above submission, we arrive at a finding that the Ld. CIT(A) has rightly allowed the appeal filed by the assessee. Thus the 2<sup>nd</sup> ground of appeal is dismissed.

16. The 3<sup>rd</sup> ground of appeal

On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the disallowance made u/s 14A computed as per Rule 8D thereby overlooking the crucial fact that this method of calculation has been

prescribed by the statute and held as a reasonable method by the Hon'ble Bombay High Court in Godrej & Boyce Mfg. Co. Ltd. 328 ITR 81 (Bom.).

17. During the course of assessment proceedings, the AO noticed that the assessee has derived dividend income of Rs.89,04,073/- which is exempt from tax. Also the assessee has earned long term capital gains of Rs.23,40,491/- which is exempt u/s 10(38) of the Act. The AO made a disallowance of Rs.1,01,58,903/- u/s 14A. The AO further noted that the assessee has *suo motu* made a disallowance of Rs.10,00,000/-.

18. In appeal, the Ld. CIT(A) observed that the assessee's share capital and reserves are Rs.63.28 crores whereas investment in shares are at Rs.34,71,00,000/-. Therefore, following the ratio laid down in *CIT v. Reliance Utilities Power Ltd.* 313 ITR 340 and *CIT v. HDFC Bank Ltd.* (2014) 366 ITR 505 (Bom), the Ld. CIT(A) deleted the disallowance. However, he held that the AO can compute 0.5% of the average value of the investments of Rs.12,05,61,937/- on which the disallowance comes to Rs.6,00,000/-. As the assessee has made *suo motu* disallowance of Rs.10,00,000/-, the Ld. CIT(A) held that no further disallowance is required.

19. Before us, the Ld. DR relies on the order of the AO, whereas the Ld. counsel for the assessee relies on the order of the Ld. CIT(A).

20. We have heard the rival submissions and perused the relevant materials on record. In the instant case, as recorded by the Ld. CIT(A) the own funds of the assessee are more than the investments generating tax-free income. Therefore, he has rightly followed the ratio laid down in

*Reliance Utilities Power Ltd.* (supra) and *HDFC Bank Ltd.* (supra) and deleted the disallowance of Rs.77,03,582/- made by the AO u/s 14A r.w. Rule 8D(2)(ii). We uphold the order of the Ld. CIT(A) on the above matter.

The disallowance made by the AO under Rule 8D(2)(iii) comes to Rs.24,33,852/-. In the case of *ACIT v. Vireet Investment (P.) Ltd.* (2017) 82 taxmann.com 415 (Delhi-Trib) (SB), it is held that only those investments are to be considered for computing average value of investment which yielded exempt income during the year. Therefore, we restore the matter to the file of the AO to follow the ratio laid down in *Vireet Investment (P.) Ltd.* (supra) and compute average value of investment only those investments, which yielded exempt income during the year under consideration. Thus the 3<sup>rd</sup> ground of appeal is partly allowed for statistical purposes.

21. The 4<sup>th</sup> ground of appeal

On the facts and in the circumstances of the case and in law, the CIT(A) has erred in directing the AO to restrict the disallowance u/s 14A to Rs.10 lacs for the computation u/s 115JB of the IT Act, without appreciating that as per Explanation 1 to Section 115JB of the Act, an amount disallowed u/s 14A is to be considered as expenditure incurred for earning tax free dividend and long term capital gains and the same has to be added back/increased to the book profit u/s 115JB of the IT Act.

22. In *Vireet Investment (P.) Ltd.* (supra) it is held that computation under clause (f) of Explanation 1 to section 115JB(2) is to be made without resorting to computation as contemplated u/s 14A r.w. Rule 8D.

Following the above decision of the Special Bench of the Tribunal, we confirm the order of the Ld. CIT(A).

Thus the 4<sup>th</sup> ground of appeal is dismissed.

23. To sum up, for AY 2010-11, the appeal filed by the assessee is allowed for statistical purposes, whereas the appeal filed by the Revenue is dismissed. For AY 2011-12, the appeal filed by the Revenue is partly allowed.

**Order pronounced in the open Court on 09/09/2019.**

Sd/-  
(MAHAVIR SINGH)  
JUDICIAL MEMBER

Mumbai;

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Dated: 09/09/2019

*Rahul Sharma, Sr. P.S.*

**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//

BY ORDER,

(Sr. Private Secretary)  
**ITAT, Mumbai**